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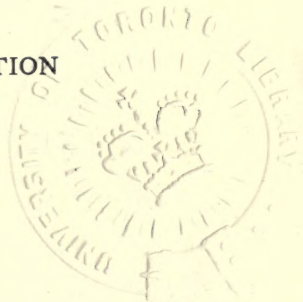
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EDUCATION AND THE DEAD HAND

IT is the policy of our law to encourage gifts for charitable purposes. Included among such purposes are the promotion of education, as well as the relief of poverty, the encouragement of religion, and a somewhat indefinite class of objects which are or may be thought to be beneficial to the public. Such gifts are valid whether made to a charitable corporation for any or all of the purposes for which it was created, or (in all but a very few states) to individual trustees for charitable purposes. It is not necessary that the beneficiaries of a charity should be definite persons; on the contrary, the indefiniteness of the beneficiaries is an essential element in the legal conception of a charity. It is because they are supposed to be beneficial not merely to particular persons but to the public in general, or to some portion of the public, that gifts for charity are favored.

If a testator chooses to leave his property to definite beneficiaries, he cannot control its disposition for more than a generation or two. But a trust for charitable purposes may last forever. By the creation of such a trust, specific property or the beneficial interest in specific property or in a shifting fund or mass, may be rendered forever inalienable, may be forever "taken out of commerce," may be devoted in perpetuity to the accomplishment of the purposes for which the trust was created. One who happens to acquire property during the short span of his lifetime may by giving it for charitable purposes control its disposition throughout the ages.

An extraordinary power this, and one which not unnaturally has excited serious misgivings. Lord Campbell once declared:

"A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed *in saecula saeculorum* when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which, I think, ought by human law to be strictly watched and regulated."¹

And indeed some economists, notably M. Turgot,² have thought that the very existence of a power to create a perpetual foundation is incompatible with the public weal, and have advocated its complete abolition. It appears to them shocking that a man who has lain in his tomb for centuries should be still controlling the disposition of the property which he once owned, and thereby to some extent controlling the destinies of mankind.

But have not our privately endowed hospitals and churches and libraries been of inestimable value to our people? Have not our privately endowed institutions of learning played a not unworthy part in promoting education and the well-being of the state? Is not the world the better because of John Harvard, Elihu Yale, Ezra Cornell, Matthew Vassar, and the multitude of other founders and benefactors of our endowed colleges and universities? What reader of this REVIEW does not owe a debt, directly or indirectly, to the generosity of Nathan Dane? And have not the generous gifts of the Phillips family been of great value in the field of secondary education? It is true that the public schools and the state universities are playing a most important, a most necessary, part in American education. But the privately endowed institutions also have their *rôle*. It is possible in them to further many objects, to try many experiments, to which it would be improper to devote the public funds, or which the public would be unwilling to support until convinced by proof of their success. We may divorce

¹ *Jeffries v. Alexander*, 8 H. L. C. 594, 648 (1860).

² *Encyclopédie*, sub. tit. *Fondations*. See also LOWE, ENDOWMENT OR FREE TRADE (1817); FITCH, "Educational Endowments," *Frazer's Magazine*, Jan., 1869, p. 11. But see 5 J. S. MILL, *DISSERTATIONS*, 1-28; KENNY, *ENDOWED CHARITIES*, 4-27.

the church from the state, but can we dogmatically assert that religion must be absolutely divorced from education? The burden of research in some fields of learning is perhaps too heavy to justify the necessary drain upon the public treasury. The complete separation of education and politics, the freedom from the control of an executive temporarily in office, of a legislature temporarily dominated by one or another of the political parties, has its advantages, as experience has shown.

The real problem, as all but a few extremists would concede, is not whether educational and other charitable endowments should be permitted; but how far the control of the founders should extend, how far it is permissible to depart from the directions of the founders when in the course of time circumstances have so changed as to make it impossible, illegal, or at least inexpedient, strictly to comply with them. It frequently happens that although the provisions made by the founder of a school or college are in accordance with the best standards of the time of its establishment, in course of time standards change and the strict observance of the provisions would destroy the institution or at least retard its development. Is the institution to be forever fettered by such provisions?

The history of the English people is so much longer than our own, that a study of their experience may well prove profitable to us.³ Centuries have elapsed since many of their educational institutions were founded, centuries in which the progress of society in general and of education in particular has been tremendous. In many cases it has been found imperatively necessary to revise the schemes of the founders, in order to save the institution from decay and death. The most far-seeing of men could not foresee the changes that time has brought to pass.

In the sixteenth century it was the fashion in England among

³ The whole subject of charitable foundations in England has been thoroughly investigated. As a result of the untiring efforts of Lord Brougham, several parliamentary commissions were appointed, who labored from 1818 to 1837, producing thirty-eight volumes of reports which contain an exhaustive store of information. From time to time other commissions have made reports, *e. g.*, Commission on Popular Education, 1861; Schools Inquiry Commission, 1867-68. Since 1853 there have been annual reports rendered by the permanent Board of Charity Commissioners, created by an act of Parliament in that year; and since 1902 there have been annual reports of the Board of Education, created in 1899, to whom the power of the Charity Commissioners as regards educational endowments was transferred by Orders in Council, 1900-02.

the charitably inclined to establish Grammar Schools, that is, as the term was then used, schools for instruction in Latin and Greek. At the beginning of the nineteenth century some of the more ambitious of the governors and masters of these schools wished to extend the curriculum so as to include writing and arithmetic and modern languages and even physical science. But Lord Eldon, a very great judge, but as conservative a man as ever sat upon the woolsack, held that this could not be done, that the founders had shown their devotion to the classics and that the will of the founders must be respected.⁴ Such a doctrine, however, rendered many of the schools practically useless—some of them worse than useless.⁵ It could not stand. Lord Eldon's successors had already shown signs of taking a more liberal view than he, holding that the school curriculums might be revised and other changes made,⁶ when Parliament, the omnipotent, took a hand. Several statutes were enacted providing a simple method whereby the changes necessary to enable the schools to play their proper part in modern education could be systematically made under the supervision of the courts or of public officials, who should have regard to, but who should not be absolutely bound by, the intentions of the founders and benefactors.⁷ Similarly Parliament has empowered the

⁴ "The question is, not what are the qualifications most suitable to the rising generation of the place where the charitable foundation subsists, but what are the qualifications intended." *A. G. v. Whiteley*, 11 Ves. 241, 247 (1805). See also *A. G. v. Earl of Mansfield*, 2 Russ. 501 (1826), and cases cited *TUDOR, CHARITIES*, 4 ed., 631. Lord Eldon was probably historically in error in thinking that the founders of Grammar Schools intended to exclude everything but the classics. 1 *REPORT OF COMMISSIONERS ON POPULAR EDUCATION (England)*, 1861, p. 458. See also 1 *REPORT OF SCHOOLS INQUIRY COMMISSION*, 1867-68, p. 452.

⁵ See *REPORT OF COMMISSION ON POPULAR EDUCATION*, 1861; *REPORTS OF SCHOOLS INQUIRY COMMISSION*, 1867-68; the reports of Lord Brougham's commissions; and the annual reports of the Charity Commissioners. And see *KENNY, ENDOWED CHARITIES*, 52.

As to the evils resulting in course of time from other charitable trusts, see *HOBHOUSE, THE DEAD HAND*. As to the disastrous consequences of that once popular form of charity known as doles, *i. e.*, the promiscuous distribution of money or goods among the poor, see *KENNY, ENDOWED CHARITIES*, 40-52. In the case of doles and certain allied forms of charity, Parliament has authorized the application of the funds to education by the Charity Commissioners with the consent of the governing body. *Endowed Schools Act*, 1869, 32 & 33 Vict. c. 56, § 30.

⁶ See *A. G. v. Gascoigne*, 2 Myl. & K. 647 (1832); *A. G. v. Caius College*, 2 Keen, 150 (1837); *TUDOR, CHARITIES*, 4 ed., 632.

⁷ See *The Grammar Schools Act*, 1840; *The Endowed Schools Acts*, 1860, 1869, 1873, 1874; *The Elementary Education Act*, 1870; *The Board of Education Act*, 1899;

universities of Oxford and Cambridge to make such changes as should be necessary to enable them to awake from the dreams of the Middle Ages and adjust themselves to the needs of modern society.⁸

But in the absence of legislation by an omnipotent Parliament, what can be done? In the law of charitable trusts in England, and in all but a very few states, there prevails a principle called the doctrine of *cy-près*. Under this doctrine when property is given for a particular charitable purpose, and when that purpose becomes impossible of accomplishment, the courts may authorize the application of the property to other charitable purposes, provided these other purposes, as well as the expressed purpose, fall within a more general charitable purpose of the donor. The doctrine also applies when the particular charitable purpose of the donor is or becomes illegal. All this is clear enough. The real difficulties begin to arise when the accomplishment of the particular charitable purpose of the donor is neither impossible nor illegal, but where it would be unwise, where it would be inexpedient, to carry it out. It is generally said by the courts that in such a case no departure from the expressed directions of the donor can be authorized.⁹

But can it be that the disposition of property is placed be-

The Education Act, 1902. Under these acts authority to authorize new schemes was vested in, first, the Endowed Schools Commissioners, later the Charity Commissioners, and now the Board of Education. These acts authorized among other things changes of curriculum and changes as to religious qualifications of governors and masters and pupils. Under the most recent of the Education Acts (9 & 10 GEO. 5, c. 41 (1919)), if the governing body of an educational institution applies for a Parliamentary grant, provisions in any instrument regulating the trusts or management of the institution which are inconsistent with the conditions prescribed by the Board of Education for the receipt of Parliamentary grants, may be modified.

⁸ See Oxford University Acts, 1854-69; Cambridge University Act, 1856; University Tests Abolition Act, 1871; Universities of Oxford and Cambridge Act, 1877. Under the last-named act changes may be authorized by commissioners who "shall have regard to the main design of the founder, except where the same has ceased to be observed before the passing of this Act, or where the trusts, conditions, or directions affecting the emolument have been altered in substance by or under any other Act." See KENNY, *ENDOWED CHARITIES*, 194.

⁹ See, for example, *Harvard College v. Society for Promoting Theological Education*, 3 Gray (Mass.), 280 (1855) (attempt to separate divinity school from Harvard College); *Winthrop v. A. G.*, 128 Mass. 258 (1880) (attempt to allow Harvard College to administer funds given to individual trustees to maintain a museum in connection with Harvard College); *Harvard College v. A. G.*, 228 Mass. 396, 117 N. E. 903 (1917) (attempt to allow Massachusetts Institute of Technology to co-operate in use of funds given to Harvard College for engineering school).

yond human control? Is there to be no power of control lodged anywhere among living men? The persons or groups of persons who might conceivably authorize changes are as follows: (1) The beneficiaries; (2) the Attorney-General; (3) the legislature; (4) the donor if living or, if dead, his representatives; (5) the corporation or trustees.

In the case of a private trust, the terms may be modified if all the beneficiaries are *sui juris* and consent.¹⁰ In the case of a non-charitable corporation the terms of the charter may be changed if all the stockholders consent, and if the state which granted the charter also consents.¹¹ But in the case of a charity the beneficiaries are necessarily uncertain, for it is this uncertainty in the persons to be benefited by the fulfillment of a purpose which makes the purpose charitable. The beneficiaries of a school or college include all persons now living or who may be born hereafter who are or who may be entitled to become students at the institution. Obviously, since the beneficiaries are uncertain, there is no way in which their assent to a change can be given.¹² If their assent is a *sine qua non*, no change can ever be made.

The Attorney-General is so far a representative of the beneficiaries of a charity that he may bring a proceeding to enforce charitable trusts, and he is a necessary party to proceedings involving their validity and their administration.¹³ He has no authority, however, to surrender or to modify the rights of the beneficiaries. It would undoubtedly be unwise to entrust this power to a political officer who would seldom have the time or the necessary qualifications to deal with the delicate questions of policy which would be involved.

What of the power of the legislature? In England, Parliament undoubtedly enjoys, and has not infrequently exercised, the power to revise or even to extinguish charitable foundations.¹⁴ But the

¹⁰ See SCOTT, CASES ON TRUSTS, Chap. X. There is some dissent. See *Clafin v. Clafin*, 149 Mass. 18, 20 N. E. 454 (1889). At any rate the settlor's provisions are not binding for more than a limited time. See SCOTT, CASES ON TRUSTS, 831 n.

¹¹ See COOK, CORPORATIONS, 7 ed., §§ 492-500.

¹² Some of the beneficiaries may be definite, in which case they may bring suit to enforce the trust. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., App. A.

¹³ *Strickland v. Weldon*, 28 Ch. D. 426 (1885); GRAY, RULE AGAINST PERPETUITIES, 3 ed., p. 533 n.; TUDOR, CHARITIES, 4 ed., 376.

¹⁴ The English statute books are full of instances of special acts remodelling old charitable foundations. See, for instance, Stat. 34 & 35 VICT. c. 117 (1871), approving

power of our legislatures is subject to constitutional limitations. A hundred years ago it was made clear by the decision in the Dartmouth College Case¹⁵ that the federal Constitution limits the power of a state legislature to modify the provisions of the charter of a charitable corporation.

The story of Dartmouth is well known. In 1769 George III granted a charter under the public seal of the province of New Hampshire to Dartmouth College. By the terms of this charter the college was to be governed by a self-perpetuating body of twelve trustees. In 1816 the legislature of the state of New Hampshire passed a statute "to amend the charter and encourage and improve the corporation of Dartmouth College," changing the name of the corporation to Dartmouth University, increasing the number of trustees to twenty-one, giving the Governor the power to appoint the additional trustees, and creating a board of overseers to be appointed for the most part by the Governor; in brief, transferring the control of the institution to the state. This was done over the strenuous objections of the old board of trustees. An action was brought in the courts of New Hampshire to test the validity of the act of 1816.

In the masterly argument¹⁶ by Jeremiah Mason before the Superior Court of Judicature of New Hampshire, the validity of the act was attacked on three grounds: First, it was contended that the act was not an exercise of legislative power, because in effect it attempted to authorize the taking of property from one set of trustees and the giving of it to another; that it was therefore invalid on general principles and under provisions of the state constitution as to the separation of powers.¹⁷ Second, it was contended that it violated a provision in the state constitution that "No subject shall be . . . deprived of his property, immunities or privileges, put out of the protection of the law, exiled or de-

a scheme as to the famous charities of Christopher Tancred. See HOBHOUSE, *THE DEAD HAND*, 66.

For instances of the modification of corporate charters by Parliament, see *Trustees of Dartmouth College v. Woodward*, 65 N. H. 473, 573 (1817).

For instances of general acts affecting educational endowments, see notes 6 and 7, *supra*.

¹⁵ *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518 (1819).

¹⁶ *Ibid.*, 65 N. H. 473-502 (1817); FARRAR, *DARTMOUTH COLLEGE CASE*, 28-70.

¹⁷ Art. 37 of the Bill of Rights.

prived of his life, liberty or estate, but by the judgment of his peers or the law of the land."¹⁸ Third, it was contended that it violated the provision of the federal Constitution that "No State shall . . . pass any . . . law impairing the obligation of contracts."¹⁹

The state court overruled all these contentions, and upheld the act.²⁰ The case was then brought before the Supreme Court of the United States by writ of error. The only question there arguable was whether the act violated the federal Constitution. The Fourteenth Amendment with its provision that "No State shall . . . deprive any person of life, liberty or property without due process of law" was not to become a part of the organic law of the United States until more than half a century later. To overturn the act it was necessary, therefore, to bring it within the scope of the contracts clause. And this the Supreme Court proceeded to do.

Influenced no doubt by prevalent French juridical conceptions, the court held that the term "contract," within the purview of the constitutional provision, includes not merely executory obligations but also executed grants or conveyances. The charter itself constituted a grant of the privilege or franchise of being a legal entity with certain powers; a change in the charter, it was held, impaired this grant. Furthermore, property had been conveyed to Dartmouth College by the founder and by other donors prior and subsequent to the granting of the charter, for the purposes expressed in the charter; a change in the charter, it was held, impaired these grants.²¹

¹⁸ Art. 15 of the Bill of Rights. See also Arts. 2, 20, 23.

¹⁹ Art. I, § 10.

²⁰ 1 N. H. 111; 65 N. H. 473, 624 (1817).

²¹ "From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke, or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter." *Per* Story, J., 4 Wheat. (U. S.) 518, 689.

It had previously been held by the Supreme Court of the United States that it was an impairment of the obligation of contracts for the legislature to rescind a convey-

This reasoning sounds far-fetched to many lawyers to-day. The truth seems to be that the court was trying to make the contracts clause accomplish as far as possible the function of a "due-process" provision. If the Fourteenth Amendment had been originally written into the federal Constitution it would have been unnecessary to give to the contracts clause the wide interpretation which the court gave to it. It seems clear that the act of the New Hampshire legislature did violate the provision of the state constitution prohibiting deprivation of property contrary to the "law of the land," and that to-day it would violate the due-process clause of the Fourteenth Amendment.²² Perhaps also it was not a proper exercise of legislative power, and violated the provisions of the state constitution as to the separation of powers.²³ It would seem

ance of land made by it. *Fletcher v. Peck*, 6 Cranch (U. S.), 87 (1810). Or to revoke an exemption from taxation. *New Jersey v. Wilson*, 7 Cranch (U. S.), 164 (1812). Compare *Terrett v. Taylor*, 9 Cranch (U. S.), 43 (1815); *Pawlet v. Clark*, 9 Cranch (U. S.), 292 (1815).

²² See *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378 (1887); *Regents of University of Maryland v. Williams*, 9 G. & J. (Md.) 365 (1838); *Ohio v. Neff*, 52 Ohio St. 375, 40 N. E. 720 (1895); *Brown v. Hummel*, 6 Pa. 86 (1847). Cf. *Downing v. Indiana State Board of Agriculture*, 129 Ind. 443, 28 N. E. 123, 614 (1891); *Sage v. Dillard*, 15 B. Mon. (Ky.) 340 (1855); *Webster v. Cambridge, Female Seminary*, 78 Md. 193, 28 Atl. 25 (1893); *Dow v. Railroad*, 67 N. H. 1, 27, 36 Atl. 510 (1886). See Doe, "A New View of the Dartmouth College Case," 6 HARV. L. REV. 161, 213; JOHN MARSHALL, ed. by Dillon, vol. I. 154.

In *Ohio v. Neff*, 52 Ohio St. 375, 40 N. E. 720 (1895), *supra*, it appeared that a charter was granted to Cincinnati College in 1819 by an act of the legislature which provided that "This act shall be subject to such alterations as the general assembly may from time to time see proper to make." It was held that in view of the provision in the constitution of Ohio that "Private property shall ever be held inviolate," the legislature had no power to strip the college of its property by placing the college under the management of the University of Cincinnati. See further, as to the effect of provisions reserving to the legislature power to alter charters, *Pennsylvania College Cases*, 13 Wall. (U. S.) 190 (1871); *Bryan v. Board of Education*, 151 U. S. 639 (1894); *Sage v. Dillard*, 15 B. Mon. (Ky.) 340 (1855); *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778 (1892); *Webster v. Cambridge Female Seminary*, 78 Md. 193, 28 Atl. 25 (1893). And see *Sinking Fund Cases*, 99 U. S. 700 (1878); *Zabriskie v. Hackensack, etc. R. R. Co.*, 18 N. J. Eq. 178 (1867).

²³ See *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. (U. S.) 99, 152 (1830); *Regents of University of Maryland v. Williams*, 9 G. & J. (Md.) 365 (1838); *Brown v. Hummel*, 6 Pa. 86 (1847). See *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 663 (1874), as to limitations on legislative power based on general principles. "No court . . . would hesitate to declare void a statute . . . which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B." See also *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798).

As to the power of the legislature as *parens patriae* when the purposes of the trust

therefore that the state court was wrong in overruling Mr. Mason's second and perhaps also his first contention. But neither of these contentions presented a federal question, and neither was available in the federal court.

At any rate it has been settled law²⁴ since the decision in the Dartmouth College Case that the legislature of a state has no power arbitrarily and without its consent to deprive a private²⁵ charitable corporation of the privileges conferred upon it by its charter, by annulling the charter, by taking away its property or devoting the property to other purposes than those specified in the charter, or by interfering with the methods of control and administration therein laid down.²⁶ It is true that no matter who may

fail or are illegal, see *Mormon Church v. United States*, 136 U. S. 1 (1890); *Prince William School Board v. Stuart*, 80 Va. 64 (1885).

²⁴ *Trustees for Vincennes University v. Indiana*, 14 How. (U. S.) 268 (1852); *State v. Springfield Township*, 6 Ind. 83 (1854); *Edwards v. Jagers*, 19 Ind. 407 (1862); *City of Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642 (1855); *Montpelier Academy Trustees v. George*, 14 La. 395 (1840); *Trustees of New Gloucester School Fund v. Bradbury*, 11 Me. 118 (1834); *Norris v. Trustees of Abingdon Academy*, 7 G. & J. (Md.) 7 (1834); *Regents of University of Maryland v. Williams*, 9 G. & J. (Md.) 365 (1838); *Ohio v. Neff*, 52 Ohio St. 375, 40 N. E. 720 (1895); *Brown v. Hummel*, 6 Pa. 86 (1847); *Montpelier v. East Montpelier*, 29 Vt. 12 (1856).

²⁵ "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property . . . the subject is one in which the legislature of the State may act according to its own judgment. . . . That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny." *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 629, 634, *per* Marshall, C. J. See also *s. c.*, 4 Wheat. (U. S.) 668-672, 693, *per* Story, J.

In the cases cited in the preceding note, as in the Dartmouth College Case, the institution was held not to be public. *Cf.* *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695 (1893); *Greenville v. Mason*, 53 N. H. 515 (1873); *Plymouth v. Jackson*, 15 Pa. 44 (1850).

If the institution is public, the legislature has control over it. *Trustees of University of Alabama v. Winston*, 5 S. & P. (Ala.) 17 (1833); *Lewis v. Gaillard*, 61 Fla. 819, 56 So. 281 (1911). See *Moscow Hardware Co. v. Colson*, 158 Fed. 199 (C. C. Ida., 1907); *Estate of Royer*, 123 Cal. 614, 56 Pac. 461 (1899); *Hathaway v. New Baltimore*, 48 Mich. 251, 12 N. W. 186 (1882); *Smith v. Westcott*, 17 R. I. 366, 22 Atl. 280 (1891); *Lewis v. Whittle*, 77 Va. 415 (1883); *Wambersie v. Orange Humane Society*, 84 Va. 446, 5 S. E. 25 (1888). See 53 Am. Dec. 470; 29 L. R. A. 378; 45 L. R. A. 675; 35 L. R. A. (N. S.) 243.

²⁶ Furthermore it has been held that the doctrine of the Dartmouth College Case is applicable to a charitable trust administered by unincorporated trustees. The conveyance by the donor to the trustees for a charitable purpose is a "contract" which cannot be impaired by the legislature. *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E.

consent to changes in the charter, such changes are impossible without the consent of the legislature, expressed by a special act or a general law. In our law corporate existence is conferred only by the legislature, under special acts or general laws; and the extent of the corporate powers is determined by the legislature. But the legislature once having created a corporation and endowed it with certain powers may not solely of its own volition destroy the corporation or modify its powers.

But what if the founder and other benefactors should consent to the amendment of the charter? In the Dartmouth College Case and in the decisions following it, much is said of what is due to the founder and other benefactors. It is said that since they gave the property, their wishes must be respected in dealing with it. It has been held that they may institute proceedings to prevent misapplication of the property, to enforce the carrying out of the charitable purposes.²⁷ If the charitable purposes become impossible of accomplishment and there is no room for the application of the *cy-près* doctrine, they are perhaps entitled to receive back their property, or what remains of it; although the view that it should go to the state has some authority and a strong policy

92 (1890); Crawford v. Nies, 220 Mass. 61, 107 N. E. 382 (1914), 224 Mass. 474, 113 N. E. 408 (1916). See also Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 697, *per* Story, J.; Magill v. Brown, Fed. Cas. No. 8952, p. 419 (1833). In Cary Library v. Bliss, *supra*, it was said that the rule in the Dartmouth College Case as to charters "is a mere extension of the doctrine which gives a similar effect to the written statement of a scheme that is made the foundation of donations to unincorporated trustees of a public charity."

²⁷ Ervien v. United States, 40 Sup. Ct. Rep. 75 (1919) (land granted by Congress to a state upon trust for particular purposes; injunction allowed against threatened breach of trust); Garrison v. Little, 75 Ill. App. 402, 417 (1897); Chambers v. Baptist Educational Society, 1 B. Mon. (Ky.) 215, 220 (1841); Mills v. Davison, 54 N. J. Eq. 659, 35 Atl. 1072 (1896); Hascall v. Madison University, 8 Barb. (N. Y.) 174 (1850). The Attorney-General is a necessary party. See note 13, *supra*. The donors are not necessary parties. Women's Christian Association v. Kansas City, 147 Mo. 103, 126, 48 S. W. 960 (1898).

The founder of an eleemosynary corporation and his heirs or anyone designated by him have authority to act as visitors of the corporation. When a body of trustees is incorporated the visitatorial power is usually held to be vested in the trustees. The visitatorial power, however, is a power to enforce but not to modify the purposes for which the corporation exists or for which property is given to it. As to this see Phillips v. Bury, 2 T. R. 346, 352 (1788); Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 562, 672; Allen v. McKean, 1 Sumn. (U. S. C. C.) 276 (1833); Sanderson v. White, 18 Pick. (Mass.) 328, 339 (1836); Mackenzie v. Trustees of the Presbytery, 67 N. J. Eq. 652, 61 Atl. 1027 (1904).

behind it.²⁸ But beyond these they have no rights. They have no power to revoke their gifts.²⁹ Nor may they authorize a modification of the purposes for which their gifts were made. With complete unanimity the courts have held that where property is given to a charitable corporation for the purposes declared in its charter, the trustees of the corporation may object to a change in the charter though authorized by the legislature and consented to by the founder and other benefactors. Thus where a town is the founder of a school or college, its consent is not sufficient to validate a statute modifying the charter.³⁰ The result is the same where the state itself is the founder and sole benefactor,³¹ unless the institution is in truth a public institution, a governmental agency.³² In most cases, moreover, it is physically impossible to obtain the consent of the donors. Frequently there are so many donors that it would be impracticable to obtain the consent of all. Usually when the question of amending the charter arises many if not all of them are dead; and whatever may be argued as to the effect of the consent of the donors themselves, the consent of their heirs or executors or next of kin or devisees or legatees is of no avail.³³

Finally, a change in the charter of a charitable corporation may be desired by the corporation itself. What is the effect of consent

²⁸ GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., §§ 44-51 *a* (corporations), § 603 *i* (trusts).

²⁹ "The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution." *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 641 (1819), *per* Marshall, C. J. See also *Langdon v. Plymouth Cong. Soc.*, 12 Conn. 113 (1837); *Christ Church v. Trustees*, 67 Conn. 554, 35 Atl. 552 (1896); *St. Paul's Church v. A. G.*, 164 Mass. 188, 199, 41 N. E. 231 (1895).

³⁰ *City of Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642 (1855).

³¹ *Galveston County v. Tankersley*, 39 Tex. 651 (1873); *Grammar School v. Burt*, 11 Vt. 632 (1839); *Montpelier v. East Montpelier*, 29 Vt. 12 (1856); *Grammar School v. Bailey*, 62 Vt. 467, 20 Atl. 820 (1889).

In *Fletcher v. Peck*, 6 Cranch (U. S.), 87 (1810), it was held that the contracts clause of the federal Constitution prevents a state from rescinding grants of land previously made by it. *Cf.* *New Jersey v. Wilson*, 7 Cranch (U. S.), 164 (1812); *Terrett v. Taylor*, 9 Cranch (U. S.), 43 (1815); *Pawlet v. Clark*, 9 Cranch (U. S.), 292 (1815).

³² See note 25, *supra*.

³³ *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 642 (1819); *Cary Library v. Bliss*, 151 Mass. 364, 377, 25 N. E. 92 (1890). See also *A. G. v. Margaret and Regius Professors*, 1 Vern. 55 (1682).

by the corporation expressed by vote of its board of trustees?³⁴ On this question the Supreme Court of the United States has not passed. The state decisions are in conflict.³⁵ Those decisions in which it is held that no change may be made even with the consent of the trustees, argue that to allow a change would be a breach of faith to the donors. And yet, as we have seen, it is agreed that the consent of the donors will not justify changes. Is it not a bit absurd to hold that the subsequent wishes of the donors are to be entirely disregarded and yet to contend that the expression of their wishes at the time they made their gifts are to be treated like the laws of the Medes and Persians? "Under the guise of

³⁴ Informal assent or acquiescence by individual trustees is not effective. *Allen v. McKean*, 1 Sumn. (U. S.) 276 (1833); *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378 (1887); *Case of St. Mary's Church*, 7 S. & R. (Pa.) 517 (1822). See *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92 (1890).

³⁵ In the following cases it was held that the charter of a charitable corporation may be amended with the consent of the board of trustees: *Pennsylvania College Cases*, 13 Wall. (U. S.) 190, 218 (1871) (*semble*); *Regents of University of Maryland v. Williams*, 9 G. & J. (Md.) 365 (1838) (*semble*); *Visitors, etc. of St. John's College v. Purnell*, 23 Md. 629 (1865); *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778 (1892); *Case of St. Mary's Church*, 7 S. & R. (Pa.) 517 (1822) (*semble*); *Ex parte The Greenville Academies*, 7 Rich. Eq. (S. C.) 471 (1854) (*semble*). See *Bryan v. Board of Education*, 151 U. S. 639 (1894); *People v. College of California*, 38 Cal. 166 (1869); *Sage v. Dillard*, 15 B. Mon. (Ky.) 340 (1855); *Central University v. Walters' Exrs.*, 122 Ky. 65, 90 S. W. 1066 (1906).

The opposite result was reached in *Allen v. McKean*, 1 Sumn. (U. S. C. C.) 276 (1833) (*semble*); *Board of Education v. Bakewell*, 122 Ill. 339, 10 N. E. 378 (1887) (*semble*); *State v. Adams*, 44 Mo. 570 (1869); *Thiel College's Appeal*, 216 Pa. 630, 66 Atl. 83 (1907). And see *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92 (1890); *Crawford v. Nies*, 220 Mass. 61, 107 N. E. 382 (1914), 224 Mass. 474, 113 N. E. 408 (1916). But *cf.* *Ware v. Fitchburg*, 200 Mass. 61, 85 N. E. 951 (1908).

If land is given to a charitable corporation or to trustees for charitable purposes, with a direction that the land shall be forever used for these purposes, it has been held that a court of equity (SCOTT, CASES ON TRUSTS, 356), or the legislature as *parens patriae*, may authorize a sale of the lands, when, in view of changing circumstances, the ultimate purposes of the donor would be more effectively promoted by their sale than by their retention. See *Stanley v. Colt*, 5 Wall. (U. S.) 119 (1866); *Sohier v. Trinity Church*, 109 Mass. 1 (1871); *Van Horne, Petitioner*, 18 R. I. 389, 28 Atl. 341 (1893). And see *Trustees Baptist Church v. Laird*, 10 Del. Ch. 118, 85 Atl. 1082 (1913) (conversion not expressly forbidden by donor). But see *contra* *Tharp v. Fleming*, 1 Houst. (Del.) 580 (1858). In Connecticut it is held that owing to the provisions in the state constitution as to separation of powers, the legislature may not, although the courts may, authorize a sale of such property. *Bridgeport Public Library v. Burroughs Home*, 85 Conn. 309, 82 Atl. 582 (1912). As to the power of the legislature as *parens patriae* to authorize the sale of property of persons under a disability, such as infants, lunatics, etc., see COOLEY, CONSTITUTIONAL LIMITATIONS, 6 ed., 115; 16 L. R. A. 251; 8 L. R. A. (N. S.) 62.

fulfilling a bequest," said John Stuart Mill,³⁶ "this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow. . . . No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found." It must not be overlooked that a too meticulous adherence to the words of the donor often means the defeat and not the accomplishment of his ultimate purpose. He intended to make his property useful to mankind. To render it useless is to defeat his intention.

Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. The Rule against Perpetuities is inapplicable to charities only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity which by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity which shall be forever exempt from modification. This idea is expressed by the Commissioners on Popular Education in England, who said:

"It seems, indeed, desirable in the interest of charities in general, and of educational charities in particular, that it should be clearly laid down as a principle, that the power to create permanent institutions is granted, and can be granted, only on the condition implied, if not declared, that they be subject to such modifications as every succeeding generation shall find requisite."³⁷

It may be suggested that unless donors can rely upon the strict observance of all their directions they will be dissuaded from making gifts for charitable purposes. But experience in England shows the fact to be otherwise. Charitable gifts were never more common in England than in the early days of the Reformation, when the fact that Henry VIII had defeated the intentions of many a founder of religious institutions was fresh in the minds of every English-

³⁶ 1 DISSERTATIONS, pp. 32, 36.

³⁷ 1 REPORT OF COMMISSION ON POPULAR EDUCATION, 1861, p. 477.

man. Bequests to the English universities actually increased after Parliament had authorized them to depart from the directions of their founders and benefactors.³⁸ It would seem rather that the charitably minded would be discouraged by the sight of charitable institutions gradually ceasing to accomplish the high purposes for which they were created.

All this is clearly recognized in the better-reasoned decisions. Institutions must change, and there must be a power to authorize changes. In *Central University of Kentucky v. Walters' Executors*³⁹ the court said:

"The very nature of the enterprise, on the contrary, looked to improvement. It contemplated, by every reasonable implication, that new methods, new people, even new ideas, would be employed, when approved by the governing body of the institution. A college means, or ought to mean, growth; the elimination of the false; the fostering of the true. As it is expected to be perpetual in its service, it must conform to the changed condition of each new generation, possessing an elasticity of scope and work commensurate with the changing requirements of the times which it serves. For the past to bind it to unchangeableness would be to prevent growth, applying the treatment to the head that the Chinese do to the feet."

In the *Case of St. Mary's Church*,⁴⁰ Gibson, J., said:⁴¹

"The power of assenting to amendments must rest somewhere; and it can, nowhere, be so conveniently or safely deposited as with the trustees, under the controlling influence of the congregation, exercised through the medium of an election."

And referring to the Dartmouth College Case, he said:⁴²

"All that was decided there was, that the college should not undergo a violent transformation at the mere will of the Legislature; but it was not supposed by anyone, that if the assent of the corporation had been procured, the Act of Assembly would have been unconstitutional."

In this case it appeared that the corporation (created to hold and manage the temporalities of a church) consisted under its original charter of eight lay and three clerical trustees, and that at

³⁸ 4 REPORT OF COMMISSION ON POPULAR EDUCATION, 1861, p. 368.

³⁹ 122 Ky. 65, 83, 90 S. W. 1066 (1906).

⁴⁰ 7 S. & R. (Pa.) 517 (1822).

⁴¹ P. 541.

⁴² P. 547.

a meeting of the board of trustees it was voted (the lay trustees all concurring, the clerical trustees dissenting⁴³) to amend the charter so that the board should consist of eleven lay trustees. The amendment was held to be invalid. Tilghman, C. J., said:⁴⁴

"I grant, that if the clergy had consented; if even a majority of the clerical trustees had consented, there would be no good objection to the alteration. Because, although the charter does not provide for it, yet, in the nature of things, it must be supposed that all human institutions may in the course of time require alteration. And when the question for alteration comes on, there is no rule so convenient as to decide by a majority. . . . I agree therefore, that in corporations where there is no distinction of classes, a majority of the whole corporation would be sufficient. But where there are different classes, the majority of each class should consent, before the charter can be altered."

This limitation upon the authority of the majority seems sound. Similarly, when the acts of the trustees are subject to the supervision and control of another body, *e. g.*, a church conference or synod, amendments should be allowed only with the consent of the supervising body.⁴⁵

Apparently the fear lurking in the hearts of those who would compel the observance of the directions of donors in their minutest details is that a failure to observe these directions might lead to the overthrow of charitable trusts, and ultimately perhaps of the institution of private property; that no clear line can be drawn between a departure from the letter of the donor's directions, and confiscation.⁴⁶ It is true that the line is not a clear one, that the difference is in the last analysis a difference in degree. That is true of practically all differences in the law; in their final analysis they are distinctions in degree.⁴⁷ The difference between what is

⁴³ One of the clerical trustees was improperly excluded from the meeting. This of itself was a sufficient ground in the opinion of the court for vitiating the proceedings at the meeting.

⁴⁴ Page 537.

⁴⁵ See *Liggett v. Ladd*, 17 Ore. 89, 21 Pac. 133 (1888).

⁴⁶ "If the original trust, in all its requirements, is not obligatory, where shall the line be drawn? And what is to hinder a total perversion of the fund? If a change can be made so material as one affecting the choice of curators, I can see no limit." *State v. Adams*, 44 Mo. 570, 580 (1869). See also *Brown v. Hummel*, 6 Pa. 86, 94-95 (1847).

⁴⁷ "I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it." *Holmes, J.*, in *Haddock v. Haddock*, 201 U. S. 562, 631 (1906).

reasonable and what is unreasonable, between what is right and what is wrong, is often but a distinction in degree. To refuse to allow what is reasonable and what is right, because of aversion to what is unreasonable and what is wrong, is to deny all progress.

I would not contend that absolute power should be given to the trustees to divert charity funds to any charitable purpose they may select. Regularly they have the power and the duty of administering the property for the purposes for which it was given. Even where the purposes become impossible of accomplishment, they have no authority to proceed to apply the property to any other purposes. Such application may in that case be authorized by the courts, but may not be made by the trustees without such authorization.⁴⁸ I would contend, however, that even if the precise purposes for which the property was given are not actually impossible of accomplishment, even if changes are not imperatively demanded, yet if the trustees consent to certain changes, and the court is of the opinion that such changes are not unreasonable in view of the general purposes of the donors and of the changes that time has brought to pass, in view, in short, of all the circumstances, the court should authorize such changes.⁴⁹ I contend, in other words, that the consent of the trustees is a most important factor in determining what changes are justifiable. The trustees are peculiarly fit to determine such questions. They hold and administer the property; they and they alone represent both the donors and the beneficiaries.⁵⁰

In the case of property held by a charitable corporation, the desired changes may require an amendment of the corporate charter. In that case I would contend that if the trustees consent to an act

⁴⁸ *Lakatong Lodge v. Franklin Board of Education*, 84 N. J. Eq. 112, 92 Atl. 870 (1915).

⁴⁹ "The necessity that will authorize and warrant an order from the court deviating from the exact plan as indicated by the will of the donor, need however be only a reasonable necessity and not an absolute physical impossibility." *Women's Christian Association v. Kansas City*, 147 Mo. 103, 127, 48 S. W. 855 (1898).

⁵⁰ "Their [the donors'] descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also." *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 642 (1819), *per* Marshall, C. J.

of the legislature authorizing such an amendment, the act should not be held unconstitutional if it is not so unreasonable as to subvert the general purposes for which the corporation was founded or for which its funds were given. The decision in the Dartmouth College Case is not opposed to this view. Counsel for Dartmouth College admitted that the act of the legislature would have been valid if the trustees of the college had consented to it; the Supreme Court placed its decision on the ground of the lack of such consent. It is submitted that if the trustees had consented there would have been no impairment of the obligation of contracts, no arbitrary taking of property without due process of law or contrary to the law of the land, no exercise by the legislature of judicial power.

As a matter of fact the charters of our older colleges have been amended over and over again at the request of their trustees.⁵¹ Harvard University is governed by a Board of Overseers selected in a manner quite different from that provided for in its original charter.⁵² In many of the colleges religious requirements as to governing bodies and officers of instruction have been changed. Usually no question has been raised as to the validity of these changes. Surely they are not all in violation of the Constitution of the United States or of the state constitutions. And even when such changes have not been made, the requirements have often been evaded, particularly requirements as to the beliefs in certain religious dogmas; and such evasions have been winked at. It is encouraging hypocrisy to say that the requirements may be successfully evaded but cannot be openly changed.

A few years ago the question of amending the charter of Brown University was agitated. This charter requires that there should be thirty-six trustees, of whom twenty-two should be Baptists; five, Quakers; four, Congregationists; and five, Episcopalians. A committee, composed of three eminent lawyers, Stephen O. Edwards, Charles E. Hughes, and Everett Colby, reported that an amendment of the charter abolishing these religious requirements would probably be held unconstitutional, although consented to

⁵¹ See FINAL REPORT OF THE COMMITTEE APPOINTED TO CONSIDER POSSIBLE CHANGES IN THE CHARTER OF BROWN UNIVERSITY (1910), 55-58.

⁵² For the changes which have been made in the charter, see the annual OFFICIAL REGISTER OF HARVARD UNIVERSITY. See also SHIRLEY, THE DARTMOUTH COLLEGE CAUSES, 167-174.

by the corporation.⁵⁸ It is submitted that such a holding is not demanded by the decision in the Dartmouth College Case, that it would be opposed to the weight of authority in the state decisions, and that it would eventually create an intolerable situation. Lord Eldon's reactionary views as to the English grammar schools did little harm, for Parliament soon swept away the dam which Lord Eldon raised to stem the current of educational reform. But in this country there would be no such way of escape. Why put this unnecessary strain upon our constitutional guaranties? The evils would become more pronounced as generation succeeded generation, until finally the courts would be driven to say that the Constitution does not preclude relief. Sooner or later this view must prevail, unless progress is to be stayed by a view which surrenders the welfare of the living to the fancied wishes of the dead.

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⁵⁸ See FINAL REPORT OF THE COMMITTEE APPOINTED TO CONSIDER POSSIBLE CHANGES IN THE CHARTER OF BROWN UNIVERSITY (1910), 36-58.

CAPITALIZATION OF PERIODICAL PAYMENTS BY GIFT

A CERTAIN cartoon of 1804 reveals John Bull, rotund, ruddy, and perplexed, scratching his head over a long scroll entitled "A Plain Short and easy description of the Different Clauses in the INCOME TAX," which shows nothing more than a tangle of cross references. Near the upper right-hand corner of the picture hovers the younger Pitt, equipped with wings and a harp, in the capacity of "Guardian Angell." The "Angell" radiates good cheer and confidence. If Pitt has since 1913 occupied a point of vantage commanding a bird's-eye view of the United States, he must as an expert have extracted vast amusement from this country's frantic efforts to learn in half a dozen years as much about income taxation as Great Britain has learned in over a hundred.

The States render our task more difficult by overlaying the federal tax, no joke in itself, with a patchwork quilt of local levies on income. We have had plenty of income taxes in the past. They began as early as the seventeenth century.¹ But these old-time levies were generally failures, and were either wiped off the statute books or disregarded in practice. They produced comparatively few judicial precedents, and we face the new crop of resolutely enforced, successful income taxes with little knowledge as to the manner in which the courts will treat them. Under present conditions, the analysis of questions relating to taxation is neither academic nor dry.

I

THE PROBLEM

In particular, the differentiation of "statutory" or taxable income from other kinds of wealth presents an extended field for controversy of lively practical importance. Training and viewpoint sometimes lead the enthusiastic tax collector to claim that all receipts from any source are income.² The most signal contra-

¹ See list in KENNAN, *INCOME TAXATION*, 210 *et seq.*

² *Doyle v. Mitchell Brothers Co.*, 247 U. S. 179 (1918); *Southern Pacific Co. v. Lowe*, 247 U. S. 330, 335 (1918).

diction of this claim is found in the well-established rule as to gifts.³ Under the English statute,

"Pure acts of grace and favour, the outcome of goodness of heart, perhaps done at times of rejoicing, should not be taxed."⁴

And

"A voluntary gift, *e. g.*, an allowance by a father to his son, would not be assessable."⁵

A ruling of the Massachusetts commissioner of corporations and taxations exempts gifts.⁶ Wisconsin seems a little more doubtful, if we may judge from a case where an attempt to tax as income an inheritance of foreign land was given fairly serious consideration, receiving its *coup de grace* through close interpretation of the statute rather than through an appeal to general principles.⁷ This, however, is not enough to shake the rule, particularly in view of the explicit provision of the federal revenue act that "gross income" does not include

"The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income)."⁸

³ When gifts are spoken of herein, real gifts are meant, and not so-called gifts or bonuses which are actually a kind of compensation for services. The distinction sometimes becomes a very fine one. See numerous British cases as to what is and what is not taxable income of a clergyman. *Blakiston v. Cooper*, [1909] A. C. 104, is a fair sample. See also U. S. TREAS. REGS. 45, arts. 32, 107, 108; MASS. RULES AND REGS. 5008, 5014, 5016, 5017, 6032, and 6035. The Massachusetts Rules and Regulations referred to here and elsewhere are those promulgated in January, 1920, by the Commissioner of Corporations and Taxation; the United States Treasury Regulations 45 were revised as of December 2, 1919, and to the date of writing have not been substantially modified with respect to the subject matter of this article.

⁴ T. HALLETT FRY ON INCOME TAX, 110. And see *Cooke v. Fry*, 3 Tax Cas. 335, 341 (1895); *Drummond v. Collins*, [1914] 2 K. B. 643.

⁵ MURRAY AND CARTER, GUIDE TO INCOME-TAX PRACTICE, 5 ed., 97.

⁶ MASS. RULES AND REGS. 4002.

⁷ *State ex rel. Brenk v. Widule*, 161 Wis. 396, 154 N. W. 696 (1916).

⁸ Revenue Act of 1918 (Act Feb. 24, 1919, c. 18, 40 STAT. AT L. 1065), § 213, subsec. (b), (3). The New York statute is practically identical. N. Y. LAWS, 1919, c. 627, § 359-2 (c). In *United States v. Oregon-Washington R. & Nav. Co.*, 251 Fed. 211, 214 (1918), Ward, C. J., handed down a dissenting opinion in the course of which he said: "The Income Tax Laws of 1913, 1916, and 1917 expressly provide that only the income of gifts is to be taxed, from which it may be inferred, that but for this provision, the gifts themselves would have been taxed as income." Such may be the learned judge's inference, but it is not mine. These laws give the impression of pushing the power of taxation to its limits rather than of voluntarily restricting it.

The quoted passage has double significance. It gives statutory sanction to a time-honored practice. It also shows that the topic of this discussion is by no means contemptibly narrow. Here the specific problem paradoxically includes the broader general one, for if we are forced to distinguish between the principal and the income of a gift, we must formulate and bring to bear rules applicable to the income tax in its largest aspects. When doing this, it will be a help rather than a hindrance to confine the immediate application of those rules to narrow and concrete questions.

Even standing alone, the discussion would be well worth while, because gifts have acquired undeniable business importance. The "science of giving" receives nowadays the most earnest and prayerful attention. We prescribe the courses in which our estates shall flow when we die, and it is increasingly common, not only for wealthy persons but also for those more modestly classified as well-to-do, to divide much property during life. This tendency has two obvious causes.

First, the "cost of dying," as measured by inheritance and estate taxes, has assumed alarming proportions.⁹

Second, the punishing federal surtax makes the concentration of income very bad business indeed. The easiest way to "spread" income is by outright gift of the property from which it springs. But expediency has led to the adoption of certain other legal devices which fall short of such gifts and still depart radically from the old-fashioned voluntary allowance to a child or other dependent. One of these furnishes a convenient thread on which to string the present discussion. Suppose we have a wealthy father who for one reason or another does not desire to give his dependent daughter any large amount of principal. If he sticks to the scheme of doling out five hundred or a thousand dollars a year for pin-money, there is no doubt that the daughter will escape income tax, but an equal certainty that the father will gain nothing except the warmth of her gratitude. He would like the right to make a deduction from his gross income. He therefore gives her a ten- or twenty-thousand dollar promissory note bearing five per cent interest. She makes no promises about not calling for the principal, yet considerations

⁹ 4 MASS. L. QUART. (No. 3), 157 and 5 *id.* (No. 2), 107 contain discussion of the tax on gifts in contemplation of death. It is doubtful whether this tax can or should be made to cover any large fraction of the class of gifts *inter vivos*.

of policy are almost certain to prevent her from doing so against her father's wishes. The father is entitled to claim tax deductions on account of his interest payments. Waiving any question of personal exemption, the daughter is now in receipt of a taxable income. It is better, though, for her to pay tax at a low rate than for her father to pay at a high rate. Between them, they economize by making each dollar go further. Still, both parties would be pleased by a refinement of this plan, under which the donor remained tax free and the donee had fuller advantage of the rule exempting gifts.

Undoubtedly such refinements will be, or are being, attempted. What form can they take, and how far are they likely to succeed?

II

SINGLE PAYMENTS

For the sake of thorough analysis we should examine a gift of income involving only a single payment before proceeding to the complications introduced by periodicity of payment.

Suppose that our donor — and for convenience let us call him D — owns on January 1, 1920, a thousand-dollar six per cent bond, originally bought by him at par. Attached to the bond is one bearer coupon for sixty dollars. Both bond and coupon are payable December 31, 1920. There is no doubt as to the solvency of the obligor. The market rate of interest is and remains six per cent. D tears off the coupon on New Year's day and gives it to our recipient, whom we will call R. In due course D receives his thousand dollars and R receives sixty dollars when he cashes the coupon. Where and how deep can income tax strike?

Take R first. Must he in 1921 return for tax the whole sixty dollars; or none of it; or the amount by which the coupon appreciated during his ownership? Of these three positions, the first seems unsound. The argument to sustain it is that the exemption of gifts applies only to things in possession, not to *choses in action*; that the paper and ink of which the coupon was made cannot be taxed, but that the promised payment giving it real value is fully assessable. The difficulty with this in the particular case is that we are discussing a *chose in action* which has been thoroughly "chattelized." People buy and sell and variously deal with cou-

pons every day. Coupons are considered an embodiment, not a mere symbol, of value. But the same argument can be put much more broadly. It is a far cry indeed to the time when a promise to pay money, even if not embodied in a specialty, was deemed a personal, unmarketable right. The all-pervading promissory characteristics of modern business have compelled acceptance of the view that such legally enforceable promises are merchantable property. It would be flouting everyday commercial practice to hold that the exemption does not include this kind of property.

The second position, which presents the rosiest countenance to the taxpayer, is at least arguable. It must be admitted that while the coupon was part of the parent bond it had no independent commercial identity or capital value; but it can be asserted consistently with this admission that severance of the coupon accomplished its emancipation and set it up in independent business with a capital status and value of its own.¹⁰ Accession to this value caused by approach of the day when the bond interest is payable means simply more capital, and not income at all. Some jurisdictions have held that such accession of value, even when translated into money by sale, is not taxable income unless it arises in the regular course of the recipient's business.¹¹ But this line of reasoning suggests an embarrassment. Suppose D follows up his gift of the coupon a day or two later by giving R the scalped bond also. Unless the taxing authorities can prove that the two acts were preconceived as parts of a scheme to cheat the public revenues by pretending to split a single gift, it would seem that R owes no tax even after realizing on both coupon and bond. Yet we know that he would have been taxable for the full value of the former if it and the bond had been given him still joined together.

On the whole, the third position appears soundest. It is in accord with the tendency manifested under recent American income-tax acts to assess increases of capital value. Whatever the general merits of that practice, its application here hardly produces an unjust result. For an analogy, consider the case of a discounted

¹⁰ A good instance of the half-dependent, half-independent nature of coupons is found in *Kenosha v. Lamson*, 9 Wall. (U. S.) 477 (1870); s. c., annotated, 19 L. Ed. 725.

¹¹ See British text-writers and numerous British cases. For instance, *Tebrau (Johore) Rubber Syndicate, Ltd. v. Farmer*, 5 Tax. Cas. 658 (1910); s. c., 47 Sc. L. R. 816 (1910).

promissory note. The amount of the discount is held to be income.¹² Any other holding would permit wholesale avoidance of tax.

Accepting the third position, we can under the hypothetical facts calculate R's tax in advance:

Present value of coupon when received $\times 1.06 = \$60$

Present value of coupon when received = $\$56.60 +$

Income received when coupon cashed = $\$3.40 -$

Turn now to D. The gift itself brought him no material gain. Back of any donation may lie a feeling of duty or of family affection, or the tremendous spiritual significance of the widow's mite and Sir Launfal's bowl of cold water. These things are beyond temporal taxation. But D ultimately exchanges his bond for its face value in cash. The natural view would be that this exactly balances his original investment and produces no taxable income. Still, an astute tax collector may incline to argue the point. One proposition which the collector will *not* urge is that D's original thousand-dollar investment flowed all through the bond and the coupons and sought a common level, as water does in a lake; that whenever D cashed a coupon he received in exchange a payment representing some income and some principal; that therefore the final payment on redemption of the bond contained a certain amount of income. The government disables itself to make this claim by taxing *all* the interest as fast as it comes in, thus asserting that every cent paid against coupons is income and the last thousand dollars only is repayment of principal.

A similar but somewhat stronger argument is that the coupon was capitalized in D's own hands during the act of gift, and sucked fifty-six dollars and sixty cents worth of capital out of the bond while it was being torn off. Thus the bond, apparently calling for a payment of principal only, really came to call for a mixed payment of which an indistinguishable fraction worth fifty-six dollars and sixty cents was income and taxable as such. But *Hartman v. Greenhow*,¹³ which lawyers will remember as one of the landmarks along the weary road trodden by Virginia's creditors after the Civil War, seems likely to block this contention.

¹² U. S. TREAS. REGS. 45, art. 34; MASS. RULES AND REGS. 2006, 2007.

¹³ 102 U. S. 672 (1881).

There the Commonwealth of Virginia had issued bonds, agreeing that the coupons should be receivable at face value in payment of taxes. After the issue, a law was passed providing for taxation of the bonds and deduction of the tax from interest payments. The plaintiff, owning coupons cut from bonds belonging to a stranger to the litigation, presented his coupons in payment of some state tax. The defendant, a collector of state taxes, refused to receive them without making the deduction which the tax law purported to authorize. The plaintiff applied for mandamus. A divided court denied the application. On error the United States Supreme Court, one justice dissenting, reversed this ruling. The decision went only upon the ground that Virginia had tried to impair the obligation of contract. But any State which tumbles into that bramble bush will find that

"There's a great text in Galatians
Once you trip on it, entails
Twenty-nine distinct damnations
One sure, if another fails."

Constitutional prohibitions fairly focus on acts of this kind. Thus the following passage from the majority opinion:

"Here, also, the coupons held by the petitioner were distinct contracts imposing separate obligations upon the state. He was not the owner of the bonds to which they had been originally attached. In his hands they were as free and discharged from all liability on those bonds as though they had never been connected with them. And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power: it undertakes to impose upon one the burden which should fall, if at all, upon another."¹⁴

These words are trumpet-tongued with the deep damnation of the Fourteenth Amendment. They voice an absolute prohibition without hint of compromise by apportioning the tax. If it was wrong to assess Hartman for taxes on account of principal, it would seem equally wrong to assess D for taxes relating to interest which he has in the plainest way turned over to R.

¹⁴ 102 U. S. 684-685. And see *New York, etc. R. R. v. Pennsylvania*, 153 U. S. 628, 645-648 (1894).

It may be suggested that payment to D's nominee is the same as payment to D himself. Take, for example, *Rensselaer & S. R. Co. v. Irwin*.¹⁵ Here the X railroad had leased its line practically in perpetuity to the Y railroad, the latter covenanting to pay four per cent semiannual dividends directly to the former's stockholders. Although the dividend money never came into the possession of the lessor company, it was held under the act of 1913 to constitute taxable income of the lessor.

But this is very different from the hypothetical case under consideration. X owed its stockholders a duty to use its assets for their financial benefit. Every time Y paid and the stockholders accepted a dividend, X's obligation was for the moment satisfied. Potential causes of action against X were extinguished. An orderly, prearranged series of such extinguishments is just as much income as an orderly, prearranged series of cash payments. Our friend D differs from X because D's generosity brings him nothing in any form having a material value.

If the conclusions stated or indicated up to this point are correct, it appears that a single instalment of future income can be severed from its capital source and given away in such manner as to free the donor from all income tax in respect thereof, and at the same time subject the donee to only a very moderate tax.

III

PERIODICAL PAYMENTS

Can periodical payments be capitalized in the same manner? Putting aside legal rules, undoubted persuasiveness lies in the claim that all periodical receipts, as distinguished from isolated single receipts, are income. It is hard to say in a word why this is so, but the reason will be brought out as we go along. The taxpayer counters the claim by saying that at most it expresses a presumption, rebuttable on proof that any particular series of receipts under consideration has the effect of exhausting the recipient's capital.

¹⁵ 239 Fed. 739 (1917); s. C., *affd.* C. C. A., 249 Fed. 726 (1918). The statement of facts by the majority of the upper court is not clear. It half gives the impression that X was also taxed upon amounts which Y paid directly to X's bondholders as interest on their investment. Such action would of course make a ridiculous circle, for X by applying this additional income to the payment of interest gets a claim of deduction exactly offsetting these receipts.

But the law does not march entirely in step with either of these propositions. We know well enough that receipts produced from such a wasting subject matter as a mine may be income.¹⁶ To take the other side, no one would have the temerity to claim that a legacy becomes income simply because it is payable by instalments, half at the end of the first and half at the end of the second year after the testator's death.¹⁷ Between these instances lies a wide stretch of debatable territory. In mapping this out, it will be well to deal first with the British and then with the American law.

(a) *The British Law*

Parliament's legislative power is so nearly unrestrained that the principal question with respect to the scope of British tax laws is one of interpretation. Since 1842 at least the form of the income-tax statutes has been such as to give even interpretation little play in designating the property on which these laws operate. Not satisfied with any general phrase like "net income," the various "schedules" refer to specific things such as "annual value" of lands, "gains," "profits," "annuities," "yearly interest" of money, and "annual payments." However, English judges and jurists employ their sound common-law training to prevent harsh or unjust construction of statutes. A very interesting series of cases distinguish from the thing taxable as an "annuity" certain other things closely resembling it and sometimes loosely called annuities themselves.

The series opened in 1858 with *Foley v. Fletcher*,¹⁸ where it was alleged that the plaintiff had sold mining property at a named price to the defendants, who promised to pay the price in semi-annual instalments running over some thirty years. When the defendants began deducting income tax from the periodical payments, the plaintiff sued and was met by a plea setting forth the purpose of the deductions. The case came up on demurrer to this plea. The court had to and did admit that annuities were expressly taxable, but felt strongly that Parliament had not intended to

¹⁶ *Stevens v. Hudson's Bay Co.*, 101 L. T. (N. S.) 96, 97 (1909); and several cases in the United States Supreme Court, of which *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 520, 524 (1917), is typical.

¹⁷ This illustration given in *Foley v. Fletcher*, 3 H. & N. 769, 785 (1858).

¹⁸ *Ibid.*, 769.

levy an assessment on capital. Being of opinion that the instalments in question were capital, the judges addressed themselves to formulating a definition of "annuity" through the meshes of which payments under this contract could squirm their way to exemption. The task was not easy. Pollock, C. B., said:

"this is not a contract to pay an annuity, but to pay a principal sum of money, and the court can only carry into effect the language of the act."¹⁹

And Baron Watson added:

"an annuity means where an income is purchased with a sum of money, and the capital has gone and has ceased to exist, the principal having been converted into an annuity."²⁰

That is, the parties showed they had in mind the payment of a definitely specified principal sum. Seemingly the plaintiff, far from treating as expendable income the periodical payments, would heap them up to replace the capital asset for which they were the equivalent. So the plaintiff had judgment.

The point was clinched about half a century later by *Secretary of State in Council for India v. Scoble*,²¹ which went to the House of Lords. The facts were approximately parallel to *Foley v. Fletcher* except that the series of instalments was called an "annuity" by the contract of purchase and each instalment was defined as including (1) a part payment of principal and (2) interest on unpaid principal. The holding was that no tax could be exacted with respect to that part of each payment designated as (1).

About two years afterwards an unsuccessful attempt was made to distinguish a third case of the same general nature on the grounds that the total price to be paid was not clearly ascertained, and that the plaintiff had gone out of its way to expedite the exchange of its capital asset (a railway) for a series of periodical payments.²²

¹⁹ *Foley v. Fletcher*, 3 H. & N. 779.

²⁰ *Ibid.*, 784-785.

²¹ [1902] 2 K. B. 413, [1903] 1 K. B. 494, [1903] A. C. 299. Commenting editorially on the case, the LAW QUARTERLY REVIEW said, "It lays down, or rather reaffirms, a clear and intelligible principle." 19 L. QUART. REV. 255, 256.

²² *East Indian Railway Co. v. Secretary of State in Council for India*, [1905] 2 K. B. 413; argument of counsel better reported in 21 T. L. R. 606. Endeavors to press the exemption beyond cases of this type have not been crowned with success. *Delage v. Nugget Polish Co., Ltd.*, 92 L. T. (N. S.) 682, and 21 T. L. R. 454 (1905), annual payments for use of secret process; *Chadwick v. Pearl Life Insurance Co.*,

Mr. Walter Strachan has written several articles for the *LAW QUARTERLY REVIEW*,²³ in the course of which he comments upon and explains the British decisions just noted. What he says is worth careful consideration. For a non-judicial definition of income he turns to an American, Professor Irving Fisher:

"(a) *Capital is a FUND*, (b) *Income is a FLOW*. A fund of property existing at an instant of time is called capital. A flow of services rendered by that capital, for instance, by the payment of money from it, or any other benefit rendered by a fund of capital in relation to such fund through a period of time, is called income."²⁴

The definition draws no distinction at all between the flow proceeding from a jug of known and limited capacity and the flow from a hydrant connected with the city water works. So Mr. Strachan justifies the taxation of a terminable annuity because it is a flow, although consisting "only of a *single jet*."²⁵

But the English courts clearly do not subscribe to this interpretation of Professor Fisher's definition. They have decided that some payments which flow from and exhaust capital funds are themselves capital, not taxable income. They must treat the jug and the hydrant alike so long as the former is the old oaken

[1905] 2 K. B. 507, annual payments in return for assignment of lessees' interest in real property; *Jones v. Inland Revenue Commissioners*, [1920] 1 K. B. 711, 89 L. J. (K. B.) 129, variation of *Delage* case. Compare *Oswald v. Kirkcaldy Corporation*, [1919] S. C. (Scotland), 147. These cases suggest numerous interesting lines of inquiry which diverge too far from that followed by the text to be pursued here.

²³ "The Differentiation of Capital and Income," 18 L. QUART. REV. 274; "Capital and Income under the Income Tax Acts," 29 *id.*, 163; "Income Tax in Relation to Annuities," 33 *id.*, 172.

²⁴ Copied from 29 L. QUART. REV. at page 170. Previously given with immaterial variations in punctuation, 26 *id.*, 40.

²⁵ 29 L. QUART. REV. at page 170. Parliament in the middle of the nineteenth century probably was not so philosophical. When the modern income-tax acts came in, the most common sort of annuity in England was the government consols. These were perpetual, unless the government saw fit to redeem them. Under either contingency no question of a wasting corpus arose. As indicating their financial importance, we find in *WILLICH'S POPULAR TABLES*, 4 ed. (1859), beginning at page 88, a five-page tabulation showing the price of three per cent "consolidated annuities" for every year from 1731 to 1858; also the average rate of return on these securities; and in addition a running table of historical events which bore upon the price of the annuities. May not these public securities have filled Parliament's vision almost to the exclusion of the very different terminable annuity? An interesting historical summary bearing upon this point is available in Appendix 7 (j) to the first instalment of the minutes of evidence before the Royal Commission on the Income Tax (1919-1920).

bucket or some equally time-honored container which Parliament knew and named in its act. When a plaintiff appears with a new-fangled non-refillable bottle, he is given a careful hearing and sometimes gets back his taxes. "Statutory" income is by no means identical with economic income. Mr. Strachan puts the idea gracefully:

"Economics is a relentless logical science; Law tempers logic with justice and equity, 'Right and wrong, between whose endless jar justice resides.' It may be logical, but it would be unjust to regard purchase-money, or building-society instalments in repayments of a capital advance, as income taxable under the Income Tax Acts, and thus the law stands."²⁶

He then presses the point of intention. The man who buys a terminable annuity intends it to be and treats it as an income stream; the owner or creditor who sells a railway or lends money with provisions for instalment payment normally means to retain at least part of each instalment as a capital fund. Plainly this argument of intention must not be allowed to run wild, or the saving, canny Scots of Edinburgh would pay little income tax, but it is useful within proper bounds.²⁷

If *Secretary of State v. Scoble* had arisen under our own federal income tax act, immediate inquiry would have been directed to the original cost of the railway or its value on the date when the tax became effective. Congress and our treasury officials believe that appreciation of capital assets, when realized by sale, is taxable income. The British, on the contrary, say that such an accession is not income unless it accrues to the taxpayer in the regular course of his business. The owners of mines or railways are in business to operate their properties, not to sell them, and profit on such a sale would probably strike a British court as pure capital gain.

This phase of the discussion seems to have led us far afield from D and R. But the significance of the cases is in their hint that if Parliament had not from the first taxed annuities by name, the

²⁶ 29 L. QUART. REV. 171.

²⁷ On the matter of intention, I refer again to WILKIE'S POPULAR TABLES and find, commencing on page 39, a two-page table indicating how much per annum, at several different rates of interest, must be subtracted from the annual payments under a lease, estate, or annuity for a given number of years certain in order to replace the purchase-money or capital. Clearly there are two sides to the intention argument.

judges might have insisted upon dissecting these wasting investments and have dealt with some part thereof as principal. Blackstone, writing about usury well before the birth of the modern British income tax, recognized payments under life annuities as containing (a) instalments of principal, (b) legal interest, and (c) "additional compensation for the extraordinary hazard" due to the uncertainty of human life.²⁸ Much more recently there has been in England lively discussion concerning the injustice of taxing the whole of an annuity payment. In part this discussion was sidetracked by the proposition that it would be unfair to change the tax laws because many existing contracts had been made with the taxation of annuities allowed for by the parties.²⁹ English courts turn a tolerably indulgent ear to the pleas of those receiving annuity-like payments arising in novel manners. To bring this down to the very case of our donor and recipient, suppose D in England tore a dozen successive coupons off a bond and gave them to R. The latter's lawyers would very likely not be laughed at if they claimed that up to the value of the coupons at the time of gift, any receipts from them remained capital, despite the fact that these receipts came to R in a stream flowing through several years.

(b). *The American Law*

For reasons which will soon appear, it is now necessary to subdivide the discussion as follows:

(1) *Terminable Annuities*. By annuity I mean the strict annuity, which Coke defines as a

"yearly payment of a certaine summe of money, granted to another in fee for life or yeares, charging the person of the grantor onely."³⁰

(2) *Terminable Rights to the Income of Property held in Trust*. I purposely avoid considering the taxability of receipts derived from property to which the recipient has a terminable legal title and right of possession. This line of discussion would too greatly expand the present article.

(3) *Terminable Charges upon Property*. It is assumed that the

²⁸ BL. COMM., bk. II, p. 461.

²⁹ MURRAY AND CARTER, GUIDE TO INCOME-TAX PROCEDURE, 5 ed., 265. See also the last reference in note 25, *supra*.

³⁰ CO. LITT. 144 b.

property is in the possession of some person other than the individual entitled to the benefit of the charge.

(1) *Terminable Annuities*

From what has already happened, it seems safe to say that the United States will shelter a score of assorted income-tax systems before many years pass. Without wandering too far among the mazes of local law, we may, for the sake of contrast if for no other reason, examine the practical application of the present federal and Massachusetts statutes in respect of annuities. Almost the only point of similarity between the two acts is that each was made practicable by a constitutional amendment. The federal law imposes a general tax upon income at progressive rates; Massachusetts imposes three or four different special taxes at rates non-progressive but varying according to the income sources, and leaves much income altogether untaxed.³¹ Looking beyond mere differences in the statutes themselves, we find them standing against wholly different historical backgrounds. For many years before 1913 the federal government had lived principally on the proceeds of highly indirect taxes. Hence the United States income levies have blazed their own trails. But Massachusetts has since the seventeenth century operated a direct general property tax, important parts of which survive side by side with the new income tax substituted for certain sections of the older law. The sturdy veteran is sure to influence, and not unlikely to overshadow, the young shoot grafted upon it.

Few or no federal cases deal squarely with the taxability of annuities as income. There are some analogous decisions about mines and the like, but it is unlikely that these would be deemed entirely decisive of the annuity question.

Does "income" as used in the Sixteenth Amendment include the entire receipts from an annuity? Since the definition of the term

³¹ MASS. GEN. ACTS, 1916, c. 269, taxes only income received by residents. Income from stocks, bonds, notes, money at interest, and the like, is taxed at six per cent; income from annuities at one and one-half per cent; income from professions and businesses at one and one-half per cent; and net gains from sales and purchases of intangible personalty at three per cent. The rates have been increased, largely because of war expenses. There are numerous exceptions and deductions not here material. Massachusetts has a very complicated and entirely distinct corporate income tax.

must come not only from etymological derivation but from "the implicit assumptions of its [the word's] use in common speech,"³² the English practice at the time of the amendment's adoption is germane. No doubt many members of Congress and of our state legislatures knew that England taxed annuities as income and had done so for at least seventy years. But it is equally just to assume that they knew of the doubts about and protests against this action and of the fact that one reason given for its continuance was "let well enough alone." Having regard for all these facts, the legislators by mere failure to define "income" as used in the amendment can hardly have meant to incorporate the somewhat peculiar British usages. Actual practice supports this view. The treasury and the federal courts have broken with English traditions, notably in the taxation of casual capital profits.³³

In 1913 it would have been useless to turn to America herself for any general "implicit assumption" respecting the taxability of annuities as "income." Certain states had settled opinions based on the application of local tax statutes, but the country at large had been too little concerned with this kind of problem to possess a real national opinion as to its proper solution.

The existing federal law on its face is an illogical compromise. "Gross income" does not include the amount received by an annuitant "as a return of premium or premiums paid by *him*" under an annuity contract.³⁴ The revenue officials obviously must refrain from taxing receipts under annuities purchased with the annuitants' own money until the aggregate of such receipts exceeds the aggregate premiums or consideration paid.³⁵ But they might have held a donated annuity fully taxable. Such holding seemed to be indicated by a ruling with respect to testamentary charges.³⁶ A later, although less authoritative, statement is to

³² See opinion by Learned Hand, D. J., in *United States v. Oregon-Washington R. & Nav. Co.*, 251 Fed. 211, 212-213 (1918).

³³ And the federal income-tax authorities at least do not tax a man on the annual value of a house owned by him and occupied as his residence. See *Brushaber v. Union Pacific Railroad Co.*, 240 U. S. 1, 23 (1916). The British law does impose this kind of tax. HALLETT FRY ON INCOME TAX, 61.

³⁴ Revenue Act of 1918, 40 STAT. AT L. 1065, § 213, sub-sec. (b), (2).

³⁵ U. S. TREAS. REGS. 45, arts. 47, 72.

³⁶ "An annuity charged upon devised land is income taxable to the annuitant, whether paid by the devisee out of the rents of the land or from other sources." U. S. TREAS. REGS. 45, art. 47.

the effect that an annuity purchased for R by D is not taxable until the payments thereunder equal the amount paid or set aside to purchase or establish the annuity. Income Tax Ruling No. 289. *Quære* whether this extends to testamentary annuities. It ought to, in logic and common sense. For if D by will gives R an annuity, the latter may demand payment of the present capital value in a lump.³⁷ Doing this, R could make and pay for his own annuity bargain with an insurance company. Possibly, under the law of some jurisdictions, a capable draftsman would be able to concoct a will preventing such action, much as ordinary restraints on anticipation are contrived. But this should make no difference. Every one of the cases suggested presents substantially the same problem of wasting capital.

It is worth noting in this connection that the Scoble case is probably sound federal law. The treasury has issued several rulings which recognize the existence of principal in periodical payments on instalment purchases.³⁸

Now for Massachusetts. Here the income-tax statute specifically designates the "income of annuities" as assessable.³⁹ But this begs the question beautifully. It is our immediate problem to find what *is* the income of an annuity. We encounter forthwith a long sweep of historical background. In the old days Massachusetts tax acts were passed annually or at least with considerable frequency. They fell into conventional form, each following its predecessor closely in the designation of taxable property. Eighty-odd years ago the case of *Swett v. Boston*⁴⁰ decided that a testamentary annuitant was not taxable under one of these acts providing for the assessment of the "capital or principal sum" of a trust fund. While this case was pending, its probable outcome was foreseen, although the legislature at least missed the point that a true annuity does not issue from any defined fund of capital. Late

³⁷ *Parker v. Cobe*, 208 Mass. 260, 94 N. E. 476 (1911); *Matter of Cole*, 219 N. Y. 435, 438, 114 N. E. 785 (1916); *In re Robbins* (*Robbins v. Legge*), [1907] 2 Ch. 8.

³⁸ U. S. TREAS. REGS. 45, arts. 42, 44, 45.

³⁹ MASS. GEN. ACTS, 1916, c. 269, § 5 (a).

⁴⁰ 18 Pick. (Mass.) 123 (1836). Compare the extraordinary case of *Kennard v. Manchester*, 68 N. H. 61, 36 Atl. 553 (1894), where grasping assessors, having taxed certain land to the tenant under a fifty-year lease, tried to tax the rent by capitalizing it at eight per cent and thus assessing the lessor for \$100,000 "money on hand, at interest, or on deposit."

in 1835 the Revised Statutes were passed, continuing an old levy on professional and business incomes and adding thereto a new one on the

"... income ... from an annuity, unless the capital of such annuity shall be taxed in this state."⁴¹

The wording of this section changed only slightly down to 1916, when the modern income tax appeared.

It will be noted that this provision of the old general property tax also begged the question at issue, for it was laid on the "income" of annuities without any specification as to what that income was. The practice was to tax the whole of every receipt. There is a curious lack of reported cases about the assessment of annuities under the general property levy. Only rarely and casually have the courts referred to this particular part of the statute. The truth is that while there may have been a theoretical practice of taxing every payment in full, it came to be a practice actually more honored in the breach than in the observance. Mr. Henry H. Bond, former income tax deputy, speaking of the old tax on professional and business income, — it was, by the way, far from oppressive, — says it "had become little more than a tax in theory, yielding but little revenue, enforced against few taxable persons;" and he tars the associated annuity tax with the same brush.⁴²

If the Massachusetts courts had ever been pushed to the wall, there is no reason to doubt that they could have held the former levy on annuities to be a valid property tax; could have said that when it spoke of income it meant money at rest in the pocket of the annuitant and not income flowing from obligor to obligee.⁴³ *Loring v. Beverly*⁴⁴ is an analogous case. Here a trustee on tax day had in bank money received as dividends on non-taxable stock. The deposit was assessed as property. In sustaining the assessment, the court distinguished income from property taxes by saying that the latter impinge on property upon the tax day; the former cover "all property received as income during the tax year." This is inaccurate. The Massachusetts judges even now call their income levy a "property tax" and in the case of income

⁴¹ MASS. REV. STAT., c. 7, § 4; compare the COMMRS. REP., c. 7, § 4.

⁴² PROCEEDINGS NATIONAL TAX ASSOCIATION, 1917, 92-93.

⁴³ Opinion of the Justices, 220 Mass. 613, 618, 624, 108 N. E. 570 (1915).

⁴⁴ 222 Mass. 331, 110 N. E. 974 (1916).

from investments are undecided as to whether the tax is imposed on the principal of the investments or on the income as received.⁴⁵ If a state wishes, it can have a tax day every week,⁴⁶ or even a sort of continuous "blue Monday."⁴⁷ The real question is whether income is taxed as a *flow* or as a *thing*. Granted that an annuity is taxed as a thing, and granted also that the legislature has undoubted power to tax all property, whether income or capital, within its jurisdiction, misdescription of the mixed fund as "income" alone is not fatal or even serious. All that has to be decided is that the legislature duly expressed the intention "whatever it is, it is taxed." The history of events in 1835 reveals beyond a reasonable doubt the existence and expression of such an intention.

It follows that the long-continued Massachusetts description of receipts from annuities as pure income *need* not be given much weight. More than that, the Massachusetts legislature has expressly recognized and taken advantage of the fact that annuities have a capital value. Move the much-travelled D and R to Boston, let D die, and let him leave a testamentary annuity to R. Can the state consistently capitalize that gift for the purpose of exacting legacy tax — which it does⁴⁸ — and then claim that for the purpose of the income tax there is no capital value? Any attempt to justify this on the ground that the taxes are "of a different nature" is wide open to demurrer.⁴⁹ True, but what of it? Freedom from income tax is not claimed because succession duty has been paid, but because when calculating the amount of this duty

⁴⁵ *Maguire v. Tax Commissioner*, 230 Mass. 503, 512, 120 N. E. 162 (1918).

⁴⁶ *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357 (1895).

⁴⁷ Opinion of the Justices, 77 N. H. 611, 615, 93 Atl. 311 (1915).

⁴⁸ MASS. ACTS, 1909, c. 490, pt. IV, § 6. Wisconsin exempted from income tax "all inheritances . . . which are subject to and have complied with the inheritance tax laws of this state." A testamentary annuitant whose annuity had been capitalized and assessed for inheritance tax claimed that the installments were not taxable income. *Held*, that the contention was sound. *State ex rel. Kempsmith v. Widule*, 161 Wis. 389, 392, 154 N. W. 695 (1915). But the trust income out of which the annuity was paid was taxable to the trustees. *State ex rel. Hickox v. Widule*, 166 Wis. 113, 163 N. W. 648 (1917). In the second case the court split hopelessly, and some justices wished to retract the first decision. Compare the ruling under the federal income tax of the Civil War days. SELIGMAN ON THE INCOME TAX (ed. 1914), 470.

⁴⁹ Part of the court in *State ex rel. Hickox v. Widule*, 166 Wis. 113, 123, 163 N. W. 648 (1917), thought such justification good.

the government has advanced and relied on the notion that the string of future payments can be capitalized in the present. A more truly logical way out of the dilemma lies in asserting that so applied a succession tax is nothing more than a sort of supplemental, anticipatory income tax. This line of argument has been familiar in England since 1853, when Gladstone suggested that the death duties effected a differentiation of income tax rates in favor of earned income. It would be more of a novelty in the United States.

But notwithstanding all this, one can scarcely doubt that if the present application of the Massachusetts income tax to annuities were challenged, the government would be victorious. For one thing, the challenger would not cut a very appealing figure. The rate of tax on a pure annuity is less than one-quarter the rate of tax on income from most intangible property.⁵⁰ Besides, tax acts survive an extraordinary number of logical blows. Here the judges would say that the definition of "income" in the amendment to the Massachusetts constitution depended far less on dictionaries, logic, and economics than on established fiscal usages.⁵¹ What matter that the law of 1836 had broken down? It stood on the books for more than three-quarters of a century. Every lawyer, most of the legislators, and a goodly proportion of the voters knew about it. They must have meant to include in their amendment the kind of thing which had for so long been called income.

Thus the status of annuities under the federal revenue act is uncertain; under the Massachusetts law they have little chance of escape. But under both laws it is probable that many periodical payments will be split into income and principal and only partially taxed, or even called pure principal and not taxed at all. It would be dangerous to say that we shall swing further than the British in this direction, for the situation here is complicated by our habit of taxing accessions to capital value. Still R with his dozen gift coupons severed from the bond could make a lively and hopeful battle.

Some general observations upon the annuity matter will not be a

⁵⁰ For the original rates, see note 31, *supra*. Rates on business income and on income from stocks, bonds, and the like, increased by GEN. ACTS, 1919, c. 324 and c. 342. *Quaere* if the low rate on income from annuities is an unscientific recognition of their perishable nature.

⁵¹ *Tax Commissioner v. Putnam*, 227 Mass. 522, 526, 528, 116 N. E. 904 (1917).

waste of time, for no doubt the various American states can produce situations running all the way between that of the federal government with its lack of tradition and that of Massachusetts with her overload of tradition.

The Massachusetts commissioner of corporations and taxation has made two very significant rulings.⁵² He supposes a corporation granting a pension to an employee. If the pension can be stopped at any time in the corporation's pleasure, the payments are gifts and not taxable as realization of an annuity. If the employee has a right to compel continuance of the pension irrespective of the corporation's desire, a taxable annuity is created. Observe that this difference cannot be because in the latter case a right of action springs into being. Creation or transfer of a right of action is thoroughly consistent with a gift. The courts will protect rights properly passed by gift, just as they will protect other rights.⁵³

The fundamental distinction between these cases lies in the fact that under the second only did the corporation create a dependable expectation of continued benefit. That pensioner could rely on his pension; the first pensioner could not. The average man would be quick to recognize three kinds of gifts. To begin with, a donation to meet a special emergency — illness, some unusual liability, or any of a thousand accidents of life. Although such a donation may be by instalment, it will not spread over any great stretch of time and the donee will not distinguish it in effect from a single, unified act of generosity. It comes, it goes, and is not to be counted on for the future. It is not taxable income. Then we may have a piecemeal payment clearly intended for saving rather than for immediate consumption. A fair example is a large legacy payable in fractions. This is not income at all. Nine times out of ten it will be saved or, if expended, used to discharge capital obligations.

⁵² MASS. RULES AND REGS. 5016 and 5017.

⁵³ Illustrations are legion. We need not seek beyond the decisions of Massachusetts herself. A legatee may sue the executor; a donee of a bearer bond may sue the obligor, a third party; a sealed guaranty is binding even though executed gratuitously, *Roth v. Adams*, 185 Mass. 341, 70 N. E. 445 (1904); the donee of an undorsed promissory note may collect from the maker, a third party, *Grover v. Grover*, 24 Pick. (Mass.) 261 (1837); the donee of an undorsed stock certificate can compel the donor's personal representative to perfect the gift, *Herbert v. Simson*, 220 Mass. 480, 108 N. E. 65 (1915). Compare *Kennedy v. Howell*, 20 Conn. 349 (1850), and *St. Paul's Episcopal Church v. Fields*, 81 Conn. 670, 72 Atl. 145 (1909).

Last comes a series of payments of such size and spread over so long a time that the man who receives them will consider them permanently recurrent additions to the fluid wealth wherewith he discharges current expenses. They become one of the enduring elements which go toward fixing his standard of annual outgo. If the recipient thus ignores or forgets the element of obsolescence with respect to the payments, why is not the tax collector entitled to do likewise? The perfect example is a life annuity. But the term may well be certain and at the same time shorter than the average expectation of life. I have heard a sagacious man of affairs say that for him "fifteen years was eternity." He knew from experience how utterly all prospects might alter in a fifteen-year period, and felt that it was vain to try regulating the more distant future. One could hardly deride a court for holding that a line of regular payments running somewhere between ten and fifteen years was so extended as to occupy the position of income in the recipient's scheme of existence.

The statement of these distinctions is by no means intended as a surrender to them or a guaranty of their legal effect. In practical argument they may not hold water at all. But they cannot safely be disregarded.

(2) *Terminable Rights to the Income of Property Held in Trust*

Probably five trusts out of six are composed principally of intangible personal property. The old common law did not recognize life estates in personalty, but ultimately a distinction was drawn between the use and the ownership. Colloquially speaking, however, the *cestui* has no "use" of the trust property. He rarely even sees it. His "life estate" or other interest carries not possession but a right to net income. The customary words of limitation are a direction to the trustees to pay the income to So-and-So for such-and-such a time, although the same result follows where this particular formula is not used.⁵⁴ If the *cestui* sold his interest, the purchaser would fix the price by estimating as nearly as might be the present value of the future payments.

So far, then, as questions of mere marketability are concerned, this kind of gift is very like a terminable annuity. But although we have observed a certain reluctance to tax as income the pro-

⁵⁴ Field v. Hitchcock, 17 Pick. (Mass.) 182, 183 (1836).

ceeds of an annuity, no similar feeling has been manifested with respect to the periodical proceeds of a trust fund. This unbending attitude of the taxing power does not pass unchallenged, as appears from the Notes on the Revenue Act of 1918 submitted by the Secretary of the Treasury to the House Committee on Ways and Means in November, 1919. While the submission was "without recommendation at this time," the material no doubt had received careful consideration. The Notes suggest legislation which will definitely prevent life tenants of trusts from claiming obsolescence allowances, for

"If these claims be allowed, cases would arise in which a clear income from an unimpaired corpus divided between a life tenant and remainderman would entirely escape taxation."⁵⁵

Now objection to an obsolescence claim which swallows the whole annual receipts is right and proper. Even a wasting capital asset has income-earning power so long as a bit of it remains in existence. But this admission is not enough to satisfy the anxious Secretary of the Treasury. He assumes — and perhaps the claimants of the obsolescence allowances assume — that the government is put to the narrow choice of taxing either the life tenant or nobody at all. That assumption neglects two obvious and easy victims — the trustee and the remainderman. Let us bear them in mind while we consider the case of the life tenant.

Suppose a testamentary trust fund, managed by T as trustee, with the beneficial interest so limited that R takes the income for life and X the principal free of trust on R's death. If an annuitant is subject to income tax on the ground of long-continued periodicity of payments, so it would seem is R. Besides, this situation has a double aspect which the annuity lacked. Not only has R a right to the annual output of the *res*, but the entire capital is temporarily devoted to his benefit. When X's estate first vests it is worth less than one thousand dollars, because the remainderman cannot come into possession until the life estate ends. The depreciation of X's interest would be the same even if R simply played dog-in-the-manger with the property. This was proved long ago by the parable of the slothful servant who laid away his pound in a napkin. To the remainderman's mind the life tenant's right has a nuisance

⁵⁵ Notes on the Revenue Act of 1918, part I, p. 11.

value distinct from its productive value. When we considered R as an annuitant, it was suggested that the government cannot consistently lay inheritance tax on a capitalization of his annuity and then lay income tax on the whole of each payment which he receives. But considering him as a *cestui que trust*, why may not the inheritance levy fall upon the negative or nuisance value of his estate, while the income levy falls upon the manifestation of its positive or productive power?

An argument ingenious, even if a trifle fine spun. The difficulty with it as proof that R should pay income tax is that by an easy and natural expansion it proves that X, the remainderman, should pay income tax. For the relative values of the life estate and the remainder are not constant. As the former wears itself away, there is a steady flow of new value into the latter. If X waited ten years or so after the establishment of the trust and then sold out for a fair price to a stranger with more money or more patience, he would receive substantially more than the original market worth of his interest. Has he realized a taxable gain? If so, does he not realize a greater taxable gain in case he follows the usual course of holding on until R's death and then receiving the full thousand dollars from the trustee?⁵⁶ It would be a shocking feat of double taxation to assess X on such a gain and also assess R on every cent of his receipts from T.

Where remainders were contingent and shifting, it might be harder to justify the taxation of a given remainderman for all the accessions of value caused by the absorption of the life estate. But even this would not necessitate taxation of R, if the law provided that T, the trustee, represented all remainder interests and must pay the accretion tax on them before distribution. The United States treasury has already ruled that T and not R pays taxes assessed against gains arising from successful marketing of the trust principal.⁵⁷

On quite another theory T could be saddled with the whole income tax during the continuance of the life estate. If the donor

⁵⁶ *Eisner v. Macomber*, 252 U. S. 189 (1920), seems to call for something like a "stop" or a *realization* of income before a valid tax can be imposed on it. Seemingly there can be a valid property tax on the falling into possession and enjoyment of a vested interest. *Moffit v. Kelly*, 218 U. S. 400 (1910), and *Matter of Pell*, 171 N. Y. 48, 63 N. E. 789 (1902).

⁵⁷ U. S. TREAS. REGS. 45, art. 347 (a new article added in 1920).

were alive and were giving R an annual allowance out of his current receipts, D would have to meet all assessments and R would go free under the hypothesis that gifts are not taxable. Why not treat T as stepping into D's shoes and carrying on his personality for purposes of taxation? ⁵⁸

The Secretary of the Treasury in the passage cited from his Notes on the Revenue Act of 1918 adopts what we may call the external standard. If bonds, stocks, or other securities or property produce income which would be taxable to a person owning them absolutely, he seems ready to insist that the same income is equally taxable to a life tenant who receives it from the hand of a trustee. The other or internal standard would require him to break through the surface of the trust, examine the several concurrent estates or interests, and find an apportionment of actual income effected by the gradual shifting of values between the estates. This the Secretary is not prepared to do. Perhaps it is only dressing the same thought in different words to say that he overlooks or overrides the possible distinction between income *derived from a thing* — the trust *res* — and income *received by a person* — the life tenant or remainderman.

Whatever the conclusions to which these currents and cross currents may flow, enough has been said to show that in one form or another, from one person or several persons, the government is entitled under income-tax laws to levy upon the full produce of an undiminishing trust *res*. This is not the case of an annuity, where an existing capital asset is chopped to pieces and must be reconstructed a bit at a time from the fragments as they come back to the annuitant. When we deal with a trust the question is rather one of apportioning income tax between several estates than of reducing the total amount of tax. Hence the trust device rarely provides D with effective mechanism for making a gift which shall as a whole enjoy the maximum exemption. But it may enable him to make a composite gift to several persons, one or some of whom will stand comparatively tax free.

⁵⁸ Dissenting opinion in *Drummond v. Collins*, [1914] 2 K. B. 643, 658, suggests this possibility. See s. c., [1913] 3 K. B. 583, and [1915] A. C. 1011. Confining taxes to the trustee would avoid the unjust duplicate taxation now allowed where the *cestui* is in one state and the trustee and *res* in another. *Maguire v. Tax Commissioner*, 252 U. S. (1920).

(3) *Terminable Charges upon Property*

For present purposes it seems necessary to distinguish two types of charges. D may charge a piece of property with periodical payments to R, but otherwise give X full title to and possession and enjoyment of the property; or D may create a trust, charge the *res* or its income with periodical payments to R, and forbid the trustee to relinquish the *res* to X, the remainderman, until the last of these payments has been made. A charge of the first kind falls between a terminable annuity and a terminable interest in the income of a trust fund, while in the second case R stands almost, if not quite, as if he were the "life tenant" or "tenant for years" of the trust fund. Since the taxation of this kind of "tenancy" and of the annuity have both been taken up, the reader can draw his own conclusions as to the true measure of income taxes upon charges.

(c) *Computation*

Courts are human enough to believe that figures lie less frequently than words. The man who desires to slip periodical payments past the clutches of an income tax on the argument that they are not wholly income should be prepared with an actual calculation to stand inspection and criticism. The first step in such a calculation is uniform. The payments are capitalized as of an appropriate date and the claim is made that the recipient is entitled to receive back that capital untaxed. From this point on, complication after complication must be unfolded. Do the untaxed receipts arrive first or last, or interspersed with income throughout the whole series? If the number of payments and the amount of each be certain, one may at least resort to exact mathematics. If there is uncertainty in either of these elements, the laws of probability must be invoked. If there is uncertainty in both of them, the claimant seems to swing perilously near guesswork. An actuary can always do the figuring with contemptuous ease, but a lawyer must educate himself thoroughly in the methods employed before he attempts explanations to a court.

It would, however, be an abuse of the reader's patience to attempt here any thoroughgoing discussion of calculations.⁵⁹

⁵⁹ For a case where computation played an important part, see *East Indian Railway Co. v. Secretary of State in Council for India*, [1905] 2 K. B. 413. Henry

IV

SUMMARY UNDER THE HYPOTHESIS THAT GIFTS ARE NOT
TAXABLE AS INCOME

The briefest summary is found in a return to our original problem. We have D wishing to make a gift to R, and to make that gift in such a form that despite its periodical nature D will pay no tax in respect of the amount donated and R will pay the least possible tax. D may succeed in creating this situation if he severs from one of his capital assets a right to future income and transfers that right to R. The only example given has been that of coupons stripped from a bond. But there are more ways than one to skin this cat. For instance, a landlord might shear from the reversion his rights under the covenant to pay rent.⁶⁰

As to a single payment thus severed, the scanty existing authority favors a satisfactorily thoroughgoing exemption. Any break toward an unfavorable conclusion is likely to come from the contention that a payment to D's nominee is a payment to D himself. And so it is, where D thus obtains a material advantage; but not where he honestly and unqualifiedly foregoes any such advantage by making a genuine gift.⁶¹

Granted this step, it is next to be determined how far one can demand application of the same doctrine to periodical payments. Five years — ten years — life? There is a sharp and really dramatic collision between the rule that gifts are not taxable income, and the revenue man's concept that with few exceptions all periodical receipts *are* taxable income, particularly when the recipient pays nothing to get them. This concept of taxability has very

White Edgerton's article on "Premiums and Discounts in Trust Accounts," 31 HARV. L. REV. 447, 455-459, 467-469, is an able discussion of a similar problem.

⁶⁰ This has been done not infrequently for other purposes. *Shea v. McCauliff*, 186 Mass. 569, 72 N. E. 69 (1904); *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491, 122 N. E. 575 (1919).

⁶¹ The text disregards the possibility that donated property may have appreciated or depreciated during the donor's ownership. On that point we find the ruling of the New York Comptroller: "Gifts . . . constitute a disposition of property which may result in a profit or loss." N. Y. COMPTROLLER'S REGS. (1920), art. 91. The Comptroller falls a victim to muddy thinking or muddy expression of thought. A gift does not *result* in profit or loss. It may possibly furnish a proper occasion for taxing profit or deducting loss which has accrued but never has been and never will be realized by the donor. See Professor Edward H. Warren's article in 33 HARV. L. REV. 885.

largely triumphed in England under statutes which favor it; what it will accomplish here can be learned only from experience.

Another kind of summary is possible. The differing effects of periodical payments upon the sources from which they are drawn may burden the taxpayer's case with unfavorable presumptions or bless it with favorable ones. Presumptions are important in debatable situations. What is income to D may of course be capital to R, or *vice versa*.⁶² Nevertheless there is an easily comprehensible tendency to judge the nature of a payment from what it does to the corpus which puts it forth. Where a physical subtraction from the corpus can be observed, one feels that all along the line we have a dealing with capital. Where, on the contrary, the distribution is simply from the earnings of an unimpaired fund, one draws much more easily the conclusion that the receipt is income. By and large, periodical payments may spring:

1. From a pure *chose in action*, and not from any fund of property tangible or intangible. So with a true annuity chargeable only upon the person of the obligor. Here the *chose in action* steadily shrinks, but the shrinkage is not emphatically apparent. You have to argue it out. The presumption is not particularly favorable to exemption from income tax.

2. Exclusively from the income of a fund. For example, a charge on income. Here the shrinkage of the recipient's limited interest, while real enough, is likely to be lost sight of because the capital remains an undiminished mass. Again the presumption is unfavorable.

3. Exclusively from the capital of a fund. Suppose five thousand dollars handed by D to X, not to be put on interest but to be doled out in specie to R at the rate of one thousand dollars a year. To convince a court that this is taxable income would not be easy.

4. Partly from the income and partly from the capital of a fund. Take case 3, but have X bank the money so that it earns interest; or take the very common testamentary provision which entitles the testator's widow to the income of a trust *and* so much of the

⁶² So in *Delage v. Nugget Polish Co., Ltd.*, 92 L. T. (N. S.) 682 (1905), payments which were held to be capital expenditures of the defendants, and thus not deductible from their gross income, were nevertheless adjudged taxable income of the plaintiffs, who received them. MASS. RULES AND REGS. 5019, 7088, acc.

principal as the trustees deem advisable. These are strong facts for at least partial exemption from income tax.

Plainly enough, any of these so-called presumptions is rebuttable. Still taxpayers' counsel who meet those of the first and second cases will have a far harder time capturing the court's sympathy. It should also be remembered that in a given jurisdiction the first case dealing with a novel legal theory may crush the theory for all time and under all circumstances. If the facts of that case are extreme or repellant to the court's common sense, the upshot is often an unfavorable decision packed so full of emphatic language and *dicta* that it is practically impossible to employ the theory again even with different and far more appealing conditions. The clumsy legal fisherman too often muddies the water for skilled rods which follow.

V

GIFTS MADE TAXABLE AS INCOME

It would be imprudent to assume that gifts will always enjoy their present exemption from income tax. The ill starred federal act of 1894 undertook to levy upon "money and the value of all personal property acquired by gift or inheritance."⁶³ Where income taxes exist only by grace of constitutional amendment, more or less effective resistance to a tax on gifts may be offered upon the ground that the bare word "income" in the amendment is too narrow to justify the taxing of donations. When the average man thinks of an "income" he thinks of receipts which one has a legal right to demand, and not those which come through the good will and generosity of others.

Aside from this constitutional possibility, an interesting point may be taken with respect to gifts from foreign sources. There are on the books cases holding that if D, domiciled in state X, bequeaths to R, domiciled in state Y, property having its *situs* in X, Y may not tax the transfer even though D's executor brings the property across Y's boundary and gives it to R. For, say the courts, Y had neither personal jurisdiction over D nor jurisdiction *in rem* over his property.⁶⁴ Gift income resembles a legacy and is

⁶³ 53d Cong., 2d sess., c. 349, § 28; 28 STAT. AT L. 553.

⁶⁴ *State v. Brim*, 57 N. C. 300 (1858); *Hood's Estate*, 21 Pa. St. 106 (1853); and a rather solemn warning in *Tilt v. Kelsey*, 207 U. S. 43, 60 (1907). Similar results, but different argument, in such British decisions as *Hay v. Fairlie*, 1 Russ. 117, 128 (1826).

different from income-as-of-right. A gift is a unilateral transaction, controlled as to its essence — the passage of title — only by the donor's will and the law controlling the *res*. For tangibles and specialty *choses in action*, this law is probably that of the physical *situs*;⁶⁵ for pure intangibles, probably the law of the donor's domicile.⁶⁶ The law of the donee's domicile cannot prevent the vesting of title in him; so far as our states are concerned it cannot except by way of reasonable police regulation prevent physical introduction of the article donated.⁶⁷ Conversely, it has not the slightest power to perfect or expedite the gift.

With income to which a man is legally entitled the case is distinctly different. Before the income is realized, there inheres in the recipient for at least a short time the valuable power to compel payment. His domiciliary jurisdiction by its personal control over him reaches that power of compulsion, and thus acquires a grip upon the income transaction.

Thus it seems possible that even if taxation of gifts as income is allowable, our states will not be permitted to levy upon foreign gifts. I do not suggest a similar limitation applying to the United States. The federal power to tax its citizens, whether resident or non-resident, has tremendous geographical sweep.⁶⁸ What the federal government can do to a resident alien with respect to his foreign property is possibly a shade more doubtful.⁶⁹ In this connection a distinction may also be drawn where a state seeks to tax the realization of such a gift as a life interest in the income of a foreign trust fund. Here the vesting of the donation ends its unilateral character. From then on there exists between trustee and *cestui* a bilateral relation composed of a duty on one side and a correlative right on the other. The valuable end of that relation — the right — lies in the *cestui's* jurisdiction.⁷⁰

⁶⁵ *Green v. Van Buskirk*, 7 Wall. (U. S.) 139 (1869). Where the transfer is by death, the law of the decedent's domicile becomes relevant.

⁶⁶ *Fidelity, etc. Trust Co. v. Louisville*, 245 U. S. 54 (1917).

⁶⁷ *Rossi v. Pennsylvania*, 238 U. S. 62, 66 (1915); U. S. Const., Art. I, § 10.

⁶⁸ It may be pushed to the extreme of a tax for exercising non-remunerative privileges in foreign jurisdictions. *United States v. Bennett*, 232 U. S. 299, 304-307 (1914); *United States v. Goelet*, 232 U. S. 293, 296 (1914).

⁶⁹ See, however, *Moore v. Miller*, 5 App. D. C. 413, 423 *et seq.* (1895); *United States v. Erie Railway Co.*, 106 U. S. 327, 704 (1882).

⁷⁰ In *Maguire v. Tax Commissioner*, notes 45 and 58, *supra*, arguments were made for and against the notion that *cestui's* interest is a right of action rather than an estate. The ground of decision rendered it unnecessary to consider this point.

VI

CONCLUSION

I have attempted merely to suggest some possibilities of a rather curious situation. It is foolish to do more than sketch the superstructure of a legal fabric until the underpinning has been well tested. Probably few competent lawyers would be prepared to advise their clients that the exemption of gifts from income tax is founded upon the rock of constitutional privilege. But even if legislative complaisance lies at the bottom it does not follow that the rule rests upon shifting sand. Good legislative practices are often sensibly continued.

Is this particular exemption good or bad? On the whole it seems good, both for government and taxpayer. Our taxes are very severe and none too equitably adjusted.⁷¹ Now — to take up a new metaphor — no administration can safely challenge the ingenuity of the nation's money-makers with an unyielding fiscal pack-harness. Block the fair and honest methods of easing the load where it weighs too heavily, and some clever chap will be stimulated to spill the whole thing into the ditch; or else the pack-animal may refuse to go.⁷² No fairer, more honest, or more generally beneficial device for easing a galling tax could be imagined than the device of intelligent generosity. It is far better to leave this in the taxpayer's hands than to set him seeking less praiseworthy means.⁷³

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⁷¹ "Pity 't is 't is true." And perhaps it is unavoidable. "That the tax in question was exceedingly onerous is undoubted; but it may be said that there is nothing very poetical or romantic about tax laws, at best." *Glasgow v. Rowse*, 43 Mo. 479, 489 (1869).

⁷² There have been sundry murmurs to this effect with the excess profits tax as the burden of their complaint.

⁷³ The report of the British Royal Commission on the Income Tax was not available in the United States when the foregoing text was written. Paragraphs 28, 96, 180-207, and 576 of the report bear more or less directly on the topics above discussed. See also paragraphs 290-300, covering the allowance of insurance premiums as deductions from taxable income. In a very real sense life insurance is a sinking fund for the replacement of the mortal human machine.

My comments upon the British income tax do not take into consideration the changes which have been or may be made in it as consequences of the Royal Commission's report.

THE PROGRESS OF THE LAW, 1919-1920

THE CONFLICT OF LAWS

THE NATURE, ORIGIN, AND EXTENT OF LAW

PERHAPS the most important question in the Conflict of Laws is involved in a learned article by Professor Lorenzen.¹ This article deals with cases where general concepts — such as *domicil*, *movables*, *locus contractus*, *locus delicti* — have a different meaning in two states concerned in a legal relation. Much authority is brought together in this article. In the opinion of the present author, the subject possesses no practical difficulty, though it offers an interesting field for study. Each court in which a question arises involving the conflict of laws must decide it according to its own ideas. If a question arises in an English court as to a domicil in France, the English court must apply its own ideas of domicil to the determination of the question, just as it would apply its own ideas of procedure or evidence.

II. In *In re Tallmadge*,² the vexed question of the *renvoi* was presented by proceedings on the will of a person who died domiciled in France though a citizen of New York. In a learned and exhaustive report, which was confirmed by the Surrogate, Mr. Referee Winthrop gave the first thorough discussion of the subject in an Anglo-American court, decided that the *renvoi* is no part of New York law, and therefore applied the conflict of laws of New York to the question of what law governs, as every court should do, and applied the law of France to the inheritance.

III. The question of the legislative jurisdiction of a state is neatly raised by the case of *American Fire Ins. Co. v. King Lumber & Mfg. Co.*³ A contract of insurance on Florida property was made by correspondence between a Florida broker and a Pennsylvania company; the contract being completed by mailing the policy from

¹ Ernest G. Lorenzen, "The Theory of Qualifications in the Conflict of Laws," 20 COL. L. REV. 247.

² 109 N. Y. Misc. 696, 181 N. Y. Supp. 336 (1919).

³ 39 Sup. Ct. Rep. 431 (1919).

Pennsylvania. Certain representations had been made by the broker to the assured. A Florida statute provided that any person "who directly or indirectly makes or causes to be made" any policy for or on account of an insurance company should be taken as its agent. The Florida courts had held that this provision applied, and that the representation of the broker bound the company. This decision was upheld by the Supreme Court.

The court did not deny that the legislative power of Florida is confined within the territorial limits of the state; but it held that the company, by consenting to a contract through a Florida broker, was subject so far as the contract was concerned to the Florida law.

This presents an interesting question as to the law applicable to an interstate contract made by correspondence. A promise made by mail or telegraph "speaks" to use the language of Mr. Justice Lindley⁴ "in the place where it is received." While therefore the place of mailing a letter may impose a liability⁵ this must be subject also to the legislative power of the place of receipt, to the extent of affecting the nature of the offer and the instrumentalities both of offer and of receipt. The relation of the broker who transmitted the offer and to whom the acceptance was sent to complete the contract was therefore subject to the regulation of the state of Florida.

DOMICIL

In *Blaine v. Murphy*⁶ we have a new phase of the difficult question of domicile where the dwelling-house is cut by a boundary line. The question was, whether the federal court had jurisdiction on the ground of diverse citizenship. The plaintiff was a citizen of New York; the defendant claimed the same citizenship. It appeared that the defendant conducted a hotel on the line between New York and Massachusetts. The boundary had been marked by a monument which if correct showed that all the house except one or two unimportant rooms lay in New York. The owner had always regarded himself as domiciled in New York; license papers were taken out there, legal descriptions had ascribed him to New York, and the will of the ancestor and former owner had been proved there. But in the last perambulation and remarking of the

⁴ *Bennett v. Cosgriff*, 38 L. T. N. S. 177 (1878).

⁵ *Perry v. Mount Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632 (1886).

⁶ 265 Fed. 324 (1920).

boundaries it was found that the monument at the hotel was fifty feet out of the way, and that the principal part of the building was in Massachusetts. The court held that the defendant was domiciled in Massachusetts. The intention necessary to fix a domicile is the intention to live in a certain place, not an intention to be domiciled in the territory of one or another sovereign. To quote the language of Young, J., in *Kerby v. Charlestown*,⁷ "A man's home is where he makes it, not where he would like to have it."

Another element possibly enters into this case. The difficulty is caused by an artificial situation created by the boundary line. In fact, is a man's home limited to a room, or to a house? If a man lives on a farm, is he not at home in every acre of the land as well as in the house? This may be doubtful; but as to the four walls of his castle there is no doubt — he is at home in any part of the enclosed dwelling-place. In the case under discussion the real home was in both states. The technical domicile must be fixed by law in the one state or the other, and when once fixed it abides until the entire home is left. Under the circumstance of the misplaced boundary-stone, it might be claimed that the domicile *de facto* was in New York. On the whole, however, this contention must fail; for, as the court found on a petition for rehearing, the change was not of the boundary, but only of the wrongly-placed monument. There had therefore been no *de facto* domicile in New York as a result of this wrongly-placed monument.

SITUS

I. There is growing recognition of the fact that a trust estate, as a composite *res*, may, like the assets, tangible or intangible, gathered together for doing business, have a fixed situs of its own; which need not be called "the seat of the trust," but might as well be called that as anything else. The seat of the trust is the place where it is created to be administered. There seems to be no legal reason why the trust *res* should not be taxed at the seat of the trust.⁸ In *Thorne v. State*⁹ the Supreme Court of Minnesota, citing the passage just referred to, allowed a succession tax on trust shares owned by a non-resident, the trust *res* consisting of shares in do-

⁷ 78 N. H. 301, 99 Atl. 835, 838 (1916).

⁸ 32 HARV. L. REV. 632.

⁹ 177 N. W. (Minn.) 638 (1920).

mestic and foreign corporations, held by Minnesota trustees who received dividends from the corporations, paid expenses, and declared and paid dividends to the holders of the trust shares.

In *State v. Phelps*,¹⁰ a trust fund created by a Wisconsin will, the trustees being accountable to a Wisconsin court, included stock in a Philadelphia corporation; which by arrangement with the trustees paid dividends directly to a Pennsylvania beneficiary. The beneficiary on receiving a dividend sent a receipt for it to the trustees, who included it in their account. It was held that a Wisconsin income tax was payable on the dividends.

II. *Greenough v. Osgood*,¹¹ was another case in which the "seat" or "situs" of a trust was considered. An ante-nuptial settlement by a woman domiciled in New York had placed in the hands of Massachusetts trustees an estate consisting of personalty, most of it in Massachusetts, and of Massachusetts land. The trustees filed a bill for instructions. The court found from these facts that the settlor intended the estate to be administered in Massachusetts, and that the bill would therefore lie; and proceeded to give instructions according to Massachusetts law.

III. In *Primos Chemical Company v. Fulton Steel Corporation*¹² the court decided that a deposit in a bank within the district did not constitute "property of a fixed character" so as to give the Federal courts jurisdiction to appoint a receiver for property of an absent owner. The deposit was a "live" account, with an average balance of about \$4000. The decision was placed upon the ground that money deposited is the property of the bank, and the depositor is merely a creditor. No authority was cited on the point, which was treated as too clear for doubt — as indeed, on principle, it is. But it would seem that the court should have distinguished the case of *Blackstone National Bank v. Miller*,¹³ in which Mr. Justice Holmes upheld a tax upon the bank deposit of an absent depositor on the ground (with another) that it constituted property within the jurisdiction. This theory has been subsequently acted on by the same court.

¹⁰ 176 N. W. (Wis.) 863 (1920).

¹¹ 126 N. E. (Mass.) 461 (1920).

¹² 254 Fed. 454 (1918).

¹³ 188 U. S. 189 (1903).

TAXATION

I. In a series of articles by Professor Powell,¹⁴ powerful, well-reasoned and exhaustive, a novel and difficult question of the jurisdiction to tax is considered. This same question has formed the subject of several decisions of the Supreme Court of the United States, which carry further the tendency noted a year ago.¹⁵ In *Shaffer v. Carter* the court again upheld the Oklahoma income tax on income derived by a non-resident from Oklahoma oil-wells;¹⁶ and this decision was followed in *Travis v. Yale & Towne Manufacturing Company*.¹⁷ The Supreme Court also affirmed¹⁸ the decision of the Supreme Court of Massachusetts in *Maguire v. Tax Commissioner*, discussed a year ago,¹⁹ which holds that the Constitution of the United States is not violated by taxing the income received by a domiciled beneficiary of a foreign trust.

II. Several cases involving the incidence of taxation on persons or property outside the state have been already sufficiently considered.²⁰ The most extraordinary of these decisions is *Colorado v. Harbeck*,²¹ where the Appellate Division of the Supreme Court of New York has allowed the State of Colorado to maintain an action for the recovery in New York of the amount of a tax assessed in Colorado.

JURISDICTION OF COURTS

I. In *Shipley v. Shipley*,²² it was held that a wife might sue her non-resident husband for separate support, obtaining jurisdiction by attaching his property within the state; and though she could not obtain a valid personal judgment against him, she could thereby have his property applied to the satisfaction of her claim. This is

¹⁴ Thomas Reed Powell, "Extra-Territorial Inheritance Taxation," 20 COL. L. REV. 1, 283.

¹⁵ 33 HARV. L. REV. 8.

¹⁶ *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. Rep. 221 (1920).

¹⁷ 252 U. S. 60, 40 Sup. Ct. Rep. 228 (1920). These two cases were commented on in 20 COL. L. REV. 457, by Professor Powell.

¹⁸ *Maguire v. Trefry*, 40 Sup. Ct. Rep. 417 (1920).

¹⁹ 33 HARV. L. REV. 8.

²⁰ *Maxwell v. Bugbee*, 40 Sup. Ct. Rep. 2 (1919), commented on in 33 HARV. L. REV. 582. See *Cream of Wheat Co. v. Grand Forks*, 40 Sup. Ct. Rep. 558 (1920).

²¹ 106 N. Y. Misc. 319, 175 N. Y. Supp. 685 (1919), commented on in 33 HARV. L. REV. 840.

²² 175 N. W. (Ia.) 51 (1919).

an interesting though plain application of jurisdiction *quasi in rem*.²³

II. The nature of the act of probating a foreign will was considered in *In re Longshore's Will*.²⁴ A resident of Iowa owned land in Nebraska, and on his death his will was probated there. It was then offered for probate in Iowa as "a will probated in another state." The court held that it could not be probated as such, but in the regular form required for an Iowa will. The foreign probate, the court said, operated only *in rem* upon the foreign property, and did not establish, by a decision entitled to full faith and credit, the validity of the will.

In the case of land this is very clear. The will of land is a distinct conveyance, apart from its effect in disposing of the personalty; it may be good where the land lies, though bad by the law of the domicil and therefore not a valid disposition of the personalty. Even as to the personalty in the foreign state, that state may set up its own rules for the disposition of it, differing from those of the domicil; Illinois has done so, and its action was upheld as constitutional in *Headen v. Cohn*.²⁵ In such a case, the probate would no more affect the validity of the will at the domicil than in the case of land. But even if the foreign state held unchanged the doctrine that the law governing the devolution of movables is that of the domicil, and by its decision held the will valid according to the law of the domicil, probated it, and distributed the chattels in its territory accordingly, this would still not be a judgment to which the domicil must give full faith and credit.²⁶

A decree for the probate of a will may in fact operate, as the court says, *in rem* upon certain property; or it may act *in rem* upon the will itself, determining its validity. As a will of personalty, its validity can be determined only by the courts of the domicil; but any court may give it effect merely as to the property within its jurisdiction.

III. In *Hunau v. Northern Region Supply Co.*,²⁷ Judge Learned Hand takes up again the question of jurisdiction to sue a foreign corporation. He corrects a misunderstanding of his lan-

²³ See a comment on this decision, 20 COL. L. REV. 479.

²⁴ 176 N. W. (Ia.) 902 (1920).

²⁵ 126 N. E. (Ill.) 550 (1920).

²⁶ *Overby v. Gordon*, 177 U. S. 214 (1900).

²⁷ 262 Fed. 181, 183 (1920).

guage in the first article of this series,²⁸ in which he was ranked with Professor Scott as maintaining the opinion that "by causing a particular act to be done within a state, the corporation submits the act to the provisions of the state law . . . the obligation to submit all litigation growing out of the act to the courts of that state." This language was not his, but represented an unfortunate attempt of the present author briefly to state the substance of his view. His view as now explained appears to coincide with the common opinion that a corporation may be "found" where it commonly "does business." His felicitous language is worth quoting.

"How far a corporation is immanent in every authorized act of its agents anywhere, and what will be the eventual basis of its subjection to foreign process, it is not necessary to consider; but it is clear that at present some general activities are necessary."

In another case the question of the liability of a foreign corporation to be sued where it did business is considered. In *Chipman v. Thomas B. Jeffery Co.*,²⁹ a foreign corporation, having authorized a person within the state as its agent to receive service of process, according to the New York law, thereafter ceased to do business in the state. Judge Augustus Hand held that the authority created in accordance with the statute ceased when the corporation ceased to do business within the state, except as to obligations arising within the state. Accepting Judge Holmes' distinction³⁰ between jurisdiction based on express consent and that based upon doing business without giving express consent to be sued, but doing acts which are to be taken as implying such a consent. Judge Hand held that in the latter case the extent of the consent was a question of construction; and that there was no jurisdiction in a case not covered by the consent, whether or not there might have been jurisdiction if no express consent had been given.

Judge Hand adds that where there is no express consent the jurisdiction is based on "a so-called estoppel on the part of the Corporation to object to service in actions based upon local transactions."³¹

²⁸ 33 HARV. L. REV. 10.

²⁹ 260 Fed. 856 (1919).

³⁰ Pennsylvania F. I. Co. v. Gold Issue M. & M. Co., 243 U. S. 93 (1917).

³¹ See valuable comment on this case, 33 HARV. L. REV. 730.

STATUS

I. In *Arani v. Public Trustee*,³² a Maori had adopted a European child, with due tribal ceremonies; on the death of the adoptive father the child claimed to inherit. By Maori custom a European child could not be adopted. Adoption was however provided for in an Act of Parliament, applicable in New Zealand. The Judicial Committee, Lord Phillimore writing the opinion, held that the child might inherit. The court said that though the adoption was not permitted by the tribal law the Maori might avail himself of the Act of Parliament.

It is to be noted that the Maoris are governed by their own tribal law, administered by native courts, although they are full citizens of New Zealand; and that the formalities of adoption in this case were those provided by the tribal law. This option given to a native to select certain features of the territorial law, while still governed in general by the tribal law, is certainly novel.

II. In refusing to grant a divorce from a polygamous marriage contracted where such a marriage was valid, the court in *Hyde v. Hyde*³³ carefully guarded its opinion by adding, "This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions." Such caution was necessary in the courts of a country which governs millions of Mohammedans. Following this cautious assurance, the Privy Council in *Cheang Thye Phin v. Tan Ah Loy*,³⁴ allowed a widow's share of the property of a Chinese resident in Penang, to a "t'sip" or subordinate wife, although there were two wives of the first rank.

III. In several cases the jurisdiction of a court to decree custody of a child has been considered. In *Hartman v. Henry*,³⁵ the Juvenile Court in Kansas City, Mo., awarded to the respondent custody of a child found wandering neglected in Kansas City, Mo. The petitioner had already been appointed guardian by a Kansas court, and brought his writ of *habeas corpus* to obtain custody of the child. The Supreme Court held that the Juvenile Court had jurisdiction

³² [1920] A. C. 198.

³³ L. R. 1 P. & D. 130, 138 (1866).

³⁴ [1920] A. C. 369.

³⁵ 217 S. W. (Mo.) 987 (1920).

to award custody of the child in Missouri, and the propriety of its action in this case could not be brought in question by this writ.

The decision is an application of the well-established principle that the sovereign, through his proper court, is the protector of every person within his jurisdiction who needs protection; and he may under this power take a foreign child away from his parent or his proper domiciliary guardian.³⁶

In *Groves v. Barto*³⁷ upon a divorce in Colorado the custody of the child had been awarded to the mother. The mother then changed her domicil to Washington, the father assenting. Several months later the father secured a modification of the original decree according to which custody of the child was awarded to him; and then applied to the Washington court to give him possession of the child. This application was refused, on the ground that the change of domicil deprived the Colorado court of any further control over the child. The court also found that the welfare of the child would best be subserved by the mother's custody. The decision may, it would seem, be sufficiently rested on the first ground.³⁸

In *Griffin v. Griffin*,³⁹ a California mother, upon a decree of divorce, had been awarded custody of the children; and had been forbidden to remove them from the county without permission. She secured permission to take them to Oregon, on condition she brought them back at a certain time. Instead of returning, she acquired a domicil in Oregon. As a result of her action, the California court modified its decree and awarded custody to the father, who brought *habeas corpus* in Oregon to obtain the children. The court denied the petition upon two grounds: first, that the best interests of the children demanded that they remain with the mother; second, that at the time of the last California decree the children were domiciled in Oregon and the California court no longer had jurisdiction over their status.

The first ground seems rather questionable. There was no finding unfitness on the part of the petitioner, as in the former case. Has the sovereign within whose territory a minor is found power

³⁶ *Woodworth v. Spring*, 4 Allen (Mass.) 321 (1862).

³⁷ 186 Pac. (Wash.) 300 (1919).

³⁸ See this case commented on in 20 COL. L. REV. 491.

³⁹ 187 Pac. (Ore.) 598 (1920).

to award custody of the child away from its otherwise fit parent or domiciliary guardian, merely because he believes the welfare of the child will thereby best be secured? In *Nugent v. Vetzera*,⁴⁰ the English court thought not; and sent several children of an English mother, who had been brought up in the English customs and religion, to their Austrian guardian, although the court felt that the welfare of the children would suffer thereby. In cases of temptation an English court has undoubtedly without due consideration acted otherwise.⁴¹ The American courts are somewhat more liberal; but it is doubtful whether the mere supposed "welfare" of the child would induce any court to remove a child from the custody of a not unfit guardian. A doctrine which would allow the court to do so would be a very dangerous one.

The second ground, however, seems sound, though it involves novel doctrine. That the California court cannot by its order constrain an adult person, not a wrongdoer, to remain in the state, and cannot prevent his acquiring a new domicile for himself, is certain. But the fact that the mother acquired a new domicile for herself in Oregon does not necessarily mean that the children's domicile also changed, and there is little authority on the point. It is submitted, however, that upon divorce the parent with whom the child actually lives acquires or retains the power over the child's domicile. Whether this suggestion goes too far or not, at any rate it seems clear, as this case decides, that the parent to whom the general custody is awarded obtains this power, and may exercise it even against the order of the court. The court might have put an end to the mother's custody while she remained in California; its power over her and the children ceases when they cease to be there domiciled, and its decree can no longer affect their status.

IV. One Chaloner had been declared of unsound mind by a New York court, and a committee appointed to take charge of his property. He being domiciled in Virginia, an inquiry was instituted as to his sanity and he was declared sane and competent. Upon his removal to North Carolina similar proceedings were held, with a like result. He then brought an action in a New York court, and the defendant pleaded his incompetence to sue.⁴² The court held

⁴⁰ L. R. 2 Eq. 704 (1866).

⁴¹ *Johnstone v. Beattie*, 10 Cl. & F. 42, 150 (1843).

⁴² *New York Evening Post v. Chaloner*, 265 Fed. 205 (1920).

that capacity to sue is a matter for the law of the forum, and not, as a status, determined by the law of the domicil. That capacity to take part in a legal act is not a kind of status is well settled in this country.⁴³

PROPERTY

I. Bartolus has been blamed by scores of writers incapable even of understanding him for basing his distinction between "personal" laws and laws of property upon the context, and especially on the relative position of the various phrases. In *Gwynn v. Rush*,⁴⁴ we have a proof of the genius of Bartolus, who caught the distinction four hundred years before legal science was ready for it. It was provided by a statute of Arkansas that in every final judgment for divorce granted to the wife, she should be entitled to a third of her husband's estate; and every such final judgment shall designate the specific property which should make up the third. Gwynn's wife obtained a divorce from him in Tennessee. Gwynn afterwards contracted to convey Arkansas land; the buyer refused to accept a deed unless the divorced wife was a party to it; and Gwynn brought this bill for specific performance of the contract. The court held that the statute regulated procedure in judicial proceedings for divorce, and did not constitute part of the law of property; it applied therefore only to divorces in Arkansas. Even though, as in this case, the court which pronounced the decree in Tennessee assigned the Arkansas land to the wife, this had no effect on the title. The land not having been transferred in the only way in which, by Arkansas law, land could be transferred, the former wife had no interest whatever in it.

Another case in which the distinction between a law fixing status and a law of inheritance was fundamental is *Harrison v. Moncravie*.⁴⁵ A wife claimed land in Oklahoma as statutory heir of her husband, of whose killing she had been convicted in Kansas. A statute in both Kansas and Oklahoma provided that no person convicted of killing a person should take land by inheritance or devise from such person. It was claimed that the Kansas statute made the claimant incapable of taking; the court, however, held

⁴³ *Milliken v. Pratt*, 125 Mass. 374 (1878); *Thompson v. Taylor*, 66 N. J. L. 253, 49 Atl. 544 (1901).

⁴⁴ 219 S. W. (Ark.) 339 (1920).

⁴⁵ 264 Fed. 776 (1920).

that this statute fixed the property law, not the status; and though the claimant was domiciled in Kansas the statute of that state, not affecting her status, did not apply.

This opinion is quite in line with reason and authority; but the court further found that the statute of Oklahoma did not apply, since it must refer only to conviction in Oklahoma. The result was that a federal court of equity, sitting in Oklahoma, decreed that this wife, convicted of killing her husband, should take his land as against his innocent daughter. Evidently the blood of a husband does not soil the wife's hands, in Oklahoma.

The few exceptional cases which allow the heir who killed his ancestor to profit by his crime and take the land are not necessarily in point here, because in this case the wife is not defendant but plaintiff. The weight of authority, at common law, is that equity will enjoin the criminal killer.⁴⁶ Here both states had statutes embodying the prevailing view. This view obviously is not based on time or place of killing. Grant that the statute does not affect status or competency, but is part of the land law, it would seem that Oklahoma had forbidden its courts to give the land to a convicted homicide.

The court argues that legislation is territorial and does not affect persons and things outside its jurisdiction: but having already decided that this statute affected land and not persons the subject and operation of the statute are clearly within the jurisdiction; it affects the land, no matter who the claimant. The court also argues that the statute is penal, and must be strictly construed. If so, it either puts a penal disqualification upon a person or deprives him of property. This person, however, has neither qualification nor property unless the statute confers it.

The court cited, in support of its opinion on this point, several cases of the type of *Commonwealth v. Green*.⁴⁷ These cases are all of statutes imposing, on account of conviction of a crime, disqualification to testify in court or to serve on a jury; cases where the person in question is not alleging a right which he claims is given him by law, but is called upon by a third person, who is a party in court, to testify to facts or to sit on a jury. The right involved in this case is that of the party, not of the witness or juror; and its

⁴⁶ SCOTT, CASES ON TRUSTS, 458.

⁴⁷ 17 MASS. 515 (1822).

denial because of the misconduct of a third person, the desired witness or juror, inflicts an undeserved penalty on the party. The statute is therefore closely confined in its application. In this case no such question is involved. If the criminal's right is abridged by his crime he has only himself to thank; the result is not unjust, and there is no reason for restraining the operation of the statute.

II. The question of the effect upon marital property of a change of domicile of the spouses was raised in *Succession of Popp*.⁴⁸ Acquests were made in Louisiana while the spouses resided in that state, and remained there in the form of securities in a safe-deposit box after the spouses removed to Mississippi. On the death of the wife, an inheritance tax was laid on her half of the property in Louisiana. The husband claimed that he already owned the whole estate, his removal to Mississippi having vested the wife's community right in him. The court, however, following the earlier case of *Succession of Packwood*,⁴⁹ held that the acquests vesting under the community law remained community property in spite of a later change of domicile of the spouses.

INHERITANCE

In *Helme v. Buckelew*,⁵⁰ the Appellate Division of the Supreme Court of New York held that an action, under a New York statute authorizing it, could be brought against a foreign executor duly served with process, though there was no estate in New York; and that this judgment would be entitled to full faith and credit in the state of the foreign executor's appointment. Judge Laughlin dissented.

The New York courts had already held that an action *quasi in rem* to subject New York property to the claim of a creditor might be maintained under this statute against a foreign representative.⁵¹ The court had undoubted jurisdiction in that case because of the property. But it is submitted that it is impossible to render a personal judgment against a foreign representative. The claim is not against him; apart from the Statute of Executors, which is re-

⁴⁸ 83 So. (La.) 765 (1920).

⁴⁹ 9 Rob. (La.) 438 (1845), 12 Rob. (La.) 334 (1845).

⁵⁰ 181 N. Y. Supp. (App. Div.) 104 (1920).

⁵¹ *Thorburn v. Gates*, 103 N. Y. Misc. 292, 171 N. Y. Supp. 198 (1918), affirmed 184 App. Div. 443, 171 N. Y. Supp. 568 (1918).

enacted in every state, the executor would be no more liable to pay the debt of the deceased than the heir or any other stranger to the contract. The statute has a double operation; first, it keeps the debt alive; second, it directs the representative to pay it *out of the property of the deceased*, a trust which the representative undertakes only if he takes such property. It is not possible to impose such an obligation upon a person without his consent; and the foreign executor, having received no property from New York, has given no consent to pay. The statute cannot extend so far, and it is submitted should not have such a construction; it has a perfectly legitimate application otherwise. It allows foreign representatives to sue, where there are no domestic representatives; a perfectly proper power for New York to bestow. It allows them to be sued when there is property of the deceased in the state; an entirely legal procedure for the application of the property to the debt.

An important additional consideration is that to allow this action enables New York to administer property which lies within another state.

CONTRACTS

I. In *Indian & General Investment Trust v. Borax Consolidated*,⁵² bonds had been issued by an American company, payable interest and principal in London. An American income tax had been deducted from the amount of interest paid. It was held that the company must pay the entire amount of interest agreed upon. As this interest was payable in London, where the loan was made, it is clear that American legislation could not affect the amount to be paid.

II. In *Langford v. Newsom*,⁵³ a warranty deed had been given in Texas to land in Oklahoma; a flaw was alleged in the title, but the grantee had not been ousted. The question was, whether the grantee could recover for breach of the warranty, without establishing an ouster. It was held that this question must be determined by the law of Oklahoma. The court treated it as a question of "the effect of the covenant." It would perhaps be better to use a more particular term. It is a question of whether a breach has occurred; this should be governed by the law of Oklahoma, the place of performance.

⁵² [1920] 1 K. B. 539.

⁵³ 220 S. W. (Tex.) 544 (1920).

TORTS

I. In *Pennsylvania Railroad v. Levine*,⁵⁴ action was brought for the death in Pennsylvania of a New York man. The Pennsylvania law, which of course governed, provided that the amount recovered should go to the relatives "in the proportion they would take his or her personal estate in case of intestacy." It was properly held that the damages must be divided among the next of kin according to the New York law.

II. The New York Workmen's Compensation Act, like that of many states, has been interpreted broadly to cover injuries in the state, and injuries outside the state in pursuance of contracts of employment made in the state; and apparently injuries outside the state where both parties were resident. The court refused to go further and permit recovery where the defendant resided within the state, but all other features of the case were foreign.⁵⁵

PROCEDURE

An Arizona statute provided that where adjacent mines have a common ingress of water or a common drainage they shall provide for drainage; in case of neglect by either, the mine paying for the entire drainage may recover from the other its share of the expense "in any court of competent jurisdiction." In a subsequent paragraph it was held that "the court shall have power to cause the removal of any rock, débris, or any other obstacle . . . where such removal is shown to be necessary to a just determination of the question involved." One Maine corporation brought suit against another, on this statute, in the Maine courts to recover the defendant's share of the drainage by the plaintiff of the adjoining Arizona mines of the two corporations. The Supreme Court held that the action would not lie, because the statute established "a purely local method of procedure and practice," enforceable only in the courts of Arizona.⁵⁶

Is this a case fairly within the well-established doctrine invoked by the court? As it is a mere action to recover money which is due

⁵⁴ 263 Fed. 557 (1920).

⁵⁵ *Baggs v. Standard Oil Co.*, 180 N. Y. Supp. (N. Y. Misc.) 560 (1920).

⁵⁶ *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 110 Atl. (Me.) 429 (1920).

from the defendant to the plaintiff, it seems to present no necessarily local procedure. No question can be raised as to the power of Arizona to create the obligation. Though the court gives no explanation of its application of the doctrine, it was doubtless based upon the second paragraph quoted: the necessity of appealing to an Arizona court for the removal of any physical obstacle to the determination of the question. This however is a proceeding to obtain evidence; and the court might have decided that either party could obtain its evidence by process in Arizona and produce it in Maine. The doctrine has heretofore been oftenest applied to efforts to enforce a peculiar form of stockholders' liability of another state, the enforcement of which according to the terms of the statute required jurisdiction over all the stockholders. It is well, however, jealously to guard defendants against actions which it is oppressive to bring in a foreign state.

Joseph H. Beale.

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SHOULD WE ABANDON THE DISTINCTION BETWEEN GOVERNMENTAL AND PRIVATE FUNCTIONS IN DETERMINING THE TORT LIABILITY OF A MUNICIPAL CORPORATION FOR NEGLIGENCE IN AFFIRMATIVE CONDUCT?—A recent case raises anew the old question of liability of a city for the torts of employees. In *Fowler v. City of Cleveland*¹ it was held that an action will lie against a city for injuries occasioned by the negligence of members of its fire department.

It has become a common ritual that for performance or non-performance of governmental duties no liability attaches to a municipal corporation for the willful or negligent acts of employees, unless a statute expressly so provides.² But for performance or non-performance of private or corporate duties the same responsibility attaches to a municipal corporation as to any private corporation or individual.³ Hence it is almost universally held that a municipality is not liable for injuries

¹ 126 N. E. 72 (1919). See RECENT CASES, p. 91, *infra*.

² *Hill v. Boston*, 122 Mass. 344 (1877); *Eastman v. Meredith*, 36 N. H. 284 (1858). See 1 BEACH, PUBLIC CORPORATIONS, § 734; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 955; COOLEY, MUNICIPAL CORPORATIONS, § 115; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1626.

³ *Stanley v. The Inhabitants of Town of Sangerville*, 109 Atl. 189 (1920); *Bailey v. Mayor of New York*, 3 Hill (N. Y.) 531 (1842). See 1 BEACH, PUBLIC CORPORATIONS, § 738; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 955; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1626.

caused by the negligence of members of its fire department.⁴ The court in *Fowler v. City of Cleveland*⁵ admitted this time-honored doctrine, but classified the operation of a fire department as a "purely ministerial" rather than a governmental act. An examination of the cases shows the futility, not to say absurdity, of any such distinction between governmental or public and corporate or private functions for the purpose of predicated tort liability. Building a drawbridge,⁶ maintaining a health department,⁷ or a charitable institution,⁸ confining and punishing criminals,⁹ assaults by policemen,¹⁰ operating an elevator in a city hall,¹¹ driving an ambulance,¹² sweeping and cleaning streets,¹³ have been held governmental acts. Sweeping and cleaning streets,¹⁴ street lighting,¹⁵ operating electric light plants,¹⁶ or water works,¹⁷ maintaining prisons,¹⁸ have been held private functions. In *Paterson v. The Erie Railroad Company*¹⁹ a city was allowed to recover for destruction of a fire engine although its driver was contributorily negligent. In *Opocensky v. City of South Omaha*²⁰ the court restricted the governmental function of operating a fire department to the answering of emergency calls. In *Kies v. Erie*²¹ recovery was allowed against a city for negligent construction of doors to a firehouse, but the court declared that no liability would have attached had the doors been negligently operated by the firemen. Such artificial distinctions lead to a suspicion that this doctrine of non-liability of municipal corporations for torts committed in the performance of public functions rests upon historical confusion of principles. The variety and insufficiency of the reasons which have been advanced in its support strengthen this suspicion.

Five reasons have, at one time or another, been given: 1. The state is sovereign and the municipality its governmental agency: no suit can be brought against the state without its consent, therefore none against

⁴ *Cunningham v. City of Seattle*, 40 Wash. 59, 82 Pac. 143 (1905); *Burrill v. Augusta*, 78 Me. 118, 3 Atl. 177 (1886); *Wilcox v. Chicago*, 107 Ill. 334 (1883); *Jewett v. New Haven*, 38 Conn. 368 (1871); *Fisher v. Boston*, 104 Mass. 87 (1870). See 1 BEACH, PUBLIC CORPORATIONS, § 744; 3 ABBOTT, MUNICIPAL CORPORATIONS, § 963; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1660; COOLEY, MUNICIPAL CORPORATIONS, 380.

⁵ 126 N. E. 72 (1919).

⁶ *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397 (1897).

⁷ *Howard v. Philadelphia*, 250 Pa. St. 184, 95 Atl. 388 (1915); *Tollefson v. Ottawa*, 228 Ill. 134, 81 N. E. 823 (1907).

⁸ *Leavell v. Western Kentucky Asylum for the Insane*, 122 Ky. 213, 91 S. W. 671 (1906).

⁹ *Jackson v. City of Owingsville*, 121 S. W. 672 (1909).

¹⁰ *Lamont v. Stavannah*, 129 Minn. 321, 152 N. W. 720 (1915).

¹¹ *Schwalk's Adm'r v. City of Louisville*, 135 Ky. 570, 122 S. W. 860 (1909).

¹² *Maxmilian v. Mayor of New York*, 62 N. Y. 160 (1875).

¹³ *Savannah v. Jordan*, 142 Ga. 409, 83 S. E. 109 (1914).

¹⁴ *Young v. Metropolitan Street Railroad Company*, 126 Mo. App. 1, 103 S. W. 135 (1907); *Denver v. Maurer*, 47 Colo. 209, 106 Pac. 875 (1910); *Missano v. Mayor of New York*, 160 N. Y. 123, 54 N. E. 744 (1899).

¹⁵ *Dickinson v. City of Boston*, 188 Mass. 595, 75 N. E. 68 (1905).

¹⁶ *Saulman v. Nashville*, 131 Tenn. 427, 175 S. W. 532 (1915).

¹⁷ *Bailey v. Mayor of New York*, *supra*. See *Stubbs v. City of Rochester*, 226 N. Y. 516, 124 N. E. 137 (1919).

¹⁸ *Edwards v. Pocahontas*, 47 Fed. 268 (1891).

¹⁹ 78 N. J. L. 592, 75 Atl. 922 (1910).

²⁰ 101 Neb. 336, 163 N. W. 325 (1917).

²¹ 169 Pa. St. 598, 32 Atl. 621 (1895).

the municipality;²² 2. The municipality derives no pecuniary benefit or profit from the exercise of public functions;²³ 3. Members of municipal departments in the exercise of public duties are not agents of the city, therefore the doctrine of *respondeat superior* has no application;²⁴ 4. It is necessary for the proper performance of governmental functions that a municipal corporation should not be liable for the negligence of its servants;²⁵ 5. Municipalities should not be liable for torts committed in the performance of duties arbitrarily imposed by the legislature, but should be liable only for those committed in performance of duties voluntarily assumed under general statutes.²⁶ None of these reasons is sound. The immunity of a sovereign from suit rests upon no "formal conception, or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which that right depends."²⁷ This conception does not underly a municipal corporation.²⁸ In admiralty, for example, it is well settled that a municipal corporation is liable for the torts of its servants.²⁹ Moreover, tort liability is not based upon a benefit derived by the tortfeasor. Nor does the character of the service rendered determine the fact of agency; but rather the determining factors are whether the principal employs, pays, controls, and dismisses the servant.³⁰ In answer to the fourth reason, proper performance of public duties can hardly be said to rest upon the immunity of a public corporation for willful and negligent conduct of its employees. Finally, the voluntary assumption of an unquestioned duty has never been the starting point for liability in the law of torts.

The basis for the doctrine is to be found in its origin, and its origin is to be found in early common-law actions. No action on the case lay by a private individual against a town for the omission to perform a public duty, but the proper procedure was by way of indictment.³¹ The lack of private action was later placed upon the ground that towns were usually not corporate and so could not be sued.³² And still later recovery was denied because of the long-established common-law rule.³³ It is to be noted that these cases were actions for omissions to perform public duties, and they can therefore be placed upon the general doctrine

²² *Frederick v. City of Columbus*, 58 Ohio St. 538, 51 N. E. 35 (1898). See COOLEY, MUNICIPAL CORPORATIONS, § 115.

²³ *Hill v. Boston*, *supra*.

²⁴ *Burrill v. Augusta*, *supra*; *Wilcox v. Chicago*, *supra*; *Maxmilian v. Mayor of New York*, *supra*; *Hafford v. New Bedford*, 16 Gray (Mass.) 297 (1860). See 1 BEACH, PUBLIC CORPORATIONS, § 744; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1655.

²⁵ See 3 ABBOTT, MUNICIPAL CORPORATIONS, § 963; COOLEY, MUNICIPAL CORPORATIONS, § 115.

²⁶ *Bigelow v. Randolph*, 14 Gray (Mass.) 541 (1860); *Dickinson v. Boston*, *supra*; *Edwards v. Pocahontas*, *supra*.

²⁷ Mr. Justice Holmes in *Kawananakoa v. Polyblank*, 205 U. S. 349, 353 (1907).

²⁸ See *Metropolitan Railroad Company v. District of Columbia*, 132 U. S. 1, 9 (1889).

²⁹ *Workman v. Mayor of New York*, 179 U. S. 552 (1900); *City of Chicago v. White Transportation Company*, 243 Fed. 358 (1917); *City of Chicago v. Chicago Transportation Company*, 222 Fed. 238 (1915).

³⁰ *Martin v. Temperly*, 4 Q. B. 298 (1843); *Laugher v. Pointer*, 5 B. & C. 547 (1826).

³¹ Bro. Abr., *Accion sur le case*, pl. 93.

³² See *Thomas v. Sorrell*, Vaugh. 330, 340 (1706).

³³ *Russell v. Men of Devon*, 2 T. R. 667 (1788); *Mower v. Leicester*, 9 Mass. 237 (1812); *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439 (1820).

that civil liability is not predicated upon omission to act unless such omission is of a legal duty running to the particular individual injured.³⁴ Negligent performance of an affirmative act presents a different problem.³⁵ Mr. Justice Blackburn, in *Foreman v. Mayor of Canterbury*,³⁶ properly allowed recovery against a municipality for a servant's negligence in affirmative conduct. But the correct analysis was obscured by Lord Chief Justice Cockburn in *Scott v. Mayor of Manchester*³⁷ when he allowed recovery against a municipal corporation for negligently operating gas works on the ground that the corporation derived a profit from the work.

And so an anomalous doctrine, based upon misconceptions and a confusion of misfeasance with nonfeasance, has become fastened upon the law. The time has come to face anew the real principles involved. The problem is a simple one of agency and torts, and whether there is any reason why ordinary principles should not apply to a municipal corporation. Firemen are in fact servants of the city. When a person, through no fault of his own, is injured by negligent driving of fire apparatus who should bear the loss: the innocent individual, or the corporation and ultimately the community? A principal should be liable for the torts of his agents which arise within the scope of and in the course of the employment.³⁸ This is the basic conception underlying the law of agency. And to this conception a municipal corporation should form no exception. Injuries caused by negligence of municipal employees are proper items of expense to be borne by the community. For omission to perform public duties running to the community as a whole there should of course be no municipal liability to private individuals.³⁹ But in the undertaking of an affirmative course of conduct it is immaterial that the duty being performed is a public one from which the municipality derives no profit. Liability should be based upon the exaction of the law that everyone, in the performance of an affirmative course of conduct, must at his peril measure up to a standard of due care.⁴⁰ The reasoning in *Fowler v. City of Cleveland*⁴¹ is not wholly satisfactory. It can hardly be said that operating a fire department is a ministerial act; nor, as Mr. Justice Wanamaker contends, that a sovereign should be sued in the same manner as any individual because the constitution was designed to protect the individual. Nevertheless the result is desirable. In order to reach it it was necessary to overrule a previous decision of the same court.⁴² It is to be hoped that this example will be followed in other jurisdictions when the question arises in the future.

³⁴ *Union Pacific Railway Company v. Cappier*, 66 Kan. 649, 72 Pac. 281 (1903).

³⁵ *Hunnicke v. Meremec Quarry Company*, 262 Mo. 560, 172 S. W. 43 (1914); *Depue v. Flateau*, 100 Minn. 299, 111 N. W. 1 (1907); *Black v. New York, New Haven, and Hartford Railway Company*, 193 Mass. 448, 79 N. E. 797 (1907).

³⁶ L. R. 6 Q. B. 214 (1871). See *Mersey Docks v. Gibbs*, 1 H. L. 93, 111 (1866).

³⁷ 2 H. & N. 204 (1857).

³⁸ *Howe v. Newmarch*, 12 Allen (Mass.) 49 (1866); *Limpus v. The London General Omnibus Company*, 1 H. & C. 526 (1862).

³⁹ See *Rochester White Lead Company v. City of Rochester*, 3 N. Y. 463 (1850).

⁴⁰ *Bowden v. City of Kansas*, 69 Kan. 587, 77 Pac. 573 (1904).

⁴¹ 126 N. E. 72 (1919).

⁴² *Frederick v. City of Cleveland*, *supra*.

POWERS CONFERRED UPON CONGRESS BY THE SIXTEENTH AMENDMENT. — In the recent case of *Evans v. Gore*¹ the Supreme Court of the United States decided that by taxing the salary of a federal judge as a part of his income, Congress was in effect reducing his salary and thus violating Art. III, § 1, of the Constitution.² Admitting for the present purpose that such a tax really is a reduction of salary,³ even so it would seem that the words of the amendment⁴ giving power to tax "incomes, from whatever source derived," are sufficiently strong to overrule *pro tanto* the provisions of Art. III, § 1. But, two years ago, the court had already suggested that the amendment in no way extended the subjects open to federal taxation.⁵ The decision in *Evans v. Gore* affirms that view, and virtually strikes from the amendment the words "from whatever source derived."

The court seeks to support its position by finding in the history of the proposal and adoption of the amendment, proof that it was intended to serve the *sole* purpose of enabling Congress to levy a direct tax without apportionment according to population.⁶ It is true that *one* of the main purposes in framing the amendment was, as the court says, to remove this obstacle to an income tax raised by the *Pollock* case.⁷ But there existed other obstacles as well. It had been objected that Congress could not tax the income from state and municipal bonds,⁸ nor the salaries of state officials,⁹ nor the salaries of federal judges,¹⁰ this last being the exact question before the court. It is probable that the amendment was intended to remove these obstacles as well, and that it was for this express purpose that the words "from whatever source derived" were *inserted*.¹¹ Such seems to be the opinion of the senator who introduced the amendment.¹² And even though it may not be clear that the intent was other than that found by the court, at least it may be said that the court's view is not sufficiently supported by the facts to bear the great weight attached to it.

¹ 40 Sup. Ct. Rep. 550 (1920). See RECENT CASES, p. 85, *infra*.

² "The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

³ The dissenting opinion points out that a tax on the judge's income reduces his assets no more than any other tax. *Evans v. Gore*, 40 Sup. Ct. Rep. 550, 557.

⁴ The full text of the Sixteenth Amendment is: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

⁵ *Peck v. Lowe*, 247 U. S. 165 (1918).

⁶ See *Evans v. Gore*, *supra*, 555, 556.

⁷ *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429 (1895). One of the holdings of this case was that an income tax, not laid in proportion to the census, violated Art. II, sec. 9, cl. 4, of the Constitution.

⁸ *Ibid.*, *supra*.

⁹ *Collector v. Day*, 11 Wall. (U. S.) 113 (1870).

¹⁰ Letter of Chief Justice Taney, 157 U. S. 701 (1862).

¹¹ The second form in which the amendment was proposed was: "The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several states according to population." 44 CONG. REC. 3377.

The amendment next appeared in its final form. See note 4, *supra*. Comparison shows that the two significant changes were: first, the omission of the word "direct"; second, the insertion of the words "from whatever source derived." Neither of these changes are consistent with the view that the sole purpose of the amendment was to enable Congress to lay a direct tax without apportionment.

¹² Senator Brown. 45 CONG. REC. 2246.

It is possible that the court felt that if it gave full force to the words of the amendment in the matter of the salaries of the judges, it would be difficult to refuse them that force in the matter of income derived from state and municipal bonds. The court might well hesitate to commit itself to the latter, for, apart from its legal aspect, such a decision would be of striking significance in the financial and economic world.¹³ To avoid this difficulty an opinion was given indicating that the words "from whatever source derived" are of no force at all, because foreign to the immediate purpose of the amendment.

It is suggested that a sounder solution of the problem can be found in the principle which requires express terms to effect startling changes, and denies that such changes can be introduced by the mere force of general language.¹⁴ On this principle it would be hard to say that the change that would result from compelling federal judges to pay an income tax on their salaries could be termed startling and revolutionary. Such a change would not suddenly expose the judiciary to the tyranny of the Congress.¹⁵ On the other hand, if the question arises whether the amendment gives Congress the power to tax income derived from state and municipal bonds, there would be good ground for holding that it did not. For it has been held repeatedly that Congress cannot levy such taxes,¹⁶ and that the states are equally powerless to tax federal instrumentalities.¹⁷ Furthermore, these decisions rest on no express words of the Constitution, but upon the very base and frame of our government as set forth in that instrument.¹⁸ To interfere with that frame might well be held a startling and revolutionary change. This view makes it possible to limit the effect of the amendment without an extreme disregard of its literal meaning.

THE SEVENTH AMENDMENT AND PARTIAL NEW TRIALS. — The agitation for procedural reform and in some measure its realization make it pertinent to inquire how far the Seventh Amendment of the Federal Constitution, guaranteeing the right to jury trial,¹ may prove a stumbling-block in the way of such progress. Though the Seventh Amendment

¹³ Exemption from taxation puts a premium on state and municipal bonds, thus forcing up the rate of interest at which railroads and other industrial organizations can borrow.

¹⁴ *Cope v. Doherty*, 2 DeG. & J. 614 (1858); *Kneil v. Egleston*, 140 Mass. 202 (1885). See *State v. Brown*, 71 W. Va. 519, 523, 77 S. E. 243, 245 (1885); *Woolridge v. M'Kenna*, 8 Fed. 650, 659 (1881).

¹⁵ The power to levy a general income tax, which would incidentally include the salaries of the judges, would be but a clumsy weapon in the hands of Congress, compared to the power, already possessed, of refusing to make the necessary appropriations to pay them any salary at all.

¹⁶ *Pollock v. Farmers Loan & Trust Co.*, *supra*; *United States v. Railway Co.*, 17 Wall. (U. S.) 322 (1873).

¹⁷ *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819); *Farmers Bank v. Minnesota*, 232 U. S. 516 (1914).

¹⁸ See *Dobbins v. Commissioners*, 16 Pet. (U. S.) 435, 447 (1842).

¹ The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, than according to the rules of common law."

does not apply to state courts,² the state constitutions almost universally contain similar provisions and raise identical constitutional questions.³ It is well established that the Seventh Amendment and similar state constitutional provisions guarantee the right to jury trial as it existed when the respective provision was adopted,⁴ and further that they guarantee the substance rather than the mere form of the right.⁵ Though the number of jurors — namely, twelve,⁶ the impartiality of the jury,⁷ and the unanimity of its decision,⁸ are recognized as essential ingredients, much uncertainty exists as to what is form and what is substance.⁹

The *Slocum* case,¹⁰ holding that a judgment entered notwithstanding the verdict by an appellate court is a violation of the Seventh Amendment, has been severely criticized.¹¹ The case finds its echo in a decision of the Circuit Court of Appeals of the Third Circuit,¹² which holds that to submit a case on retrial to a new jury on the single issue of damages, which were inadequately found by the first jury, is an infringement of the right to jury trial as guaranteed by the Seventh Amendment.¹³ The objection to a rigid interpretation of the Constitution was well put by Justice Hughes in his dissenting opinion in the *Slocum* case,¹⁴ where he says: "It [the decision] erects an impassable barrier, unless the Constitution be amended, to actions of Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and the expense of litigation." It is true that the practice of a partial new trial was unknown at the time of the adoption of the Federal Constitution.¹⁵ But this fact cannot be conclusive as to whether the right to have the same jury pass on all issues is a substantial or a non-essential part of the right. Those decisions commend themselves to reason that hold that whether the same or different juries pass upon the different issues is a matter of form

² *Walker v. Sauvinet*, 92 U. S. 90 (1875); *Minn. & St. Louis Ry. Co. v. Bombolis*, 241 U. S. 211 (1916).

³ For state constitutional provisions, see 2 THOMPSON, TRIALS, 2 ed., § 2226.

⁴ *East Kingston v. Towle*, 48 N. H. 57 (1868); *Thompson v. Utah*, 170 U. S. 343 (1898); *Knee v. Balt. City Ry. Co.*, 87 Md. 623, 40 Atl. 890 (1898); *Traction Co. v. Hof*, 174 U. S. 1 (1899).

⁵ *Haines v. Levin*, 51 Pa. St. 412 (1866); *Walker v. N. M. & So. Pac. Ry. Co.*, 165 U. S. 593 (1897).

⁶ *Holmes v. Walton*, 4 Amer. Hist. Rev. (N. J.) 456 (1780); *Opinion of the Judges*, 41 N. H. 550 (1860); *Thompson v. Utah*, *supra*.

⁷ *Gibbs v. State*, 3 Heisk. (Tenn.) 72 (1871); *People v. Dunn*, 157 N. Y. 528, 52 N. E. 572 (1899).

⁸ *Opinion of the Judges*, 41 N. H. 550, *supra*; *Amer. Pub. Co. v. Fisher*, 166 U. S. 464 (1897); *Springville v. Thomas*, 166 U. S. 707 (1897).

⁹ For a discussion of this subject, see Austin Scott, "Trial by Jury and the Reform of Civil Procedure," 31 HARV. L. REV. 660.

¹⁰ *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364 (1913).

¹¹ See J. L. Thorndike, "Trial by Jury in the United States Courts," 26 HARV. L. REV. 732; Ezra R. Thayer, "Judicial Administration," 63 U. OF PA. L. REV. 585; REPORT AMER. BAR ASSOC., 1913, 561. But supporting the case see Henry Schofield, "New Trials and the Seventh Amendment," 8 ILL. L. REV. 287, 381, 465.

¹² *McKeon v. Central Stamping Co.*, 264 Fed. 385 (Cir. Ct. App.) (1920). See RECENT CASES, p. 86, *infra*.

¹³ See Austin Scott, "Progress of the Law (Civil Procedure)," 33 HARV. L. REV. 236, 249.

¹⁴ See *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 400, *supra*.

¹⁵ *Parker v. Godin*, 2 Strange, 813 (1729).

and not of substance.¹⁶ Though, as objected by the Circuit Court of Appeals, the judgment represents a combination of jury findings, it is nevertheless true that all the facts of the case have been passed upon by the recognized triers of fact — a jury. If the issues are distinct, and the error confined to part of the issues only,¹⁷ distinct findings by distinct juries can hardly be prejudicial to either party. Where an error has been committed in part only of the trial, it has been insisted in a well-known opinion¹⁸ that the right is not to a new trial, but to the correction of the error. The constitutional guarantee of the re-examination of fact according to the common law does not require a re-examination of all the issues. It was even asserted in the same opinion that to set aside a verdict on the issues correctly found as well as those incorrectly found is not only unjust to the successful party, but arbitrary as well.

It is moreover difficult to reconcile the opinion of the Circuit Court of Appeals with the prevailing practice of *remittitur*s, recognized not only as valid in state courts,¹⁹ but likewise as constitutional in federal practice by the Supreme Court.²⁰ Without constitutional infringements,²¹ it is thus possible by a *remittitur* not simply to set aside the verdict in so far as it pertains to damages, but to reduce the finding of damages, and enter judgment on the reduced verdict, without any possibility of new trial except in so far as the plaintiff refuses to consent to the reduction. It is difficult, therefore, to see how the unconditional resubmission of the issue of damages to a new jury can cause offense.

But to turn to cases more directly in conflict with the decision of the Circuit Court of Appeals, it is now the common practice in state courts to grant partial new trials. The result, reached partly by statute²² and partly by judicial decision,²³ has been attained without constitutional

¹⁶ *Bennett v. State*, 57 Wis. 69, 14 N. W. 912 (1883); *Smith v. Western Pac. Ry.*, 203 N. Y. 499, 96 N. E. 1106 (1911).

¹⁷ Of course where the error taints all the issues as in a compromise verdict, a complete new trial should be granted. *Doody v. B. & M. Ry.*, 77 N. H. 161, 89 Atl. 487 (1914); *Waucantuck Mills v. Magee Co.*, 225 Mass. 31, 113 N. E. 573 (1916).

¹⁸ *Lisbon v. Lyman*, 49 N. H. 553 (1870).

¹⁹ *Burdick v. Mo. Pac. Ry.*, 123 Mo. 221, 27 S. W. 453 (1894); *Trow v. Village of White Bear*, 78 Minn. 432, 80 N. W. 1117 (1899); *Willette v. Rhinelander Paper Co.*, 145 Wis. 537, 130 N. W. 853 (1911); *Louisville & N. Ry. v. Frank*, 80 So. (Fla.) 60 (1918).

²⁰ *Arkansas Valley, etc. Co. v. Mann*, 130 U. S. 69 (1889); *Gila Valley Ry. v. Hall*, 232 U. S. 94 (1914).

²¹ Cf. *Watt v. Watt* (1905), A. C. 115, where a *remittitur* was held a denial of defendant's right to a jury trial. But in *Barber & Co. v. Deutsche Bank & Co.* (1919), A. C. 304, a *remittitur* was allowed where an error led to a virtually liquidated amount being included in the verdict.

²² *Hartman v. Baldwin*, 103 Kan. 764, 176 Pac. 115 (1918). See 1909 KANSAS LAWS, § 307. New Jersey has a similar statute; see 1912 NEW JERSEY LAWS, § 73.

²³ *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437 (1894); *Ga. Ry. & Banking Co. v. Daniel*, 89 Ga. 463, 15 S. E. 538 (1892); *Kessans v. Kessans*, 58 Ind. App. 437, 108 N. E. 380 (1915); *Case Threshing Machine Co. v. Fisher*, 144 Iowa, 45, 122 N. W. 575 (1909); *McKay v. N. E. Dredging Co.*, 93 Me. 201, 44 Atl. 614 (1899); *Pratt v. Boston, etc. Co.*, 134 Mass. 300 (1883); *Schroeder v. Edwards*, 205 S. W. (Mo.) 47 (1918); *Helvetia Copper Co. v. Hart Parr Co.*, 171 N. W. (Minn.) 272 (1919); *Ramsdell v. Clark*, 20 Mont. 103 (1897); *Lisbon v. Lyman*, *supra*; *Schlitz Brewing Co. v. Ester*, 86 Hun (N. Y.), 22, 33 N. Y. Supp. 143 (1895); *Lake v. Bender, Adm.*, 18 Nev. 361 (1884); *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242 (1899); *Clark v. N. Y., N. H., & H. Ry.*, 33 R. I. 83, 80 Atl. 406 (1911); *Laney v. Bradford*, 4 Rich. (S. C.) 1 (1850); *Spawn*

misgivings. The Massachusetts court has expressly declared a statute conferring the right to grant a partial new trial constitutional.²⁴ Moreover, the practice is not unknown in some federal courts in cases in which part of the issues only have been affected by some error of law in the trial or by some defect in the verdict.²⁵ The United States Supreme Court has not yet passed upon the question. When this question does squarely come before it, it is to be hoped that it will then allay the constitutional doubts now seemingly in the way of a procedural simplification as wise as it is expedient.

STARE DECISIS. — The doctrine of *stare decisis* is based upon the principle that certainty in law is preferable to reason and correct legal principles. This idea has become so firmly fixed in England that the House of Lords¹ and the Court of Appeal² hold that they have no power to reverse themselves on a proposition of law, no matter how erroneous their previous decision may have been. Practically all American jurisdictions, however, apply the doctrine with less and less rigidity, so that an overruled decision is by no means uncommon. The explanation of this difference in opinion is simple.

The varying conditions which exist in America geographically and politically have caused American jurisdictions to reconstruct many of the old common-law principles and to depart from them absolutely when expediency makes a change advisable. The different tests to determine navigability of streams on the question of the extent of admiralty jurisdiction,³ the law as to liability of owners of domestic animals for trespass upon unfenced land,⁴ and the riparian and priority doctrines as to the use of water⁵ are but a few of the instances where courts have completely changed existing principles of law by the force of their decisions. Such departures are unquestionably wise. But the difficult situation arises where conditions have been altered but slightly, and yet upon the most careful consideration the old legal doctrine seems wrong although it has been reiterated in decision after decision. It is such situations which cause courts the greatest anxiety. The admission of the House of Lords that it cannot reverse itself on a proposition of law is one of weak-

v. S. D. Cent. Ry., 26 S. D. 1, 127 N. W. 648 (1910); *Auwater v. Kroll*, 79 Wash. 179, 140 Pac. 326 (1914); *Moss v. Campbell's Ry.*, 75 W. Va. 62, 83 S. E. 721 (1914). See *More-Jones Glass Co. v. W. J., etc. Ry.*, 47 Vroom (N. J.), 9, 10, 69 Atl. 491, 492 (1908); *Fry v. Stowers*, 98 Va. 417, 422, 36 S. E. 482 (1900). *Contra*, *Banaszek v. Mayer Boot & Shoe Co.*, 161 Wis. 404, 154 N. W. 637 (1915).

²⁴ Opinion of the Justices, 207 Mass. 606, 94 N. E. 846 (1911).

²⁵ *Farrar v. Wheeler*, 145 Fed. 482 (1906) (Cir. Ct. App.); *Calaf v. Fernandez*, 239 Fed. 795 (Cir. Ct. App.) (1917); *Original 16-1 Mine v. 21 Mining Co.*, 254 Fed. 630 (Dist. Ct., N. D. Cal.) (1918).

¹ *London St. Tramways Co. v. London County Council* [1898], A. C. 375.

² *Olympian Oil Cake Co. v. Produce Brokers Co.*, 112 L. T. R. 744 (1914).

³ *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443 (1851); *The Daniel Ball*, 10 Wall. (U. S.) 557 (1870). See 33 HARV. L. REV. 458.

⁴ *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557 (1902).

⁵ See Samuel C. Wiel, "Theories of Water Law," 27 HARV. L. REV. 530.

ness.⁶ It would be even worse to discard the doctrine of *stare decisis* altogether. But have we not too high an opinion of our judiciary to admit that an absolute rule of *stare decisis* is necessary? The pride of our judges in their work and in the Anglo-American legal system should act as a constant check upon the natural tendency to let individual opinions change that which seems incorrect, but yet has sound legal reason behind it and has been held to be the law by our predecessors.

What are the considerations which should influence a court in deciding whether earlier decisions should be overruled? If the former decisions have resulted in a rule of property upon which the conduct of individuals has been modeled, a court should almost never depart from them. The necessity for a change seldom will outweigh the expediency of having a Gibraltar-like stability where vested interests are involved.⁷

A most troublesome and yet frequent case for the application of *stare decisis* is one where a contract has been made in reliance upon a decision, and in a subsequent lawsuit the court upon due reflection feels that the former decision is clearly wrong in the principle of law which it expounds. Should the court adopt the correct legal rule although it destroys the value of the contract? On the constitutional question involved much has been said, but the Supreme Court of the United States is definite in laying down the proposition that a decision overruling the earlier case does not come within the constitutional prohibition against impairing the obligation of contracts, that the prohibition only applies to impairment of contracts by legislative action.⁸ But although not unconstitutional, yet courts should hesitate to change the law where contractual rights will be extinguished thereby.⁹ Such a change should be made only when a court is positive that the old rule was unsound legally when laid down or has become so due to the rapidly changing surrounding circumstances. A case involving such questions should never be overruled if a reasonable judge under the circumstances could hold the law to be as formerly decided.

Where neither contracts nor rules of property are involved the question as to the need for certainty of the law as against the need for correct legal principles is much simpler. For instance, no one is entitled to rely upon the judicial interpretation of a statute that provides for disbarment in case of conviction of a felony, and the court should feel free to

⁶ See J. G. Kotze, "Judicial Precedent," 144 L. T. 349, 351, 391. It is a regrettable situation when Lord Justice Buckley speaking for the Court of Appeal in *Olympian Oil Cake Co. v. Produce Brokers Co.*, *supra*, felt compelled to say, "I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning, such as they are, I should say that it is wrong. But I am bound by authority, which of course it is my duty to follow, and following authority I feel bound to pronounce the judgment which I am about to deliver." It is a relief to know that the House of Lords reversed this decision in [1916] 1 A. C. 314, as the precedents which the Lord Justice felt bound to follow were not decisions of the House of Lords.

⁷ *Braxton v. Bressler*, 64 Ill. 488 (1872). See *Yazoo & Miss. Valley R. R. Co. v. Adams*, 81 Miss. 90, 114, 32 So. 937, 946 (1902).

⁸ *Central Land Co. v. Laidley*, 159 U. S. 103 (1894); *Cleveland & Pittsburg R. R. v. City of Cleveland*, 235 U. S. 50 (1914); *McCray v. Miller*, 186 Pac. (Okla.) 1089 (1920). See Wilbur Larremore, "*Stare Decisis* and Contractual Rights," 22 HARV. L. REV. 182.

⁹ *Thomas v. State*, 76 Oh. St. 341, 81 N. E. 437 (1907).

overrule an earlier construction. A recent California decision¹⁰ which shifts the burden of overruling such a line of decisions to the legislature is open to the same criticism as the highest courts of England. In *Johnson v. Cadillac Motor Car Co.*¹¹ the court did not hesitate to overrule its earlier decision upon the identical case when upon careful reflection it determined that the principle of law which it had laid down was incorrect. It is refreshing to see a court willing to admit its error openly. When once a court has reached the conclusion that a prior decision is wrong it is much better to overrule it expressly than to purport to follow it and yet construct subtle distinctions every time the general principle involved arises. Such a straightforward attitude will go a great way in successfully combating the attack which is often launched against our so-called case law,¹² and will furnish an impetus for careful legal thought which, combined with our respect for and adherence to judicial precedents, will preserve the wonderful living characteristics of the Anglo-American legal system.¹³

EFFECT OF IMPOSITION BY IMPERSONATION IN THE LAW OF BILLS AND NOTES. — The recent case of *Montgomery Garage Co. v. Manufacturers' Liability Ins. Co.*¹ illustrates the problem presented by the not infrequent fraud of impersonation. A represented himself as X to the defendant and received a check drawn to X's order. The *bona fide* purchaser from A was allowed to recover on the ground that the defendant intended A rather than X as the payee and the proper person to indorse. The decision follows the present trend of authority.² This species of fraud is met with in other branches of the law;³ and the problems arising therefrom are generally handled in the same way.

Upon analysis the question resolves itself into effectuating the intent of the victim, a matter of no small difficulty when it is considered that the defrauded party has more than one intent. Where the impostor is physically present, the intent of the victim to deal with the personality before him is deemed paramount.⁴ The intent to deal with the individual whom the impostor is impersonating is *ex necessitate* disregarded. This is equally the law in Sales.⁵ However, an unwarranted distinction is

¹⁰ *In re Riccardi*, 189 Pac. 694 (Cal.) (1920). See RECENT CASES, p. 93, *infra*.

¹¹ 261 Fed. 878 (Circ. Ct. App.) (1919). See RECENT CASES, p. 93, *infra*.

¹² See "The Law of the Case," 51 CAN. L. JOUR. 95, where a vigorous attack is made against the present-day methods of studying law and of making decisions.

¹³ See Charles E. Blydenburg, "Stare Decisis," 86 CENT. L. JOUR. 388.

¹ 109 Atl. 296 (N. J. 1920). See RECENT CASES, p. 84, *infra*.

² *United States v. Nat. Bank*, 45 Fed. 163 (1891); *Boatsman v. Stockmen's Nat. Bank*, 56 Colo. 495, 138 Pac. 764 (1914); *Metzger v. Franklin Bank*, 119 Ind. 359, 21 N. E. 973 (1889); *Emporia Bank v. Shotwell*, 35 Kan. 360, 11 Pac. 141 (1886); *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619 (1886); *McHenry v. Citizens Bank*, 85 Oh. St. 203, 97 N. E. 395 (1911); *Land Title and Trust Co. v. Nat. Bank*, 196 Pa. 230, 46 Atl. 420 (1900); *Jamieson v. Heim*, 43 Wash. 153, 86 Pac. 165 (1906).

³ See WILLISTON, SALES, § 635; Clarence Ashley, "Mutual Assent in Contract," 3 COL. L. REV. 71. See also 68 U. OF PA. L. REV. 387.

⁴ *Robertson v. Coleman*, *supra*; *Famous Shoe Co. v. Crosswhite*, 124 Mo. 34, 27 S. W. 397 (1894); *Land Title and Trust Co. v. Nat. Bank*, *supra*; *Heavey v. Commercial Nat. Bank*, 27 Utah, 222, 75 Pac. 727 (1904).

⁵ *Phillips v. Brooks, Ltd.*, [1919] 2 K. B. 243; *Edmunds v. Merchants' Co.*, 135 Mass. 283 (1883); *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441 (1917).

sometimes made when the imposition is effected through correspondence. In the law of Sales, the intent to deal with the party actually carrying on the correspondence has been held subsidiary to the intent to negotiate with the party whose name is used.⁶ There are a few cases in the law of Bills and Notes in accord;⁷ but the majority of decisions draw no distinction between impersonation by correspondence⁸ or in the presence of the victim. It is indeed difficult to determine which of the two conflicting intents should be effectuated; but that the result should be the same, whether the impostor appears in person or whether he acts through correspondence, would appear to be the better reasoning.⁹ In truth, the propriety of metaphysically ascertaining a dominant intent may well be disputed. Why would it not be consonant with justice to say in all these cases that so long as there is any intent to deal with the very party who is actually present, writing, telegraphing, or telephoning, that intent shall be paramount whenever the rights of a *bona fide* purchaser intervene?

Though the argument *contra* has been presented with much vehemence,¹⁰ it is hard to see why any loss due to fraudulent impersonation should fall upon the indorsee. This is not the general rule in regard to fraud.¹¹ To cleave too closely to the contention that this is a forgery¹² through which the holder cannot acquire any rights is fallacious. The fact that the impostor is criminally liable for forgery is not conclusive. Before we can say that there has been a forgery defeating any rights of the purchaser against the drawer, we must first determine whether the person who purports to sign is the person intended by the drawer to sign. To decide that there has been a forgery begs the very question in issue. Again, too much emphasis should not be laid on the name. A name is not the sole method of designating an individual. If the name *per se* were controlling, then a John Smith who wrongfully indorsed a check payable to John Smith, another individual, should pass a good title to the instrument. But such is not the law;¹³ the man who was intended

⁶ Cundy v. Lindsay, 3 A. C. 459 (1878).

⁷ Palm v. Watt, 7 Hun (N. Y.), 317 (1876); Mercantile Bank v. Silverman, 148 N. Y. App. Div. 1, 132 N. Y. Supp. 1017 (1911), affirmed 210 N. Y. 567, 104 N. E. 1134. But see First Nat. Bank v. Amer. Exch. Bank, 49 N. Y. App. Div. 349, 63 N. Y. Supp. 58 (1900), affirmed 170 N. Y. 88, 62 N. E. 1089.

⁸ Boatsman v. Stockmen's Nat. Bank, *supra*; Metzger v. Franklin Bank, *supra*; Maloney v. Clark, 6 Kan. 82 (1870); Hoffman v. Amer. Exch. Bank, 2 Nebr. (Unof.) 217, 96 N. W. 112 (1901).

⁹ See Clarence Ashley, "Mutual Assent in Contract," 3 COL. L. REV. 71, 75, 76.

¹⁰ Western Union v. Bimetallic Bank, 68 Pac. 115 (1902); Gallo v. Brooklyn Savings Bank, 199 N. Y. 222, 92 N. E. 633 (1910); Tolman v. Amer. Exch. Bank, 22 R. I. 462, 48 Atl. 480 (1901); Simpson v. Denver, etc. R. Co., 43 Utah, 105, 134 Pac. 883 (1913).

¹¹ See Smith v. Livingston, 111 Mass. 342 (1873); Scandinavian Bank v. Johnston, 63 Wash. 187, 115 Pac. 102 (1911); NORTON, BILLS AND NOTES, 4 ed., 357; NEGOTIABLE INSTRUMENTS LAW, §§ 55, 57.

¹² Both at the common law and under the negotiable instruments law the purchaser takes the risk of forgery. Rossi v. Nat. Bank, 71 Mo. App. 150 (1897); Shaffer v. McKee, 19 Oh. St. 526 (1869); cf. especially cases in note 13, *infra*. See NEGOTIABLE INSTRUMENTS LAW, § 23; BRANNAN, NEGOTIABLE INSTRUMENTS LAW, ANN., 3 ed., 81 *et seq.*; Hamlin v. Wizard Oil Co. v. U. S. Express Co., 265 Ill. 156, 106 N. E. 623 (1914).

¹³ Mead v. Young, 4 T. R. 28 (1790); Beattie v. Nat. Bank, 174 Ill. 571, 51 N. E. 602 (1898); Thomas v. First Nat. Bank, 101 Miss. 500, 58 So. 478 (1912); Graves v. Amer. Exch. Bank, 17 N. Y. 205 (1858).

as payee should indorse, and no other. Similarly where the name of the payee is wrongly designated, an indorsement by the party intended as payee will pass a good title, despite the variance in names.¹⁴

In these cases, the negligence or diligence of the defrauded party — generally the drawer of the instrument — should not, as a rule, be material in determining his liability.¹⁵ Nevertheless a rule which will protect the *bona fide* purchaser accords with justice. The consequences of the mistake should fall upon the drawer rather than on the purchaser, since the mistake is primarily the former's, whether he has himself been deceived or has deliberately tried to shift the burden of identification by giving the impostor a negotiable instrument¹⁶ instead of cash. The fraud upon the drawer facilitated a fraud upon the purchaser. In short, the defrauded drawer of the instrument should have an equitable or personal defense rather than a legal or real defense.¹⁷ No difficulty should be experienced in handling the variety of facts which may be presented, if impersonation is treated like fraud and not like forgery. In this way some certainty,¹⁸ an undoubtedly desirable attribute in this branch of the law, can be approximated.

CONSTRUCTIVE MURDER — DRUNKENNESS IN RELATION TO *MENS REA*. — The actual decision and the *dicta* in a recent case in the House of Lords¹ nicely illustrates the incessant struggle between the objective and the subjective points of view in the criminal law,² — between the idea of punishment as retribution based on desert,³ and that of punishment as prevention based on social necessity.⁴ The defendant in perpetration of rape upon a young girl put his hand over her mouth to stifle her cries and thus suffocated her. On an indictment for murder, his defence was that he was so drunk that he did not know his acts to be dangerous. He was convicted of murder and the conviction is here sustained.

¹⁴ *Moore v. Anderson*, 8 Ind. 18 (1856); *Shaw, Kendall & Co. v. Brown*, 128 Mich. 573, 87 N. W. 757 (1901). See NEGOTIABLE INSTRUMENTS LAW, § 43.

¹⁵ See Charles L. McKeehan, "A Review of the Ames-Brewster Controversy," 41 AMER. L. REG. N. S. 503, 507.

¹⁶ *Gallo v. Brooklyn Savings Bank*, *supra*, and *Western Union v. Bimetallic Bank*, *supra*, in effect permit a drawer, who is dubious and hesitant about giving cash, to protect himself absolutely by writing out a check. In other words, the drawer can successfully shift to the purchaser of the check the entire responsibility of identification. The decisions in these two cases, it is submitted, are erroneous.

¹⁷ As to the nature of defenses, real and personal, see the late Dean Ames' learned summary. 2 AMES, CASES ON BILLS AND NOTES, 811-813.

¹⁸ See Charles L. McKeehan, "A Review of the Ames-Brewster Controversy," *supra*, 508, n. 12.

¹ *Director of Public Prosecutions v. Beard*, [1920] A. C. 479. See RECENT CASES, 89.

² There are here two fundamentally conflicting schools of juristic thought. Both start from the act which injures the state, but the one focuses on the determination of the moral blameworthiness of the actor, the other on the repressive control of certain types of action.

³ See SIR JAMES STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, 1 ed., 99; WOOLSEY, POLITICAL SCIENCE, 334.

⁴ See HOLMES, COMMON LAW, Ch. II; SALMOND, JURISPRUDENCE, 4 ed., §§ 28, 29. However important the preventive aspect of the criminal law may be, it is doubtless true that "punishment is not just because it deters; it deters because it is felt to be just." See Victor Cousin, Preface to the Gorgias of Plato.

On the question of constructive murder, the decision clearly reasserts the once well-settled law that an act done in the furtherance of a violent felony and resulting in death is murder.⁵ Some doubt had been cast on this doctrine by the decisions in certain abortion cases⁶ and by a *dictum* of Justice Stephen in *Reg. v. Serne*,⁷ where it was suggested that for murder, it was necessary to show not only the intent to commit a felony but a knowledge that the felony was dangerous to life.⁸ This idea has now, fortunately, been exploded effectively by a court of highest authority.

The actual holding, on the facts of this case,⁹ with respect to the plea of drunkenness is likewise in accord with well-established principles. Voluntary drunkenness¹⁰ has never, in English law,¹¹ been an excuse for a crime.¹² In certain crimes, however, which require a specific intent, such a state of drunkenness as to negative the presence of that intent negatives the crime.¹³ Here the death arose in the course of commission

⁵ *Queen v. Franz*, 2 Fost. & F. 580 (1861); *State v. Cooper*, 13 N. J. L. 361 (1833); *State v. Werner*, 144 La. 380, 80 So. 596 (1918).

⁶ *Rex v. Greenwood*, 7 Cox C. C. 404 (1857); *Rex v. Whitmarsh*, 62 J. P. 711 (1898); *Rex v. Lumley*, 22 Cox C. C. 635 (1911).

⁷ 16 Cox C. C. 311, 313 (1887).

⁸ This modification had also been suggested in legislative circles. In 1874 a bill for the definition of homicide was introduced into the House of Commons, providing that the defendant must have known the act to be dangerous. It was not passed, and in 1879 the Royal Commission appointed to consider the law relating to indictable offenses expressly state their divergence from it on this point, and in their Draft Code (sec. 175) define as murder all cases where death is caused by the infliction of grievous bodily injury or the willfully stopping of breath for the purpose of certain heinous offenses, including all the felonies dangerous to life. See REPORT OF ROYAL COMMISSION ON INDICTABLE OFFENSES (1879), 24.

Such a salutary rule seems not only expedient but perfectly just, for "if a man begins attacking the human body he must take the consequences if he goes farther than he intended." *Per* Stephen, J., in *Reg. v. Serne*, *supra*, at p. 313.

⁹ The court held that it was clear that the defendant was not too drunk to know that he was committing rape, and hence denied the plea. On strict common-law principles, the result would have been the same even though the defendant's drunkenness had negated any intent to rape, for the drunkenness itself would have supplied the necessary *mens rea* for that crime. With this strict principle the *dicta* of the court are in apparent conflict.

¹⁰ The distinction has always been made between voluntary and involuntary drunkenness, the later being induced by the fraud or mistake of another, or through a mistake of fact on the part of the drinker himself. Responsibility in the case of involuntary drunkenness is to be determined by the individual's actual mental state. *Pearson's Case*, 2 Lewin C. C. 144, 145 (1835); *People v. Robinson*, 2 Park. (N. Y.) Crim. Rep. 235, 304 (1855).

Voluntary drunkenness was at one time itself a statutory crime in England, punishable by fine or imprisonment in the stocks. See 4 JAMES I, c. 5 (1607). But this statute has been repealed, 9 GEO. 4, c. 61, § 35 (1828). And it seems never to have been enforced.

¹¹ In the law of European countries there is considerable difference as to the extent to which drunkenness may excuse. Austria and Italy are the most lenient, but continental law is, in general, less severe than common law. See R. W. Lee, "Drunkenness and Crime," 27 LAW MAG. AND REV. 308 *et seq.*

¹² *Reniger v. Fogossa*, Plowden, 1, 19 (1551); *Burrow's Case*, 1 Lewin C. C. 75 (1823). The American decisions are to the same effect. *Rafferty v. People*, 66 Ill. 118 (1872); *Commonwealth v. Malone*, 114 Mass. 295 (1873).

¹³ The intent is part of the crime, and if it is not *in fact* present, the crime has not been committed. One so drunk as not to know what he was doing, could have no specific intent and hence could not commit the crime. *Reg. v. Cruse*, 8 C. & P. 541 (1838)

of the felony of rape which requires no specific intent. Drunkenness could therefore have no effect on the elements of that felony or of the murder,¹⁴ the malice necessary for the latter being implied, without more, from the commission of the rape.

But while the court in its decision thus steadfastly faces toward the objective criterion and refuses to admit those considerations of moral blame which denote the play of the "subjective-desert" motive, Janus-like it looks in the opposite direction in certain of its *dicta*.¹⁵ It suggests that drunkenness may affect the ordinary *mens rea*.¹⁶ This is rank heresy in the common law and no attempts to support it have been successful.¹⁷ Its renewed outcropping in these *dicta*, however, raises again the question as to whether this modification should not be permitted, whether drunkenness should not in some circumstances affect *mens rea*.

From the objective-preventive point of view, such a suggestion is anathema, vicious in social consequence, impossible in practical administration. The maintenance of the general security demands that one so unmindful of his social duty as to get drunk should be held strictly

(assault with intent to kill); *Reg. v. Doody*, 6 Cox C. C. 463 (1854) (attempted suicide); *People v. Walker*, 38 Mich. 156 (1878) (larceny); *People v. Blake*, 65 Cal. 275, 4 Pac. 1 (1884) (forgery); *People v. Eggleston*, 186 Mich. 510, 152 N. W. 944 (1915) (burglary).

So also where there are statutory degrees of murder — murder in the first degree requiring deliberate premeditated malice; drunkenness by negating this premeditation may reduce the killing to second degree murder. *Pirtle v. State*, 9 Humph. (Tenn.) 663 (1849); *State v. Johnson*, 40 Conn. 136 (1873); *People v. Williams*, 43 Cal. 344 (1872).

And it is error for the court to fail to instruct the jury to this effect. *Hopt v. People*, 104 U. S. 631 (1881).

¹⁴ The court thus easily distinguishes this case from *Reg. v. Meade* (1909), 1 K. B. 895, over which considerable controversy had arisen. There the defendant in a drunken fit beat his wife to death. It was charged that death arose from violence done with intent to do grievous bodily injury, and it was therefore necessary to prove this specific intent. The court charged, quite correctly, that, if the defendant's mind was so affected by drink that he did not know what he was doing was dangerous, he could not have the intent to do grievous bodily injury, and in this case such drunkenness would destroy one of the constituents of the offense. The language of the court was rather general, and was widely interpreted as meaning that in any crime of violence, proof that the defendant was so drunk as not to realize his acts to be dangerous, would relieve him from responsibility therefor. The court in the principal case destroys this erroneous interpretation by restricting the *dicta* in *Reg. v. Meade* to those cases in which specific intent is necessary.

¹⁵ "I do not think that the proposition of law deduced from these earlier cases is an exceptional rule, applicable only to cases in which it is necessary to prove a specific intent. . . . This is on ultimate analysis only in accordance with the ordinary law applicable to crime, for, *speaking generally, a person cannot be convicted of a crime unless the mens was rea*. . . . My Lords, drunkenness in this case would be no defense unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it. . . ." *Director of Public Prosecutions v. Beard*, *supra*, 504.

¹⁶ Specific intent must be carefully distinguished from *mens rea*. Specific intent is that qualification of the act which makes it criminal. *Mens rea* is that state of the mind which makes it responsible.

¹⁷ There have been, however, some loose *dicta* tending toward such a doctrine. "I have ruled that if a man were in such a state of intoxication that he did not know the nature of his act, or that it was wrongful, his act would be excusable." *Per Day, J.*, in *Reg. v. Baines*, Lancaster Assizes, Jan. 1886. (Reported in the *London Times* for Jan. 25, 1886, p. 10.) See also *Rex v. Grindley*, 1 Russ. on Crimes, 7 ed., p. 88, n.

responsible for all acts done in that condition.¹⁸ From the subjective-desert standpoint, on the other hand, the modification would be welcome as serving to bring into closer harmony moral and legal responsibility.¹⁹ Ethically it is unjust to fix on a man full blame for a crime which because of his drunken state he was clearly incapable of intending.²⁰ When his acts are submerged below the threshold of self-conscious direction, his sole culpability lies in the antecedent drinking, not in the present act, a culpability often far less than that which would attach to the intentional doing of the act.²¹ His responsibility should be limited to those consequences which at the time of drinking he foresaw or might reasonably have foreseen.²²

The reconciliation of these two viewpoints resolves largely into the problem of infusing delicate ethical criteria into a practically administrable legal system. The difficulty of proving the exact condition of the defendant's mind and the inability of the jury to judge the *nuances* of drunkenness, lead one to look with hesitancy upon any general modification of the law as suggested in the court's *dicta*.²³ The refinement of the present rule would seem to depend rather upon a growing legal recognition of certain types of alcoholic insanity as medicine is progressively able to define and characterize them.²⁴ An objective voucher to the degree of the defendant's capacity to act as a rational agent, subject to law, would thus be obtained and his responsibility for his acts modified accordingly.

¹⁸ A member of society who intentionally "puts an enemy in his mouth to steal away his brains" is highly culpable. Hence it has often been said that the real basis for responsibility in drunkenness lies in this culpability. See ARISTOTLE, *NICOMACHEAN ETHICS*, Book 3, Ch. V, Par. 6 (translated by Browne); BISHOP, *NEW CRIMINAL LAW*, 8 ed., Vol. I, § 398 (3).

Austin claims that the ground of liability in the case of the drunken man lies in his "remote inadvertence," just as in the case of a crime committed in ignorance of the law, and indeed the fundamental motive in both cases seems to be the same, *i.e.*, the social demand that all should live consciously responsive to law. See Stroud, "Constructive Murder and Drunkenness," 36 *LAW QUART. REV.* 268 *et seq.*

¹⁹ See BENTHAM, *THEORY OF LEGISLATION* (trans. by Hildreth), 263.

²⁰ Of course one who seeks to nerve himself for a crime by drink should be and is strictly responsible. *People v. Krist*, 168 N. Y. 19, 60 N. E. 1057 (1901).

²¹ The culpabilities to be attached to drinking and to rape, for example, are not of equal magnitude. See THOMAS AQUINAS, *ETHICUS* (trans. by Rickaby), 2 ed., Vol. II, Question CL, Art. IV.

²² This method of thought would lead to some such distinction as that made in the canon law between *dolus* and *culpa*. A plea of drunkenness might excuse from punishment for *dolus* (intentional injury), but not from that for *culpa* (heedless negligence). The degree of the *culpa*, the guilt and punishment of the defendant would be proportionate to the foreseeable probability of the criminal act at the time of the drinking. See PALEY, *MORAL PHILOSOPHY*, Book IV, c. 2.

²³ There is a further difficulty here. If drunkenness is permitted to affect the capacity for *mens rea*, the state will have the burden of proving that the defendant was not so drunk as to be incapable of the criminal intent.

²⁴ It has been long held that delirium tremens, though superinduced by voluntary drinking, is to be treated as other insanity with respect to responsibility. *Reg. v. Davis*, 14 Cox C. C. 563 (1881); *United States v. Drew*, 5 Mason (U. S.) 28 (1828).

Leading psychiatrists treat all drunkenness as a state of insanity. See KRAFFT-EBING, *PSYCHIATRY*, I, 35; PATON, *PSYCHIATRY*, 288.

But courts are reluctant to extend this exemption to other types of alcoholic insanity. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830 (1898) (*mania-a-potu*). And it seems clear that they will not do so until the types of insanity are clearly enough defined for ready diagnosis.

RECENT CASES

ADMIRALTY — JURISDICTION — STATE WORKMEN'S COMPENSATION ACTS AS APPLIED TO MARITIME ACCIDENTS. — A bargeman employed by the petitioner was accidentally killed in the course of his employment. A federal statute provides that state workmen's compensation acts may apply to maritime accidents. (40 STAT. AT L. 395.) The dependents of the deceased were awarded compensation under the Workmen's Compensation Law of New York. The petitioner sought to have the award annulled on the ground that the federal statute was unconstitutional. *Held*, that the award be annulled. *Knickerbocker Ice Co. v. Stewart*, U. S. Sup. Ct., October Term, 1919, No. 543.

The judicial power of the United States extends to "all cases of admiralty and maritime jurisdiction." CONSTITUTION, Art. 3, § 2. The purpose of this provision is to establish a uniform national system of maritime law. See *The Lottawanna*, 21 Wall. (U. S.) 558, 574; *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 215; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 381. State regulation of matters where uniformity is not essential is permissible. *The J. E. Rumbell*, 148 U. S. 1; *The Hamilton*, 207 U. S. 398. Thus, a state may fix pilotage fees. *Cooley v. Board of Wardens*, 12 How. (U. S.) 299. But state legislation on matters as to which uniformity is necessary is invalid. *The Moses Taylor*, 4 Wall. (U. S.) 411; *The Roanoke*, 189 U. S. 185. Workmen's compensation legislation is such a matter. *Southern Pacific Co. v. Jensen*, 244 U. S. 205. See 31 HARV. L. REV. 488. Since state legislation producing diversity of regulation on this matter is unconstitutional, it would seem that federal legislation producing the identical diversity by making effective the identical state enactments would also be unconstitutional. A different result has been reached, however, in analogous cases involving the commerce clause. CONSTITUTION, Art. 1, § 8. The purpose of the clause is to secure uniformity of commercial regulations. See *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 445; *Minnesota Rate Cases*, 230 U. S. 352, 399. Nevertheless, federal legislation making effective state regulation of interstate traffic in intoxicating liquors has been upheld. *In re Rahrer*, 140 U. S. 545; *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. 311. Relying on the analogy of these cases, a result contrary to that in the principal case had been reached in the federal courts. *The Howell*, 257 Fed. 578. See also *Veasey v. Peters*, 142 La. 1012, 77 So. 948. The commerce cases, however, are explainable as manifestations of a tendency to uphold legislation regulating the liquor traffic which would be invalid if applied to ordinary commodities. See *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. 311, 332; *Sudden & Christenson v. Industrial Accident Commission*, 188 Pac. (Cal.) 803, 805. Hence the decision in the principal case seems correct. A similar result had already been reached by the Supreme Court of California. *Sudden & Christenson v. Industrial Accident Commission*, 188 Pac. (Cal.) 803.

BAILMENTS — GRATUITOUS BAILMENTS — DEGREE OF CARE REQUIRED OF BAILEE. — An insured gave the defendant a sum of money, requesting the latter to transmit it in payment of a monthly premium. The defendant, also an insured in the same company, undertook the task gratuitously. Overlooking the date when both his and the insured's premiums were due, he forwarded the money when they were overdue. Consequently the insured was suspended and remained so until his death. The plaintiff, beneficiary of the lapsed policy, sued for the amount payable under the policy. *Held*, that she may recover. *Maddock v. Riggs*, 190 Pac. 12 (Kan.).

Courts commonly base the liability of a gratuitous bailee on gross negligence. *Marshall v. Pontiac, Oxford, & Northern R. R. Co.*, 126 Mich. 45, 85 N. W. 242; *Gottlieb v. Wallace Wall Paper Co.*, 156 N. Y. App. Div. 150, 140 N. Y. Supp. 1032. But the term "gross negligence" has been applied to every conceivable degree of conduct. *Joslyn v. King*, 27 Neb. 38, 42 N. W. 756; *Spooner v. Mattoon*, 40 Vt. 300.

Because of this confusion, many courts adopted a more exact standard, namely, the same care that the gratuitous bailee took of his own chattels. *Merchants Nat. Bank v. Guilmartin*, 93 Ga. 503, 21 S. E. 55; *Rubin v. Huhn*, 229 Mass. 126, 118 N. E. 290. By this standard there could be no recovery in the principal case because the defendant was equally careless with his own premiums. A better standard is the care that the bailee as a reasonable man would use in regard to his own chattels. *Schermer v. Neurath*, 54 Md. 491; *Gottlieb v. Wallace Wall Paper Co.*, *supra*. This is the same as the ordinary standard of due care, because the lack of remuneration is a circumstance under which the bailee acts. *Dinsmore v. Abbott*, 89 Me. 373, 36 Atl. 621. It would seem that this is the only clear uniform standard and should be adopted.

BANKS AND BANKING — COLLECTIONS — LIABILITY OF CORRESPONDENT BANK TO DEPOSITOR FOR DEFAULT OF DUTY. — Plaintiff deposited four drafts payable on demand with a Wisconsin bank for collection in Ohio. The Wisconsin bank sent the drafts to the defendant bank in Ohio, which bank negligently allowed seven weeks to elapse before presenting, causing the plaintiff substantial injury. The defendant demurred to the petition. *Held*, that the demurrer be sustained. *Taylor & Bournique Co. v. National Bank of Ashland*, 262 Fed. 168 (Dist. Ct. N. D., Ohio).

There are two main lines of decision on the nature of the contract made by a bank receiving commercial paper for collection at a distant place. See *City National Bank v. Cooper & Griffen*, 91 S. C. 91, 96, 74 S. E. 366, 368. The so-called New York rule treats the receiving bank as an independent contractor to collect the money and holds it directly responsible to the depositor for the correspondent's failure to collect. *National Revere Bank v. National Bank of Republic*, 172 N. Y. 102, 64 N. E. 799; *Harter v. Bank of Brunson*, 92 S. C. 440, 75 S. E. 696. The correspondent bank is the agent of the receiving bank and under no contractual obligation to the depositor. *Montgomery County Bank v. Albany City Bank et al.*, 7 N. Y. 459. Hence, only the receiving bank, and not the depositor, can sue the correspondent for failing to do its contractual duty. *Hyde v. First National Bank*, 7 Biss. (U. S. C. C. A.) 156. *Cf. Denny v. The Manhattan Co.*, 2 Denio (N. Y.), 115. See 1 MECHEM, AGENCY, 2 ed., §§ 1464, 1465. But, under the Massachusetts rule, the receiving bank undertakes only to select a reputable correspondent and to transmit the drafts promptly to it, making the latter directly responsible, as agent, to the depositor, as principal. *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330; *Wilson v. Carlinville National Bank*, 187 Ill. 222, 58 N. E. 250. Each rule is based upon a conclusive presumption as to the intention of the parties, who probably had no actual intention on this matter. Therefore, practical considerations should control the decision and, in preventing multiplicity of action, the Massachusetts rule seems preferable. Nevertheless, it seems clearly settled that the federal courts have adopted the New York rule. *Exchange National Bank v. Third National Bank*, 112 U. S. 276; *Smith v. National Bank of D. O. Mills & Co.*, 191 Fed. 226.

BILLS AND NOTES — INDORSEMENT — INDORSEMENT UNDER ASSUMED NAME. — A fraudulently induced the defendant to believe that he was X; and thereupon the defendant gave A a check payable to order of X. A indorsed the check and sold it to the plaintiff, a *bona fide* purchaser. *Held*, that the

plaintiff could recover on the check. *Montgomery Garage Co. v. Manufacturers' Liability Ins. Co.*, 109 Atl. 296 (N. J.).

For a discussion of the principles involved in this case, see NOTES, p. 76, *supra*.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — RESTRICTIVE INDORSEE AS A HOLDER IN DUE COURSE — EFFECT OF THE NEGOTIABLE INSTRUMENTS LAW. — The payee of six promissory notes made by the defendant was indebted to the plaintiff. As collateral security for this debt he delivered the defendant's notes to the X Bank indorsed: "Pay to the order of the X Bank for credit account of the plaintiff." Unknown to either the plaintiff or the X Bank the consideration given for the notes had failed. The notes were dishonored at maturity. Subsequently the X Bank indorsed them to the plaintiff, who sues the defendant as maker. *Held*, that the plaintiff cannot recover. *Gulbranson-Dickinson Co. v. Hopkins*, 175 N. W. 93 (Wis.).

A restrictive indorsement for the benefit or use of a third person passes the legal title to the indorsee as trustee for the third person. *Hook v. Pratt*, 78 N. Y. 371; THE NEGOTIABLE INSTRUMENTS LAW, § 36 (3). See NORTON, BILLS AND NOTES, 3 ed., §§ 62-64. Where a trustee takes legal title for a valuable consideration paid by the *cestui que trust*, the trustee is treated as a purchaser for value. See *Stokes v. Riley*, 121 Ill. 166, 171. Taking a negotiable instrument as collateral security for a pre-existing debt is a parting with value. See BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., § 25. Hence the X Bank was a holder in due course at common law, and the plaintiff could have sued in its own name since a transferee from a holder in due course has all the rights of his transferor, even though the transfer is made after maturity. *Chalmers v. Lanion*, 1 Campbell, 383. This result seems eminently just, but it is hard to reach under the Negotiable Instruments Law. Section 37, sub-section 2 gives an indorsee under a restrictive indorsement the right to bring "any action [on the instrument] that his indorser could bring." In the principal case the indorser could not have recovered from the defendant since there had been a failure of consideration; hence the X Bank was barred. And since "all subsequent indorsers acquire only the title of the first indorsee under the restrictive indorsement" the plaintiff cannot recover. THE NEGOTIABLE INSTRUMENTS LAW, § 37 (3). It is interesting to note that the late Dean Ames, to illustrate the injustice of section 37, stated hypothetically a set of facts almost identical with those in the principal case. See James Barr Ames, "The Negotiable instruments Law — A Word More," 14 HARV. L. REV. 442, 446. And that the principal case destroys what little force there was to Judge Brewster's double-barrelled rejoinder that the case would never arise, and that equity would take care of it if it did. See Lyman Denison Brewster, "The Negotiable Instruments Law — A Rejoinder to Dean Ames," 15 HARV. L. REV. 26, 33.

CARRIERS — LIMITATION OF LIABILITY — EFFECT OF SHIPPER'S FAILURE TO READ VALUATION PROVISION IN UNIFORM EXPRESS RECEIPT. — Plaintiff shipped by express from one point in Michigan to another point in Michigan, a trunk, charges collect. The agent of the defendant gave him a receipt on the uniform blank, which he did not read, which declared that the liability of the express company was limited to fifty dollars, unless a greater value was declared and a corresponding increased rate paid. Plaintiff declared no excess valuation. The trunk was lost in transit. *Held*, that the plaintiff can recover full value. *Mosier v. American Railway Express Company*, 178 N. W. 81 (Mich.).

Carrier and shipper may stipulate, by a contract fairly entered into, that the loss, if any, shall not exceed a certain sum, at which the goods are valued. *Harris v. Packwood*, 3 Taunt. 264; *Hart v. Pennsylvania R. R. Co.*, 112 U. S.

331. Acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms, whatever they may be, and it is immaterial that they are in fact unknown. *Watkins v. Rymill*, 10 Q. B. D. 178. See *Upton v. Tribilcock*, 91 U. S. 45, 50. See also 1 WILLISTON ON CONTRACTS, § 90 a. Hence a shipper who takes a bill of lading or express receipt without objection, should be bound by the terms of the contract stated therein. *Hooker v. Boston & Maine Ry. Co.*, 233 U. S. 97; *Grace v. Adams*, 100 Mass. 505; *Hill v. Syracuse, etc. Ry. Co.*, 73 N. Y. 351. See *Parker v. Southeastern Ry. Co.*, 2 C. P. D. 416, 422. But this principle has been qualified in some cases where the receipt was not readily legible. *Richardson v. Rountree*, [1894] A. C. 217; *Blossom v. Dodd*, 43 N. Y. 264; *Verner v. Sweitzer*, 32 Pa. 208. And some courts have gone so far as to hold that there was no contract where the carrier did not prove actual assent. *Curtis v. United Transfer Co.*, 167 Cal. 112, 138 Pac. 726; *Chicago & Northwestern Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Wichern v. United States Express Co.*, 83 N. J. L. 241, 83 Atl. 776. It is suggested that these limitations are dictated by a desire to protect the shipper, in a necessarily rapid transaction, in which he is at a disadvantage. They are, nevertheless, departures from strict principles of contract.

CONSTITUTIONAL LAW — INTERPRETATION OF THE SIXTEENTH AMENDMENT.

— The plaintiff, a District Judge of the United States, sought to recover the amount of a tax paid by him, under protest, upon his total income, including his official salary. It was argued that such a tax was a reduction of his salary contrary to Art. III, § 1, of the Constitution. *Held*, that the tax be refunded. *Evans v. Gore*, 40 Sup. Ct. Rep. 550.

For a discussion of the principles involved in this case, see NOTES, p. 70, *supra*.

CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — STATUTE VALID IN ITS INCEPTION CAN LATER BE HELD CONFISCATORY BECAUSE OF ALTERED PRICE LEVEL. — The maximum rates that may be charged for gas in New York are fixed by statute. (LAWS 1905, c. 736; LAWS 1906, c. 125.) The United States Supreme Court in 1909 upheld the constitutionality of these rates. *Willcox v. Consolidated Gas Co.*, 212 U. S. 198. For eight years gas was furnished thereunder at a profit. Since 1917, it is alleged, higher costs occasioned by the war have caused a deficit. The gas company asks that the statutory rate be declared void, as confiscatory. *Held*, that the court has jurisdiction to determine the question, since by reason of changed conditions an act, valid in its inception, may become unconstitutional, as confiscatory. *Bronx Gas & Electric Co. v. Public Service Commission*, 180 N. Y. Supp. 38 (App. Div.).

It is now customary for courts, in their decrees, to allow an opportunity for a practical test of the rate in question. *Darnell v. Edwards*, 244 U. S. 564; *Willcox v. Consolidated Gas Co.*, *supra*. But the language of such decrees does not contemplate the case of initial reasonableness, followed by later confiscatory effect. It has only recently been recognized that the judicial enforcement of such a rate will continue only as long as its reasonableness continues. Even if the rate, as originally approved, has shown itself reasonable for many years (as it did in the principal case), changing conditions will justify a refusal to apply it any longer. "In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop." *Municipal Gas Co. of Albany v. Public Service Commission*, 225 N. Y. 89, 121 N. E. 772. See *Missouri v. Chicago, Burlington & Quincy R. R.*, 241 U. S. 533, 539. Conversely, where a rate is held confiscatory, the court may insert a provision in the decree that the State, or Commission, in interest may apply for a further decree, whenever it shall appear that, by reason of a change in

circumstances, the rate fixed is sufficient to yield reasonable compensation, *Minnesota Rate Cases*, 230 U. S. 352, 473; *Missouri Rate Cases*, 230 U. S. 474, 508.

CONSTITUTIONAL LAW — TRIAL BY JURY — INFRINGEMENT OF RIGHT BY PARTIAL NEW TRIAL. — After verdict in the Federal District Court for damages for personal injuries, the plaintiff was allowed a new trial on the sole issue of damages. The verdict on the restricted issue was rendered, and judgment was entered thereon. *Held*, that a partial new trial is unconstitutional. *McKeon v. Central Stamping Co.*, 264 Fed. 385 (C. C. A.).

For a discussion of this case, see NOTES, p. 72, *supra*.

CONSTITUTIONAL LAW — WHO CAN SET UP UNCONSTITUTIONALITY — WHETHER PUBLIC OFFICIAL HAS SUFFICIENT INTEREST. — The defendant, Secretary of State for North Dakota, refused to receive and file an application tendered by the plaintiff to take advantage of a state corporation statute. The plaintiff petitioned for mandamus to compel the defendant to accept and file the application. The defendant rested his case on the alleged unconstitutionality of the statute, as affecting adversely the rights of minority stockholders. *Held*, that the defendant cannot avail himself of this defense. *Mohall Farmers' Elevator Company v. Hall, Secretary of State*, 176 N. W. 131 (N. D.).

The court will not listen to an objection to the constitutionality of a statute, made by one whose rights are not directly affected thereby. *Hooker v. Burr*, 194 U. S. 415. See 21 HARV. L. REV. 438. Hence, it has been said by some courts, in a mandamus proceeding to enforce the performance of a statutory ministerial duty by an administrative officer, he cannot question the constitutionality of the statute involved. *Franklin County Comrs. v. State*, 24 Fla. 55, 3 So. 471; *Smyth v. Titcomb*, 31 Me. 272. But the defense is allowed when, it is said, the officer will violate his duty under his oath of office, or otherwise render himself personally liable, by acting under a void statute. *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101; *State v. Wheatley*, 113 Miss. 555, 74 So. 427. It is fundamental, however, that an unconstitutional act is not a law, and binds no one. *Marbury v. Madison*, 1 Cranch (U. S.) 137. And where there is no law there is no ground for compelling the officer to act; hence unconstitutionality should be a good defense to any proceeding to enforce a statute by mandamus. *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *State v. Candland*, 36 Utah, 406, 104 Pac. 285; *State v. Tappan*, 29 Wis. 664. Furthermore, it would seem that any act done by an officer in pursuance of an unconstitutional statute would be a violation of his duty under his oath to support the Constitution. See *Denman v. Broderick*, 111 Cal. 96, 99, 43 Pac. 516, 518; *Rhea v. Newman*, 153 Ky. 604, 607, 156 S. W. 154, 156. However inconvenient it may be to have petty administrative officials constantly questioning the statutes under which they are ordered to act, it seems that their right to do so must be conceded.

CONSTRUCTIVE TRUSTS — SUBROGATION — RIGHTS OF LENDER AGAINST PREVIOUSLY MORTGAGED PROPERTY. — An owner of certain personal property incumbered it with two successive chattel mortgages, both of which were duly recorded. He then represented to the plaintiff that the property was unincumbered. Plaintiff thereupon loaned him a sum of money and took an unsecured note in return. With this money the mortgagor paid off part of the first mortgage. The mortgagor having died, and all the creditors being before the court in a suit to dispose of the property, plaintiff requested that he be subrogated, to the extent of this payment, to the rights of the first mortgagee. *Held*, that the request be refused. *Southern Trust Co. et al. v. Garner et al.*, 223 S. W. 369 (Ark.).

Where one's property is wrongfully acquired by another, equity will impose

a constructive trust. *Edwards v. Culberson*, 111 N. C. 342, 16 S. E. 233; *Harrison v. Tierney*, 254 Ill. 271, 98 N. E. 523. If the wrongdoer uses the property to pay a creditor whose claim is secured, equity will subrogate the injured party to the creditor's former rights against the security. *Title Guaranty Co. v. Haven*, 196 N. Y. 487, 89 N. E. 1082; *Oury v. Saunders*, 77 Tex. 278, 13 S. W. 1030; *M'Mahon v. Fetherstonhaugh*, [1895] 1 I. R. 83. Subrogation, like the device of a constructive trust, is a remedial doctrine applied broadly as may best serve the purposes of justice. See Roscoe Pound, "The Progress of the Law — Equity," 33 HARV. L. REV. 420, 421; SHELDON, SUBROGATION, 2 ed., § 13. The principal case, however, refuses subrogation to the defrauded plaintiff and contends in effect that although there was fraud on the part of the mortgagor, this was negatived by plaintiff's failure to examine the records. In actions for deceit, nevertheless, the negligence of the injured party cannot, by the better view, be used as a defense. *Fargo Coke Co. v. Electric Co.*, 4 N. D. 219, 59 N. W. 1066; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056. It is also well settled that creditors cannot profit by their debtor's wrong. *In re Ennis*, 187 Fed. 720; *Brennan v. Tillinghast*, 201 Fed. 609. Furthermore, the second mortgagee's pre-existing rights here would not be prejudiced by allowing subrogation to the plaintiff. Thus the question of whether plaintiff was put on notice by the records is immaterial. It is submitted therefore that the principal case is incorrect.

CONTRACTS — ENLISTMENT — ACTION BY SOLDIER TO RECOVER PAY. — By the terms of his enlistment in the British Army, suppliant was to be paid six shillings a day. His pay was later reduced to one shilling, on the ground that the higher rate was erroneous. After discharge, he seeks to recover the difference by petition of right. The Crown demurred. *Held*, that the demurrer be sustained. *Leaman v. The King*, [1920] K. B., *The London Times*, July 24, 1920, p. 4.

It has long been settled law in England that an army officer cannot recover his pay in an action, but must rely on the grace of the Crown. *In re Tufnell*, 3 Ch. D. 164. Suppliant sought to distinguish his case on the ground that enlistment is a contract. See ARMY ACT 1881, 44 & 45 VICT., c. 58, s. 80 (1). See also MANUAL OF MILITARY LAW, War Office, 1914, p. 189. A petition of right ordinarily lies on a contract with the Crown. *Thomas v. The Queen*, L. R. 10 Q. B. 31. And once the Crown has granted its fiat that right be done, the action proceeds as between subject and subject. See 2 ANSON, LAW AND CUSTOM OF THE CONSTITUTION, 3 ed., Part 2, p. 299. The principal case therefore holds either that there is no contract; or that there is a contract unenforceable against the Crown, not because of any procedural difficulty, but because of its peculiar nature as an agreement for military service. The court declined to decide which theory is correct. The section of the Army Act giving to the Crown the final decision in cases of doubt as to pay, would support either view. See 44 & 45 VICT., c. 58, s. 140 (3). In the United States enlistment is a contract. *In re Grimley*, 137 U. S. 147. And a soldier can sue on it in the Court of Claims. *Hosmer v. United States*, 3 Ct. Cl. 6, aff'd *United States v. Hosmer*, 9 Wall. (U. S.) 432.

DAINGEROUS PREMISES — LIABILITY TO LICENSEES — IS A FIREMAN A LICENSEE? — Defendant maintained a paved driveway on its premises giving access from the street to its barn. An unguarded coal hole extended half way across the pavement. Plaintiff, a fireman, while going to a fire in the barn at night, fell into the coal hole and was injured. *Held*, that the plaintiff can recover. *Meiers v. Fred Koch Brewery*, 127 N. E. 491 (N. Y.).

By the weight of American authority, a fireman who enters property to extinguish a fire has the legal status of a licensee and takes the risk of visible

defects of the premises. *Lunt v. Post Publishing Co.*, 48 Colo. 316, 110 Pac. 203; *Beehler v. Daniels*, 18 R. I. 563, 29 Atl. 6. Since the fireman's paramount duty to the public commands him to enter and the occupier may not prohibit him, the license is said to be by operation of law. See *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113. In two states public officers have been given rights of business guests on the theory of implied invitation, though permission is immaterial to the right to enter. *Learoyd v. Godfrey*, 138 Mass. 315; *Anderson & Nelson Distilling Co. v. Hair*, 103 Ky. 196, 44 S. W. 658. In the principal case the same result is reached by placing firemen in a special category and investing them with the rights of invitees. The soundness of this result is doubtful, for in effect it compels occupiers to keep premises safe for invitees at all times on the chance that public officers will be required to enter. Since firemen are injured in the public service, they should be compensated by the public, as for example, by a pension fund.

EASEMENTS — EXTINGUISHMENT OF EASEMENTS — APPURTENANT EASEMENT GIVING ACCESS TO HIGHWAY NOT EXTINGUISHED BY ACQUISITION OF A MEANS OF EGRESS TO HIGHWAY. — A grantor sold to the plaintiff a lot from which the only access to the public road was a private way over a lot which the grantor retained. The grantor subsequently sold the latter lot to the defendant. Later, the plaintiff acquired land giving him another outlet to the highway. The defendant thereon obstructed the private way and the plaintiff sued to have an easement declared in his favor. *Held*, that the plaintiff had an easement. *Wilson v. Glascock*, 126 N. E. 231 (Ind.).

A way of necessity ends with the necessity. *Bauman v. Wagner*, 130 N. Y. Supp. 1016. See *Hart v. Deering*, 222 Mass. 407, 111 N. E. 37. On the other hand, it is generally held that an easement by express grant does not end with the necessity. *Atlanta Mills v. Mason*, 120 Mass. 244. An easement acquired because it is appurtenant, being open, apparent, and continuous, is based on the implied intent of the grantor. As the easement is based on a fiction, its limits should be narrowly construed. The weight of authority in America holds that such easement must be reasonably necessary to the beneficial enjoyment of the grantee's estate. *Johnson v. Knapp*, 146 Mass. 70, 15 N. E. 134; *Spencer v. Kilmer*, 151 N. Y. 390, 47 N. E. 1111. See 1 TIFFANY, REAL PROPERTY, § 317. The principal case suggests that the later acquisition of other modes of egress will never terminate the easement. *Mosher v. Hibbs*, 24 Ohio Cir. Ct. Rep. 375, *accord*. This goes too far. Limiting the easement narrowly, it should be held that it ceases when its reason, which is reasonable necessity, ceases.

EVIDENCE — DECLARATION CONCERNING INTENTION, FEELINGS, OR BODILY CONDITION — STATEMENT TO ONE NOT A PHYSICIAN. — The plaintiff sought to prove his injuries received while a passenger in the defendant's automobile. His statements to his wife and mother, made during his resultant incapacitation, with regard to existing pain, were admitted in evidence. *Held*, that the testimony was properly admitted. *Williams v. A. R. G. Bus Co.*, 190 Pac. 1036 (Cal.).

Under an exception to the Hearsay Rule, a third party overhearing groans or cries uttered by one in pain, may testify to such "verbal acts." *Hagenlocher v. Brooklyn R. R.*, 99 N. Y. 136, 1 N. E. 536. See *Wilkins v. Mayor of Wilmington*, 2 Marv. (Del.) 132, 133, 42 Atl. 418, 419. In most jurisdictions spontaneous exclamations of existing suffering, to whomsoever made, are also admissible. *Baltimore & Ohio Ry. Co. v. Rambo*, 59 Fed. 75; *Mississippi Central Ry. Co. v. Turnage*, 95 Miss. 854, 49 So. 840; *Cashin v. N. Y., N. H., & H. R. R. Co.*, 185 Mass. 543, 70 N. E. 930. If made to a physician, they have greater weight. See *Northern Pacific Ry. Co. v. Urlin*, 158 U. S. 271, 275;

see 1 GREENLEAF, EVIDENCE, 16 ed., § 162 b. A few states, notably New York, admit these more articulate expressions of present pain only if made to a physician during consultation. *Kennedy v. Rochester City & B. R. R. Co.*, 130 N. Y. 654, 29 N. E. 141; *Lake St. Elevated Ry. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374. And the consultation must intend medical treatment. *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573. This New York limitation, which developed only after the Code gave parties the right themselves to testify regarding their suffering, is condemned as illogical. See 3 WIGMORE, EVIDENCE, § 1719. A more flexible rule is required, yet one not without some guarantees of trustworthiness. Kansas admits statements of present pain only when validated by other evidence concerning the circumstances under which they were uttered. *St. Louis and Santa Fé R. R. Co. v. Chaney*, 77 Kan. 276, 94 Pac. 126. Some such safeguard is essential. As the meagre report of the principal case affords no indication that any guarantee was exacted before admitting the evidence, the decision is possibly wrong.

GIFTS — GIFTS INTER VIVOS — OWNERSHIP OF WEDDING GIFTS. — The plaintiff received money as a wedding gift from her mother to purchase furniture. After the furniture had been bought and used in the home, plaintiff's husband claimed an interest in it as joint owner. *Held*, that he had no such interest. *Wainess v. Jenkins*, 180 N. Y. Supp. 627. 35

Before the Married Woman's Property Acts, the property in gifts to the wife usually vested in the husband by reason of his marital rights. *Tllexon v. Wilson*, 43 Me. 186. And it was, therefore, not always necessary to determine the precise donee. Under modern statutes, with the possibility of separate ownership in the wife, it is important to distinguish the real donee of wedding gifts. As in the case of other gifts, the problem is to discover the intention of the donor, which, in the absence of express words, is to be inferred from the nature of the article, the relation between the donor and donee, and like circumstances. This reasoning, with the finding of title in the wife, has been used in cases of a devise of a separate estate. See *Miller v. Miller's Adm'r*, 92 Va. 510, 512, 23 S. E. 891, 892; *Duke's Heirs v. Duke's Devises*, 81 Ky. 308, 311. And a similar result has been reached, as in the principal case, in gifts of personalty. *In re Grant*, 2 Story (U. S. C. C.), 312; *Graham v. Londonderry*, 3 Atk. 393; *Lyon v. Lyon*, 24 Ky. Law Rep. 2100, 72 S. W. 1102; *Ilgenfritz v. Ilgenfritz*, 49 Mo. App. 127.

HOMICIDE — INTENT — EFFECT OF INTOXICATION ON MENS REA. — Respondent ravished a girl of thirteen. To stop her screams he placed his hand over her mouth and pressed his thumb on her throat so that she died from suffocation. On an indictment for murder respondent pleaded drunkenness. The trial court directed the jury that this defense could prevail only if the accused, because of his drunkenness did not know what he was doing or that it was wrong. The jury found a verdict of murder. The Court of Criminal Appeal held that there had been a misdirection, resting on *Rex v. Meade*, [1909] 1 K. B. 895. *Held*, that the conviction be restored. *Director of Pub. Prosec. v. Beard*, [1920] A. C. 479.

For a discussion of the principles involved in this case, see NOTES, p. 78, *supra*.

HUSBAND AND WIFE. — PRESUMPTION OF COERCION — EFFECT OF MARRIED WOMAN'S ACT. — Defendant, a married woman, was convicted of selling intoxicating liquors without a license. The trial court had refused to instruct the jury that there was a presumption that a married woman, who committed a crime in the presence of her husband, acted under his coercion, and should not be found guilty unless this presumption was overcome by the evidence.

Held, that this instruction was correctly refused. *King v. City of Owensboro*, 218 S. W. 297 (Ky.).

At common law a wife committing a crime in the presence of her husband was presumed to have acted under his coercion. *Com. v. Eagan*, 103 Mass. 71; *State v. Martini*, 80 N. J. L. 685, 78 Atl. 12. This presumption must have been based on the complete control once exercised by the husband over his wife's person and property. See 4 BL. COMM. 28; *Morton v. State*, 141 Tenn. 357, 360, 209 S. W. 644, 645. But a wife cannot now be chastised or imprisoned by her spouse. *The Queen v. Jackson*, [1891] 1 Q. B. 671. The Married Woman's Act of Kentucky completely frees her property. 1915 CARROLL'S KENTUCKY STATUTES, c. 66, §§ 2127, 2128. This act, with similar legislation in nearly all jurisdictions, effectively brings to an end the husband's control. See *Martin v. Robson*, 65 Ill. 129, 132, 139; *State v. Hendricks*, 32 Kan. 559, 563, 4 Pac. 1050, 1053. With this gone, the presumption of coercion, based on it, should go also. The principal case is undoubtedly judge-made law, but the conclusion seems desirable. The same result has been reached by statute. 1919 CAN. CRIM. CODE, 21; N. Y. PENAL CODE, § 1092.

JURISDICTION — VENUE — ACTION FOR CONVERSION OF ORE TAKEN FROM LAND IN ANOTHER STATE. — The plaintiff sued in Maine for the conversion of ore taken from his land in Arizona. The defendant pleaded to the jurisdiction that the only ore taken was from land *bona fide* claimed by him. *Held*, that the court had jurisdiction. *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 110 Atl. 429 (Me.).

The plaintiff sued in Massachusetts for the conversion of ore taken from his land in Arizona. The defendant pleaded to the jurisdiction that the only ore taken was from land *bona fide* claimed by him. *Held*, that the court did not have jurisdiction. *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 128 N. E. 4 (Mass.).

The doctrine that actions for injuries to land are local is almost universally accepted, unless abolished by statute. *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. The principal exception is that where the trespass is accompanied by a conversion of trees, crops, or soil taken from the land, the plaintiff may waive the trespass and sue for the conversion in a transitory action. *Stone v. United States*, 167 U. S. 178; *Stuart v. Baldwin*, 41 U. C. Q. B. 446. The Massachusetts court profess to agree with all the cases sustaining this exception, and attempt to distinguish them on the ground that in the principal case the defendant *bona fide* claimed title. Since the distinction between a *bona fide* claim and any claim not sham is impracticable, this argument can mean only that the exception is to be entirely abolished. The whole doctrine of local actions is a technical one and does little except to give rise to cases where there is a right without a remedy. See *Livingston v. Jefferson*, 1 Brock. (U. S.) 203, 208, 15 Fed. Cas. 660, 664. There seems every reason therefore not to abrogate its widest exception, and the Massachusetts decision cannot be regarded as either wise or sound.

LIS PENDENS — APPLICATION TO VENDOR'S LIEN SECURING NEGOTIABLE NOTE. — Certain land was conveyed to the defendant by one who had obtained a conveyance from the original owner by fraud. In payment, defendant signed negotiable notes secured by a vendor's lien on the land. The original owner brought action to recover the land, and filed notice of *lis pendens*. While this suit was still pending and before maturity of the notes, plaintiff purchased the notes for value and without actual notice of the suit, and sued to foreclose on the lien securing them. *Held*, that he is not chargeable with notice of the suit. *Pope v. Beauchamp et al.*, 219 S. W. 447 (Tex.).

Courts are more and more recognizing that incidental provisions to negotiable

paper, such as a power to sell collateral at maturity, are themselves negotiable, and that *bona fide* purchase for value cuts off equities against the incident as well as against the note. See Z. Chafee, Jr., "Acceleration Provisions in Time Paper," 32 HARV. L. REV. 747, 762-3. On the other hand it is clear that the filing of notice of a *lis pendens* is such notice to the world that it prevents a *bona fide* purchase of the land. *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Walter v. Kressman*, 25 Wyo. 292, 169 Pac. 3. It is also settled that the doctrine of *lis pendens* does not apply to negotiable paper. *Winston v. Westfeldt*, 22 Ala. 760; *Presidio County v. Bond Co.*, 212 U. S. 58. The principal case goes further and refuses to apply *lis pendens* to a vendor's lien securing negotiable paper. Thus the problem is squarely raised as to whether commercial necessity demands the free circulation of such a lien, even at the expense of letting the purchaser disregard the records of *lis pendens*. The principal case seems to follow the trend of authority in regard to this problem, and in limiting the doctrine of *lis pendens* is undoubtedly correct. See W. E. Britton, "Assignment of Mortgages Securing Negotiable Notes," 10 ILL. L. REV. 337, 348.

MASTER AND SERVANT — WORKMAN'S COMPENSATION ACTS — FIREMEN AS PUBLIC OFFICERS NOT INCLUDED. — A city fireman died as the result of a drenching received while extinguishing a fire. His widow sought to recover under the Connecticut Workman's Compensation Act, which defined employee as any person under a contract of service. (1918 CONN. GEN. ST., § 5388.) *Held*, that the plaintiff is not entitled to recover. *McDonald v. City of New Haven*, 109 Atl. 176 (Conn.).

There is great difficulty in drawing the line between public employees and public officers. See 1 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 425; *McNally v. Saginaw*, 197 Mich. 106, 163 N. W. 1015. Public officers, however, are not under contract of employment. *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536. By the great weight of authority firemen are public officers. *Schmidt v. Dooling*, 145 Ky. 240, 140 S. W. 197. Firemen, therefore, do not come strictly within the definition of the Connecticut act. Nevertheless they might well be allowed compensation. Policemen and firemen belong to the class that compensation acts are commonly supposed to cover. See *In re Golden*, 1915 Op. Sol. Dept. of Labor, 98. Courts construe these acts broadly and liberally. *Matter of Rheinwald v. Builders Brick and Supply Co.*, 168 App. Div. 425, 438, 153 N. Y. Supp. 598, 608. Some consensual relationship exists between members of this class and their employers, and it is sufficiently near a contract to be considered a contract of service within the acts. The decisions, however, vary greatly, even under similar statutes. Compare *McCarl v. Borough of Houston*, 263 Pa. 1, 106 Atl. 104; and *Devney's Case*, 223 Mass. 270, 111 N. E. 788. More confusion is added by the variation of statutes. See *Sudell v. Blackburn*, 3 B. W. C. C. 227; *Village of West Salem v. Industrial Commission of Wisconsin*, 162 Wis. 57, 155 N. W. 929; *State ex rel. Duluth v. District Court of St. Louis County*, 134 Minn. 28, 158 N. W. 791. The situation is further complicated by the existence of pension funds. *Matter of Ryan*, 228 N. Y. 16, 126 N. E. 350. It may be noted that on similar facts a fireman was denied compensation on the ground that there was no accident. *Landers v. City of Muskegon*, 196 Mich. 750, 163 N. W. 43.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — NEGLIGENCE OF MEMBERS OF THE FIRE DEPARTMENT. — The plaintiff's intestate was run over and killed by a fire engine negligently operated by firemen returning from a fire. *Held*, that an action will lie against the city. *Fowler v. City of Cleveland*, 126 N. E. 72 (Ohio).

For a discussion of the principles involved in this case, see NOTES, p. 66, *supra*.

RAPE — INTERCOURSE WITH WIFE UNDER AGE OF CONSENT. — Defendant contracted a common-law marriage with A, a female under the age of sixteen. A statute set the age of consent to marriage at sixteen for females. (1915 MICHIGAN COMPILED LAWS, § 11362.) Defendant was convicted of statutory rape on A, under a statute providing for the punishment of any person who shall "... unlawfully and carnally know and abuse any female under the full age of sixteen years." (1915 MICHIGAN COMPILED LAWS, § 15211.) He brings exceptions. *Held*, that the conviction be reversed and defendant discharged. *People v. Pizzura*, 178 N. W. 235 (Mich.).

Common-law marriages are valid in most jurisdictions in the United States, including Michigan. *Meister v. Moore*, 96 U. S. 76. *Peet v. Peet*, 52 Mich. 464, 18 N. W. 220. Where one party is under the age of consent, a marriage is voidable, but until avoided it is valid. *People v. Slack*, 15 Mich. 193; *State ex rel. Scott v. Lowell*, 78 Minn. 166, 80 N. W. 877; *Beggs v. State*, 55 Ala. 108. *Contra, Shaffer v. State*, 20 Ohio 1. At the time of the intercourse, therefore, A was defendant's wife. It is universally held that a man cannot commit rape on his own wife. *Frazier v. State*, 48 Tex. Cr. 142, 86 S. W. 754. The reasoning usually adopted is that a wife gives irrevocable consent to intercourse. See 1 HALE P. C. 629. It is on this reasoning that the court in the principal case chiefly relies. But such an explanation is inadequate in this case, for under the statute consent of a female under sixteen is not a defense. *People v. Smith*, 122 Mich. 284, 81 N. W. 107. The result of the case is properly reached by statutory construction. The word "unlawfully" in a similar statute has been held to exclude intercourse between husband and wife. *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845. Another court has given the same effect to the word "abuse." *State v. Rollins*, 80 Minn. 216, 83 N. W. 141. At all events, it is clear that the legislature did not intend to make criminal the intercourse to which a husband is entitled by the marital relation. See TIFFANY, LAW OF PERSONS AND DOMESTIC RELATIONS, § 31.

SALES — IMPLIED WARRANTIES — LIABILITY OF MUNICIPALITY FOR FURNISHING IMPURE WATER. — The defendant city supplied the plaintiff with water. The plaintiff contracted typhoid fever through the use of this water. He sued the city, alleging the breach of an implied warranty that the water was wholesome. The city demurred. *Held*, that the demurrer be sustained. *Canavan v. City of Mechanicville*, 180 N. Y. Supp. 62 (App. Div.).

One ground of decision given by the court was that there was no sale of the water. This seems erroneous. Water confined in pipes is personal property. *Clark v. State*, 14 Okla. Crim. 284, 170 Pac. 275; *Bear Lake Waterworks Co. v. Ogden City*, 8 Utah, 494, 33 Pac. 135; *City of Milwaukee v. Zoehrlaut Leather Co.*, 114 Wis. 276, 90 N. W. 187. See 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 35. When such water is supplied to a consumer for a price, there is a sale. *People ex rel. Heyneman v. Blake*, 19 Cal. 579; *Jersey City v. Harrison*, 71 N. J. L. 69; 72 N. J. L. 185; 58 Atl. 100. See also *Wagner v. City of Rock Island*, 146 Ill. 139, 34 N. E. 545. Thus the city seems clearly to have been a dealer in water. At common law, a dealer in provisions for immediate use impliedly warrants them to be wholesome. *Hoover v. Peters*, 18 Mich. 51; *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853. See WILLISTON, SALES, § 242. See also 32 HARV. L. REV. 71. It is held in New York this rule is not changed by the Sales Act. *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471. The city, while not a dealer in provisions in the strict sense of the term, was a dealer in an article to be used for human consumption, and should, it would seem, come under the rule. Nor should the fact that the dealer was a municipal corporation affect the result. The operation of waterworks is not a governmental function, and subjects the municipality to the same liability as a private company. *Keefer v. City of Mankato*, 113 Minn.

55, 129 N. W. 158. See *Western Savings Fund Society v. City of Philadelphia*, 31 Pa. 175, 183. It is generally said, however, that a water company, whether municipal or private, is liable for furnishing unwholesome water only on proof of negligence. See *Green v. Ashland Water Co.*, 101 Wis. 258, 263; 77 N. W. 722, 724; *Hayes v. Torrington Water Co.*, 88 Conn. 609, 612, 92 Atl. 406, 407. See also 3 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1316.

STARE DECISIS — THE EXTENT OF THE DOCTRINE. — The plaintiff was injured in an accident caused by a defective wheel on an automobile, manufactured by the defendant, but purchased from a retail dealer. A judgment for the plaintiff in the District Court was reversed at a prior hearing before the Circuit Court on the ground that no right of action existed although the defendant was negligent. The plaintiff now brings error to the Circuit Court from a judgment for the defendant. *Held*, that a cause of action does exist. *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878 (C. C. A.), reversing 221 Fed. 801.

Proceedings were instituted to disbar an attorney under a California statute (1916 FAIRALL'S CODE CIV. PROC., §§ 287, 288, 289). A certain construction had been given to these sections by a series of decisions extending over a period of thirty-five years. *Held*, that this construction can be changed only by the legislature. *In re Riccardi*, 189 Pac. 694 (Cal.).

For a discussion of these cases, see NOTES, p. 74, *supra*.

STATUTE OF FRAUDS — ORAL WAIVER OF CONDITION IN WRITTEN CONTRACT. — The plaintiff and the defendant drew up a written contract for the exchange of land free from any incumbrances. Subsequently, and prior to the date when performance was due, the parties orally agreed upon the substitution of a deposit of money for the removal of any incumbrances. In reliance upon that understanding, the plaintiff allowed an incumbrance to remain on his property on the date when performance was due. The defendant refused to perform. Plaintiff sues for breach of contract and defendant sets up the Statute of Frauds. *Held*, that the plaintiff can recover. *Imperator Realty Co. v. Tull*, 127 N. E. 263 (N. Y.).

A defendant, who prevents or hinders the performance of an obligation upon which his liability depends, is precluded from interposing such non-performance as a defense to an action on the contract. *United States v. Peck*, 102 U. S. 64; *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472. The plaintiff's excuse for non-performance is equally effective when he relies on the defendant's sanction to dispense with such performance. *Hirsch Rolling Mill Co. v. Milwaukee & Fox River Valley Ry. Co.*, 165 Wis. 220, 161 N. W. 741; *Neppach v. Oregon & C. R. Co.*, 46 Ore. 374, 80 Pac. 482. However, it is essential that the plaintiff could and would have performed the condition, had it not been for the permission of the defendant. *McCalley v. Otey*, 99 Ala. 584, 12 So. 406; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248. The plaintiff is excused because it is unjust that the defendant take advantage of the failure which he himself caused. Therefore, an oral waiver of a condition in a written contract within the Statute of Frauds should also excuse the plaintiff's non-performance. *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N. W. 34; *Hirsch Rolling Mill Co. v. Milwaukee & Fox River Valley Ry. Co.*, *supra*. The Statute of Frauds is satisfied because the action is on the written contract. The oral understanding is introduced only to excuse the plaintiff's non-performance of a condition. *Cf. Rosenfeld v. Standard Bottling & Extracts Co.*, 232 Mass. 239, 122 N. E. 299.

STATUTES — IMPEACHMENT OF STATUTES — ADMISSIBILITY OF HOUSE JOURNALS. The constitution of Georgia provides: "No bill or resolution ap-

appropriating money shall become a law, unless upon its passage the yeas and nays, in each house, are recorded." (1910 GA. CIV. CODE, § 6441.) An act appropriating money was passed, signed and deposited with the Secretary of State. Mandamus proceedings were instituted by the Governor to compel obedience by the Comptroller-General. For respondent, evidence was admitted to show that the yeas and nays had not been recorded. *Held*, that this admission was error. *Dorsey v. Wright*, 103 S. E. 591 (Ga.).

The decision amounts to holding that the court will not enforce the constitutional provision. In England, where Parliament is supreme, courts have never admitted evidence to impeach enrolled acts. *Rex v. Arundel*, Hob. 109. In spite of the fact that United States legislatures derive their powers from written constitutions, many of our state courts and the United States Supreme Court have held properly authenticated bills to be conclusive proof of their constitutional enactment. *Field v. Clark*, 143 U. S. 649; *Bloomfield v. County of Middlesex*, 74 N. J. L. 261, 65 Atl. 890. This view is supported by considerations of practical expediency. See 11 HARV. L. REV. 267. *Pangborn v. Young*, 32 N. J. L. 29. But on strict theory an act not constitutionally passed is not law, and should be given no effect by the courts. *Simpson v. Union Stock Yards Co.*, 110 Fed. 799. *West End v. Simmons*, 165 Ala. 359, 51 So. 638. And the objection that a properly certified bill should not be impeached by evidence so uncertain as a journal has no force where the entry on the journal is itself the fact to be proved. *Bank v. Commissioners of Oxford*, 119 N. C. 214, 25 S. E. 966. *Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, *contra*.

SURETYSHIP — SURETY'S RIGHT OF SUBROGATION — SUBROGATION AGAINST A BANKRUPT PRINCIPAL IN FAVOR OF A SURETY FOR PART OF A DEBT — EFFECT OF A STATUTE GIVING A SURETY "THE LIKE PRIORITY . . . AS IS SECURED TO THE UNITED STATES." — By statute the United States is given priority over all other creditors of an insolvent or bankrupt debtor. (REV. STAT., § 3466; 1918 COMP. STAT., § 6372.) It is further provided that where the principal in any bond given to the United States is insolvent, a surety on the bond, who pays the United States, is entitled to "the like priority . . . as is secured to the United States." (REV. STAT., § 3468; 1918 COMP. STAT., § 6374.) The principal on a bond given for the faithful performance of a contract with the United States defaulted and became bankrupt. The surety paid the United States the amount of the bond, which did not cover the whole of the government's loss. The government filed a claim for the residue of the damages caused by the default and this claim was accorded priority over all other claims. The surety now petitions for equal priority with the United States. *Held*, that the petition be granted. *United States v. National Surety Co.*, 262 Fed. 62.

Although in England the Crown was entitled to priority at common law over all other creditors of a bankrupt or insolvent debtor by virtue of its sovereign prerogative, the priority of the United States is founded exclusively upon statutes. *United States v. The State Bank of North Carolina*, 6 Pet. (U. S.) 29. Originally such statutes were liberally construed, but the later tendency of the courts has been to find implied limitations to this priority in other acts of Congress. *Cook County National Bank v. United States*, 107 U. S. 445. The majority of the court in the principal case took this attitude in construing REV. STAT., § 3468. Although in England at common law a surety for a bankrupt principal who is surety for part only of the debt and who has paid that part is entitled to be subrogated to the creditor's claim against the bankrupt's estate and to a ratable proportion of the securities held by the creditor to secure the whole debt, this doctrine has been severely criticized and is not generally followed in the United States. *Knafl v. Knoxville Banking Co.*, 133 Tenn. 655, 182 S. W. 232. See 2 WILLISTON, CONTRACTS,

§ 1273. And even the English courts have refused to allow the subrogation where the surety seeks to secure equal priority with the Crown. *Regina v. O'Callaghan*, 1 Ir. Eq. 439. The decision in the principal case, accordingly, necessarily involves a holding that Congress intended to give the surety a new right, and the case can be supported only on this basis. But the earlier cases indicate that REV. STAT., § 3468, is simply declaratory of the equitable doctrine of subrogation in favor of sureties. See *United States v. Ryder*, 110 U. S. 729, 739; also *United States v. Preston*, 27 Fed. Cas. No. 16,087, 4 Wash. C. C. 446. Hence the common-law rule should apply and the case seems incorrect.

TAXATION — WHERE PROPERTY MAY BE TAXED — DOMESTIC TAX ON SEAT IN FOREIGN STOCK EXCHANGE. — An Ohio stock-broker sought to enjoin the State auditor from listing his membership in the New York Stock Exchange for taxation in Ohio. *Held*, that the petition be dismissed. *Anderson v. Durr*, 126 N. E. 57 (Ohio).

A membership in such an exchange is taxable property. *Rogers v. Hennepin County*, 240 U. S. 184; *State v. McPhail*, 124 Minn. 398, 145 N. W. 108; *In re Glendinning*, 68 App. Div. 125, 74 N. Y. Supp. 190, aff'd, 171 N. Y. 684, 64 N. E. 1121. Intangible personal property is generally taxed at the domicile of the owner. *Scripps v. Board of Review*, 183 Ill. 278, 55 N. E. 700. See 1 COOLEY, TAXATION, 3 ed., 89. But certain intangible property, including an exchange membership, may acquire a "business situs" and be taxable in a state other than that of the owner's domicile. *Rogers v. Hennepin County*, *supra*; *In re Glendinning*, *supra*. Liability to taxation in both states has been uniformly held not a violation of the Federal Constitution. *Fidelity Trust Co. v. Louisville*, 245 U. S. 54; *Blackstone v. Miller*, 188 U. S. 189. See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 588. The decision in the principal case, therefore, rests on strong legal precedents. The taxation of the same property in two states is, however, unjust and economically undesirable. See *Kidd v. Alabama*, 188 U. S. 730, 732; *Blackstone v. Miller*, *supra*, 205. The Supreme Court has held that taxation at the owner's domicile of tangible personal property which was permanently located in another state violated the Fourteenth Amendment. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194. This doctrine is, however, expressly limited to tangible personalty. *Fidelity Trust Co. v. Louisville*, *supra*. See *Union Refrigerator Transit Co. v. Kentucky*, *supra*, 205, 206, 211. But the same principle should be extended logically to prevent taxation at the owner's domicile of intangible personal property which in a business sense has a *situs* in another state and is there subject to taxation.

WILLS — REVOCATION BY MARRIAGE. — The testator made a bequest to a certain woman, provided that their contemplated marriage should take place. They married as contemplated within a month. A statute provided that "a marriage shall be deemed a revocation of a previous will." (1917 ILL. REV. STAT., c. 39, § 10.) *Held*, that the will was not revoked. *Ford v. Greenawalt*, 126 N. E. 555 (Ill.).

By the common law, marriage without the birth of issue would not revoke a man's will. *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31. The contrary was held in some of the states where statutes had made the wife heir to the husband. *Tyler v. Tyler*, 19 Ill. 151. In the same case, Illinois adopted the rule that the revocation was only presumptive. But it was established in England before the Wills Act, and is held by the weight of authority in this country, that revocation caused by change of circumstance is absolute. *Marston v. Fox*, 8 Ad. & El. 14; see ROOD, WILLS, 1 ed., § 377. The decision that the statute in the principal case was merely declaratory is therefore untenable;

the purpose of the statute was apparently to make Illinois conform to the general rule. The court also reasoned that the statute itself did not prohibit considering the revocation as merely presumptive, distinguishing it specifically from the English type of statute which provides that a will shall be revoked by marriage. This cannot be sustained. A statute that marriage shall be deemed a revocation is no less absolute than a statute that a will shall be revoked by marriage.¹ *Lathrop v. Dunlop*, 4 Hun, 213; aff'd, 63 N. Y. 610. And the Illinois court had already held that the statute ended all controversy. *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397; *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172.

BOOK REVIEWS

PAPERS ON THE LEGAL HISTORY OF GOVERNMENT. By Melville M. Bigelow. Boston: Little, Brown, and Company. pp. 256.

There are five of these papers: I, Unity in Government; II, the Family in English History; III, Mediaeval English Sovereignty; IV, the Old Jury; V, Becket and the Law. Their titles give the impression that they are separate in character; but in fact they form a single thesis illustrated historically from general political and constitutional history, and, in the last two papers, from legal history. The thesis is stated in the first paper on the Unity of Government. It is the question as to the proper limits in the sphere of government of the two contrary principles of individualism and collectivism — a question the settlement of which is vital to the stability of government and therefore to the stability of civilized society. Of the sphere of these two principles Mr. Bigelow has said much with which I am in entire agreement. We cannot do without individualism. "In itself individualism is a store house of personal energy; it is the indispensable dynamic of life; when directed to the proper end it is the chief means of doing good." On the other hand, mere unrestrained individualism is "unsafe and unsound when considered in reference to the peace and stability and welfare of the state." Some of the effects of the English policy of Free Trade, and the manner in which that policy was made a fetish in order to suit the transient needs of English party politicians, are perhaps the best illustrations in modern times of the results of unrestrained individualism. That it was inconsistent with the safety of the state was shown by the War, and by the measures passed almost too late to remedy some of its consequences. In effect it denies to the state its proper sphere. On the other hand, the principle of collectivism, which makes for the unity and solidarity of the action of the state, is apt to give the state power to move out of its proper sphere. "History tells us plainly enough that whenever collectivism, such as exists, moves forward with energy towards realizing its purposes, it is sooner or later encountered by sordid individualism with a tangled mass of troublesome influences."

What, then, is the solution? The solution indicated by Mr. Bigelow is the formation of a sound public opinion which will enable the state, without repressing individualism, to bring to bear upon it a restraining influence in the interests of the public weal — a public opinion which will enable the state to repress the evil effects of individualism without reducing the individual to the position of being merely a small cog in the mechanism of a great machine. Now one of the factors in the formation of such an opinion is religion; and one of the greatest achievements of religion, and more especially of the Christian religion, is the family. In the family, as the author points out, the two principles of collectivism and individualism have full play. The family was a "body bound together by service." "It gave to society the stamp of collectiv-

ism so far as the type remained true to itself." On the other hand, *qua* outsiders the family was an individual unit. In primitive society it was "autocrat to such an extent as to make the higher government of later times difficult." It is not therefore surprising that, in our own days, those fanatics who wish to nationalize everything should see that they must first of all get rid of, or as far as possible minimize, the importance of the family. They wish to give the state a hand in its arrangement, which will have, as it always has when the state steps outside its proper sphere, a paralyzing effect. In civilized states their suggestions will take the form of proposals to endow the family; and in savage states like Russia of proposals to nationalize women. Both sets of proposals really rest on very similar exaggerations of the sphere of the state — of the principle of collectivism. As Mr. Bigelow points out, it is this combination of collectivism and individualism in the family which makes it so effective a moral agency. The state can never take its place. It can encourage it; it can suppress excesses of the individualistic spirit which are antagonistic to it; but it can do little more. If it ever disappears, with it will disappear the most effective agency for the promotion of the virtues essential to the well-being of the state, and for the maintenance of a sound public opinion.

So far I am in agreement with the general principles stated by Mr. Bigelow. It is when he tries to illustrate or prove them by instances drawn from the very remote history of our race that I cannot assent to his views. He appears to think that our Germanic ancestors, as described by Caesar and Tacitus, afford an illustration of a type of polity which contained the right blend of the principles of collectivism and individualism; that the family life of the old Germans was the central feature of their polity; and that this family life lived on throughout the Middle Ages mainly in the lower ranks of society. His view seems to be that the sovereignty of the state, as enforced by Henry II, was an encroachment on the free individualism of the family which sapped its strength; and that, if Becket had had his way, the people would have given their free consent to Henry's policy, with the result that that policy would have been liberalized, and therefore improved. It would have been the collective policy of the nation, not the individual policy of Henry. He thinks, for instance, that in the domain of legal history there would have been no need for the separation between law and equity; and that in the law of criminal procedure and evidence another and a better system, which did without a jury, would have been possible.

To my mind, if I may say so with respect, Mr. Bigelow's reading, both of general political and constitutional history and of legal history, is so original as to be almost fantastic. The teachings of history, if they are to carry weight, must be based on verified facts; and they must deal with problems and conditions which are comparable to the problems and conditions of our own times. We cannot treat the events of English history as some theologians treat the events of Old Testament history, and interpret them in a particular way for the purpose of drawing a particular moral. But it seems to me that the account given of and the moral drawn from the polity of the old Germans described by Caesar and Tacitus fail to carry conviction, partly because there is much in our author's account of the sphere of the family and its relation to the tribal state in the old Germanic law which is very conjectural, and partly because the state of society there depicted is so remote from that of the modern state that it is difficult to derive very much instruction therefrom. These old Germans were, after all, very savage; and it is doubtful whether modern society could have found much use either for their virtues or their vices. A Bolshevik state might indeed make some use of their more ignorant members in a Red army; and perhaps the more enlightened among them might be useful members of a Labor party; for they would certainly have been in opposition to any

modern government; they would have been slaves to formulae, and they would have been incapable of taking any but the shortest views based on what seemed to make for their momentary physical advantage. Some of us have read the adventures of "A Yankee at the Court of King Arthur"; we may conjecture that the stay of an old German Tribesman at the White House or any other civilized house would have been very short. To suppose that a stable state could have been founded on the "voluntary self-discipline" of these men, without the growth of the modern conception of the sovereignty of the state, does not seem to me to be a tenable thesis. Similarly, to suppose that in later times the strength of family feeling, in the form in which it makes for the stability of the modern state, is identical with the form which it took amongst the old Germanic tribes; and to suppose that it survived in later ages, when the state had acquired more strength, mainly or solely in the lower classes of society — seem to me to be merely wild imaginings.

And these theories are clearly responsible for Mr. Bigelow's very peculiar views as to the effects of Henry II's reforms on the future course of English history, as to the rights and wrongs of his controversy with Becket, and as to one or two episodes in English legal history which he has used to illustrate these views. He says that "Henry had reached the great idea of Sovereignty"; and there is little doubt but that he had gone as far towards reaching it as a mediaeval king could go. But when he goes on to assert that Henry thought of the state "as a personal thing," "as a narrow entity independent of the mass of men composing it," and that such a government had not the stability of "Old German government — single government of self-disciplined men," he seems to me to have seriously misread history. Surely it was the work of Henry II in founding a common law which made possible the growth of that sound collective feeling for the common law which, right down the ages, has been the main factor in securing for England constitutional government, and in preserving for the world one example of the successful working of such a government. Much of the collective opinion of Henry II's day would have been hostile to his reforms; and if history teaches anything, it seems to me that it teaches this, — that a sound collective opinion in the nation at large is the product of the teaching of a sovereign state, the powers of which have been used justly, because they have been entrusted to its more competent and saner members. Then, too, because Mr. Bigelow unduly depreciates the effects of Henry's reforms, it seems to me that he unduly appreciates the ideals of Becket. He regards Becket as the exponent of the collective ideals of the people as against Henry's attempts to impose upon them the sovereignty of the state. "The new primate," he says, "had behind him as no other ever had the body of the people; now, not to be exploited as they had been, and as the king was willing to have them still, but to be forwarded in a way, as Becket clearly saw it, to give the needful help, the popular help for the monarchy; in a word, to relieve the lower classes, so sore depressed, ultimately of disabilities, in accordance with the teaching of Christianity — to find the serf and leave him man." But I think that what Becket had at heart was far more the interests of the church than the interests of the people; and it is certain that his claims, if realized, would, by preventing the common law from becoming "the sovereign law of king and people," have retarded the development of the nascent English state. Let us remember that the one point in which his ideas partially prevailed gave rise to that monstrous anomaly the Benefit of Clergy.

It is this hero worship of Becket and his supposed ideals which has, it seems to me, inspired Mr. Bigelow with some erroneous ideas as to the effects of certain developments in our English legal history. He considers (and perhaps with reason) that the English development of the jury system had a very unfortunate effect on the development of the law of evidence, and that it was

not until the rise of the Court of Chancery that the absence of a law of evidence was supplied, and then inadequately. He considers that this and other defects of English law would have been remedied if, under the leadership of Becket, a further and larger reception of Roman law, canon and civil, had taken place. In particular there would have been no divorce between law and equity — "the Judicature Acts took a long step in the right way, but they should have been unnecessary. The step should have been taken in the reign of Henry Plantagenet. Thomas of Canterbury had the mind and the courage to take it, but an untimely issue of jurisdiction turned him away and slew him."

But if there had been a further reception of Roman and canon law, if the jury system had gone down before it, the experience of continental nations makes it quite clear that the inquisitory system of the canon law would have been introduced into our system of criminal procedure. Mr. Bigelow doubts whether this would necessarily have been the case; but it is difficult to see how England could have escaped the inquisitory procedure which the other states of western Europe sooner or later adopted. Like those other states, England would have had no alternative. To have avoided that result is worth a great deal more than a slow or even a distorted development of a law of evidence. Moreover, if English law had become more Romanized, it is difficult to see how our independent common law could have grown up on native lines, and become the one great rival of the Roman system. If this had not happened, the jurisprudence of the world would have been infinitely the poorer, and not only the jurisprudence of the world. When, in the sixteenth century, the tide was setting strong for absolutism, it was the constitutional ideas which had been drilled into Englishmen by the common law, it was the English Parliament which alone among mediaeval representative assemblies had been made an efficient organ of government by the common lawyers, which saved for England and the world the mediaeval ideal of the rule of law, and preserved the pattern of a constitutional state. Could these results have been achieved if English law had been thoroughly Romanized in the twelfth century?

It is for these reasons that I think that, though Mr. Bigelow's theories have much to commend them, they are hardly advanced by historical arguments which are based upon readings of history, which are, to say the least, highly disputable; and by deductions drawn from them which are perhaps even more disputable. In the sphere of legal history these deductions seem to me to have been productive of serious error; for they have led Mr. Bigelow to condemn the results of certain developments in English legal history without a sufficient consideration of what seem to me to be decisive reasons for thinking that these developments have been productive of infinitely more good than harm. I think that if Mr. Bigelow had cared to glance at the Tudor period, he would have found that some aspects of the English polity during that period show a more serious and a more considered attempt to adjust impartially the claims of collectivism and individualism than has been shown at any period before or since. Lessons drawn from that or from some later period would have been more valuable, both because the facts are better ascertained and because the problems then confronting the state were necessarily more akin to the problems which confront us to-day.

W. S. HOLDSWORTH.

UNIFORM STATE LAWS IN THE UNITED STATES, Fully Annotated. By Charles Thaddeus Terry. New York: Baker, Voorhis & Co. 1920. pp. 688.

This unpretentious volume calls attention to the collected work of the Commissioners on Uniform State Laws. The laws hitherto recommended by them, twenty-three in number, are here reprinted and indexed, and annotated with the decisions of the courts up to the time of the issue of the book.

In the case of the Acts more recently promulgated, and those of narrow scope, the annotations are not extensive; but the annotations to the commercial laws by which the work of the Commissioners is best known, consisting of the citation of all decisions on the various sections, are extensive, since the editor's aim has been to make the book exhaustive in this particular. The labor involved in collecting these decisions, and the value of the work, are quite out of proportion to the bulk of the volume.

The Negotiable Instruments Law has been enacted in every state but Georgia and Texas; the Warehouse Receipts Act in nearly as many; the Sales Act in almost all the northern commercial states, and in several others. The Stock Transfer Act, the Bills of Lading Act, the Partnership Act, have also been adopted in many states, and the number is steadily increasing.

No lawyer in practice where these statutes are in force can afford to be without this volume. The author's name is a guaranty of the care and ability with which the work has been done. No one has done more than he for the cause of Uniform State Laws. He has been a Commissioner during the period when all but three of the statutes which he prints were promulgated. For three years he was President of the National Conference of Commissioners; and his energy, sound judgment and learning have at all times been at the service of the work.

The statutes are carefully indexed, and are provided with tables showing the statutory citation of each section of each statute in every state where the Act has been enacted.

It is to be hoped that this book will be not simply a convenient tool for the practitioner, but will also fulfil the object which its editor had in mind of promoting the cause of Uniform State Laws. This is desirable not only for more obvious reasons, but to diminish the tendency and apparent necessity of extending or amending the United States Constitution to cover all questions where a uniform rule throughout the country is desirable.

It goes without saying that merely enacting uniform statutes will not secure uniform law, unless there is uniform construction of the statutes. Each of the Uniform Acts, except a few of the earlier ones, has contained the provision that the Act shall be so construed as to effectuate its purpose of making uniform the law upon the subject in the several states which enact the statute. This provision is designed to substitute for the ordinary canon of construction that a statute will be construed with reference to the previous common law of the state, a wider principle which will give to decisions of one state upon a question involving a uniform state law the strongest persuasive authority in the courts of another state when the question there arises. This principle of construction has been approved by the Supreme Court of the United States in *Commercial Nat. Bank v. Canal-Louisiana Bank*, 239 U. S. 520.

We have nothing but commendation for the plan of the book and for the way that the plan has been carried out.

S. W.

WATER RESOURCES, PRESENT AND FUTURE USES. By Frederick Haynes Newell, D. Eng., Professor of Civil Engineering and Head of the Department, University of Illinois. (A revision of the addresses delivered in the Chester S. Lyman Lecture Series, before the Senior Class of the Sheffield Scientific School, Yale University.) New Haven: Yale University Press. 1920. pp. 310 (including preliminary matter, photographs and index).

The author is one of the nation's eminent civil engineers. His service as former Director of the United States Reclamation Service is well known. The book is a carefully analyzed presentation of stream flow, reservoir structure,

hydrology and scientific information upon water resources, presented for popular reading and to cultivate public sentiment for public improvements; very readably written, without incumbrance of references. It is at its best in depicting the ingenuity of engineers and the physical difficulties which they have met and surmounted.

The portions for a law review are the opening and closing chapters, reflecting the attitude of engineers toward the condition of the law. Among occasional comments in the rest of the book may be noted the confidence expressed in the impartiality and validity of the conclusions reached, from conflicting expert testimony, by the court in the Miami Flood cases (pages 146-47). The attitude of the author toward the law is, however, mainly critical; the rules of law are "artificial relations," "obstacles erected by man" which "block his (the engineer's) way," as "invisible walls," leaving him in "chaos" (e.g., pages 39, 292).

Lawyers will admit that the law has its shortcomings; but we cannot admit, as the engineers are in the habit of charging, that in comparative efficiency the law as a whole is below engineering. The same comment would apply to the book in the same series written by Professor Swain, of Harvard ("Conservation of Water by Storage," 1915, Chester S. Lyman Lecture Series of 1914). The best defense being a stout lance, we might reply that engineers think upon the basis that the natural resources should be at their disposal to handle without the restraint of law, according to their judgment of "the greatest good of the greatest number"; and if that power is granted to engineers, the transportation and food industries can be claimed for the same purpose by the labor interests. The further one gets into the law, the more it seems that the engineers' criticisms are less a criticism of the law than impatience with men for requiring to be restricted by law.

The word "reconstruction" is used by the author as synonymous with "conservation" as formerly used, and both are used as receptacles for unalloyed good, free of all impurities (see pages 25-31, 190); "the greatest good for the greatest number," "reconstruction" of man, things, laws "from the ground up." Although published in 1920, the lectures were given in 1913, and the Russian experience of remaking the world may raise some skepticism in the reader; but assuming that we go through such reconstruction, the influence of water resources thereon would still, if we may be permitted the suggestion, seem to be somewhat over-emphasized by the book (e.g., p. 30). Mr. Pinchot sought to control the nation's destiny by controlling the forests; wood and water alike ramify through all human activities, but beyond a certain point the relation becomes too remote to be credited to either. Similar considerations may be illustrated by some sentences condensed from Angell's preface to the first edition of the first American law book upon waters. "At a very early period" (he says), "as well as at the present day, the human mind was employed in observing and admiring these aqueous circulations of nature. 'Where a spring rises or a river flows' (says Seneca), 'there we should build altars and offer sacrifices.' And who has not perused the ode of Horace to the fountain of Blandisium? Or the address of Petrarch to that of Vaucluse? With what elevation and sublime emotions do we contemplate the rivers of our own country? How frequently do we ramble in imagination, till the mind is confounded in the mazes of its own wanderings" etc. (Angell, *Water-courses*, 1st ed. (1824), preface.) In the march of social progress, inland waters will, of course, be essential; but so will many other things. At present the development of oil resources seems to be exercising more influence.

In a book emphasizing the social aspects, it is unexpected to see the adoption of the point of view that "we may properly consider it [water] as a mineral, a portion of the rocky crust of the earth" (page 36), which the social objects to be attained require to be denied. (22 HARV. L. REV. 100; 27 HARV. L. REV.

530. Compare Mr. Newell's page 293). In regard to relative social importance of uses, Mr. Newell (pp. 38, 179-180) ranks them: (1) drink, (2) food by irrigation, (3) sewage, etc., (4) manufacturing and power, (5) transportation. But engineers make slips in social outlook as well as lawyers. We read that the present tendency is that "one simple procedure is followed day and night continuously for months from the time the structure is started until it is finished" (page 139), which is not elevating for the individual who does it. And the engineers seem to discuss (without Mr. Newell's approval, however) the valuation of a domestic water supply by the money value of the persons served (page 183), which is very much the same basis as that used (page 235) to figure the value of alfalfa by the value of the pork it will produce.

The lawyer who wishes an introduction into general ideas of water engineering (and lawyers who have work in that line should have some idea of it) will find Professor Newell's work an authoritative treatise upon these engineering matters, well and attractively written.

SAMUEL C. WIEL.

HARVEY HUMPHREY BAKER, UPBUILDER OF THE JUVENILE COURT. By the Judge Baker Foundation. Concord, N. H.: The Rumford Press. 1920. pp. 133.

This little volume, the first of a series of publications to be issued by the Judge Baker Foundation, is primarily a memorial to the pioneer Judge of the Boston Juvenile Court. It is consequently somewhat varied in content, containing not only Judge Baker's review of the first five years' work, and a reprint of his article on the procedure of the Boston Juvenile Court, but also several other contributions. These last consist of a biographical tribute to Judge Baker by Roy M. Cushman, a series of statistics, for purposes of comparison, of the second five years' work, and a brief article on the work of the Judge Baker Foundation by William Healy and Augusta F. Bronner, managing director, and assistant managing director respectively, of the Foundation. The book therefore makes a varied appeal, to those interested in the personality of Judge Baker, to those who desire information on the actual operation of a notable Juvenile Court, and to those who are following the development of case diagnosis and treatment of delinquency.

The Juvenile Court, like many of the children with whom it deals, presents a problem in heredity. So far as the court is descended from the equitable jurisdiction of the courts, as *parens patriae*, it is a conspicuous success. The informal procedure, the fatherly attitude of the judge, the painstaking inquiry by doctors and psychologists to ascertain the causative factors of the delinquency, the free hand of the judge in devising remedial or protective measures, all make for the development of useful citizens and the consequent diminution of crime. On the other hand, so far as the court is a child of the criminal law, it carries within it the known weaknesses of its parent.

Conspicuous among these weaknesses is the matter of appeal, discussed at length by Judge Baker. In Massachusetts an absolute right of appeal exists in Juvenile Court cases and the judge must solemnly advise the child of this right. The result is that appeals are often taken in the most serious cases, where the judgment, skill and knowledge of the Juvenile Court might be employed best for the child's benefit or for the protection of the community. Once the ponderous machinery of the criminal law is invoked, the chances of constructive action become almost zero. For many reasons the district attorney does not like prosecuting children; for obvious reasons, a jury, saturated in the atmosphere of the criminal court, is unlikely to convict a child; and if the case finally does reach the Superior Court judge for disposition, the matter does not receive the careful consideration which the Juvenile Court is prepared to give. Thus

the matter of appeal represents a real flaw in the handling of juvenile delinquency. To make matters worse the appeal not only operates against the child's own welfare and the best interests of the community, but also the knowledge on the part of the Juvenile Court judge that an appeal may be taken sometimes influences him against his better judgment in the disposition of cases before him.

The question of appeal is only one of many problems arising out of the procedure and position of the Juvenile Court in our judicial system. Judge Baker in his book makes certain recommendations with respect to appeals, which have not been followed by legislation. It would be interesting to know how other communities handle this and other problems. The time seems to have arrived when a complete critical survey of Juvenile Court methods and procedure should be made somewhat along the lines of Mr. Reginald H. Smith's recent report on the administration of justice in his book "Justice and the Poor," published by the Carnegie Foundation. Such a survey would place in the hands of those generally interested in the Juvenile Court the material needed for the development of more effective technique and a basis for procedural and legislative changes.

HERBERT B. EHRMANN.

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A NEW PROVINCE FOR LAW AND ORDER. — III

READERS of the HARVARD LAW REVIEW who have perused the two previous articles¹ under this heading (November, 1915; January, 1919) may be interested in reading of the more recent developments of the Commonwealth Court of Conciliation and Arbitration in Australia.

There are three main aspects in which the results of such an experiment may be considered: (1) how far continuity of industrial operations is secured; (2) how far the conditions of the workers have been improved; and (3) how far the use of human life for industrial processes has been reduced to system and standardised. The first aspect appeals mainly to the employing class; the second to the employees; the third to those who study the development of law and order in human relations. All three aspects concern the whole community.

(1) Never has there been such industrial unrest as at present throughout the world. Owing to causes which I need not stay to consider, the cost of living everywhere has risen during the Great War; and it is still rising. There is a shortage of commodities; the demand for labour has increased, and much exceeds the supply; the strategic position of the class who take employment is temporarily superior to that of the class who give employment. Vague and ill considered proposals for the immediate introduction of a new social order have been spread abroad, and in remote Australia as well as

¹ "A New Province for Law and Order," I, 29 HARV. L. REV. 13; "A New Province for Law and Order," II, 32 HARV. L. REV. 189.

elsewhere. In the whirling confusion of the times how far has this Court aided in securing the continuity of industrial operations? For the answer to this question we are largely indebted to a rash speech made by a federal Minister some twelve months ago. Possibly the speech was meant to prepare the public mind for the enunciation of some government policy not yet disclosed. The Minister quoted the Commonwealth statistician as showing that there were 1647 strikes in Australia during the years 1914-15-16-17; and he said that the hopes of the framers of the federal constitution, in inserting the provisions under which the Court has been created, have been disappointed. Of course it is not the practice to treat police as useless because order is not always kept in the streets, or to treat criminal courts as useless because there are still crimes. But let the challenge be accepted as it stands. So far as can be traced only three of these 1647 strikes occurred in disputes that could possibly be entertained by this Court. It is not quite clear as to the third, but I give to the opponents of the Court the benefit of the doubt.

The Court is empowered to deal with such disputes as extend beyond the limits of any one state; and before the Court was created there were many strikes in such disputes. Even from 1904, when the Court was created, up to May, 1919, there were only three disputes at the most within its jurisdiction that were accompanied by a strike — partial or general. It is true that there was another, a very serious strike in 1917, and that it extended, as a "sympathetic" strike, beyond one state; but as the dispute was between engineers employed by the state railways of New South Wales and the New South Wales government, and as, under the accepted law, this Court could not touch the state railways, the dispute was outside its jurisdiction.

The greater the existing unrest, the more remarkable do these figures appear. In article II, I have disclosed the circumstances of two out of the three strikes. Yet a Minister for labour in Great Britain (Sir Robert Horne) said, a few months ago, that the Act is an admitted failure. I do not know where he got his information; perhaps from newspapers, perhaps from the speech of the Minister. At all events, the eyes of the public have been opened by the publication of the figures; and the speech of the prophet has ended in a blessing instead of a curse.

But apart from these telling figures there have been, to my personal knowledge, many cases in which strikes would have occurred but for the influence of the Court. It is quite a common thing for the officers of a union to restrain their members from strike on the ground that the claims are to be brought before the Court, and that the Court will not deal with them if the members strike to obtain what they seek from the Court (as in the coal miners' strike mentioned in article II). For the Court refuses to exercise its powers (at the instance of the union) under the pressure of strike. There is then no guarantee of resumption of work unless the Court grant just what the union asks; and the Court refuses to act under such constraint. But of the number of strikes that have been averted through the influence of the Court no record is kept. Since May, 1919, however, the number of strikes in disputes which the Court has power to handle has increased. There was, first, the seamen's strike, May to August, 1919; then the marine engineers' strike; and now (July, 1920) the gas strike. The facts of these strikes are worthy, each, of separate study.

I include the seamen's strike, although it now appears from a decision of the Full High Court that the dispute as to wages and most of the conditions was not within the jurisdiction of the Court of Conciliation at all; for the parties were at the time under an award whose term had not expired. But as the dispute was at the time believed to be and treated as being within the jurisdiction, I include this strike in my list. The men were excited by the exceptionally high rates granted in Great Britain and in the United States as a consequence of the war. Australian seamen had prided themselves on being the best paid in the world, and now found themselves left in the rear. They did not stay to consider that the cost of living had increased far more in Great Britain and in the United States than in Australia; according to the latest figures of the statistician, the increase in Great Britain since July, 1914, is 133 per cent; in the United States 96 per cent; in Australia 63.5 per cent. They did not stay to consider that the increase in rates was largely due to the risk from submarines. They did not stay to consider that the enormous increase in American rates was due to the efforts made to find competent men for the new merchant fleet of the United States. In Australia the government was, for the time, the principal shipping employer; for under the exigencies of war the government had purchased

many ships, and had also taken over on charter, on a tonnage basis, nearly all of the Australian interstate ships and crews, but on the condition that any increases in wages should be borne by the government. So the union approached the government controller, in April, 1919, with demands for increased rates and other matters. The controller refused to grant any concession; and the men left the ships. Then, and not till then, the controller asked the President to call a conference. Having called it, I found that the men were directed by leaders who had come from other countries and who were not familiar with or favourable to our Australian methods. One of the leaders, a man from Jersey, waxed indignant because the Court had not, in its previous award, granted provisions for better accommodation for the men, and was much perplexed when told that the Court could not have granted what had not been claimed. These leaders, coming from other parts of the world, believed in direct action — compulsion by strike; the Court was a mere capitalistic device, etc. The men were not to go back to the ships until they got what they wanted. The President refused to refer the matter into Court for consideration until the men returned to the ships, as the Court could not act freely under such conditions. The distress caused to the public by the stoppage of the ships can easily be imagined. The government, it was said, must do something; so a federal Minister held a private conference with the leaders, and, on the men returning to the ships, immediately announced that he had granted concessions. The concessions included the full increase in rates that the union sought. Each A. B. got £14 per month (in addition to keep); each fireman, £16. No reasons were given.

It is easy to purchase peace in this way — for a time. But in granting the concessions the Minister did not provide for the other ratings in the ships — the officers, the marine engineers, the cooks, the stewards. He did not treat those who had not struck as well as those who had. The effect was soon apparent. The marine engineers struck. These are well-trained fitters who pass examinations in theory and in practice; and, having the control of the firemen in the stoke-hold, they have always been paid higher rates. But now the junior engineer found that the fireman who was under his orders got £16 per month, whereas he himself got only £15.10. It so happened that the Full High Court had just decided that a union which is under an award whose term has not expired could get no

relief from the Court of Conciliation; and the engineers were under such an award. They had no remedy but strike; and they struck. They imitated the seamen; and by strike the junior engineers were successful in getting from the government £19 per month, instead of £15.10. When the seamen returned to the ship, the stewards, and others, were also thrown out of work by the seamen's action, — refusing to sign the ship's articles again unless they got proportionate concessions; and they got them. The masters and officers also insisted on proportionate concessions, and they would have struck but for the Prime Minister promising, at the last hour, to give them.² The charter party was terminated by the government in April; the shipowners have now to carry on business as best they can; and the Court has to try to bring order into the chaos created by the government. For the other unions are quick to understand what really has happened.

As for the Gas strike the trouble is just over. In December, 1919, the members of the union employed by the Metropolitan Gas Company of Melbourne struck for higher wages. The dispute was not within the competence of the Court, for it did not extend to any other state; but after three or four days the Premier of the state, fearing that the city would be left in darkness, called the leaders to confer with him. The result of the conference was that the company granted increased rates, and proceeded to increase the price of gas. December was a summer month; and the union was emboldened to try the effect of a threat to strike in winter. Most of the poorer classes use gas for light, for heat, for cooking. In May last the union presented a huge log of demands to the principal employers in several states, including demands for higher wages, for a limit of 40 hours' work per week, etc., etc.; but the union wanted certain immediate concessions as from the 30th of April. There was fair reason for asking for immediate concessions if we assume that the claims were fair; for it had been decided by the Full High Court that, under the Act, an award if made could not cover the full time to which the dispute related, but only the time subsequent to the award. The Gas companies of Melbourne and suburbs offered several concessions, including a higher basic rate all round, and (at my instance) higher secondary rates, and a weekly hiring instead of a daily hiring. But the union insisted on a still higher basic rate, and struck for it

² March, 1920.

in Melbourne. The rate granted in December exceeded that to which the official statistics then pointed; and the rate offered in May exceeded it still further. Most of the employers who are parties to the dispute in the other states are municipalities who supply gas to the residents; and any rates that wealthy companies may safely grant must react severely on the small municipal undertakings. The union held out, however, and tried to get a special "tribunal" created by the Premier of Victoria to decide whether the men should get all that is claimed for the mean time, and not only the greater part of it. Of course, the union would like a special tribunal which is to confine its attention to the difference between that which has been offered and that which is claimed. It would stand no risk of losing, and it might gain something more — even as a bee, taking all that it can get from one flower, passes on to the next. Such is the result of letting men cherish hopes of a supplementary tribunal, which in order to get temporary relief for the public is constrained to yield anything that will put an end to the strike — and thereby foments more strikes. The practice of creating, or purporting to create, special tribunals originated with the federal government in the coal case of 1916, and the gas union thought it could force the state Premier, as the federal Prime Minister had been forced, to appoint such a tribunal. But fortunately the state Premier (Mr. Lawson) saw the folly of the course proposed (as well as the unconstitutionality), and firmly refused to comply with the union's request; and after about seven weeks of strike the men have just returned to work on practically the same terms as had been offered before the strike. Certainly they have gained nothing that they could not have gained if they had never struck work at all. All the suffering which they inflicted on the public as well as on their own families has failed to produce any favourable result. It has been a sad and bitter lesson, but it will aid the methods of reason as against the methods of force — of strike. The union wants now to have the whole dispute referred to the Court.

It is hardly necessary to point the morals to be derived from the facts of these strikes. An employer is unwise as well as unjust if, when yielding to strikers, he does not give as handsome concessions to those who have not struck. Due proportion must be maintained between the several ratings or classes in any one industry, and, indeed, between different industries. To purchase present

relief from strike pressure by tampering with the balanced system of the legitimate tribunal invites further strikes. The more you yield to strikes, the more strikes there will be. It is not only illegal, it is an encouragement of strikes to create or purport to create a special tribunal to overrule the legitimate tribunal. "Nothing can be more injurious to the steady prosecution of the industries required by the public than to concede to a party dissatisfied with an award, a new tribunal specially appointed to override the award, or even to decide as to the propriety of the award."³ An executive government, from its very nature, is the worst arbiter or intermediary that can be conceived in industrial disputes.

(2) But how far have the conditions of the workers been improved by the Court?

There appeared in the *London Times* weekly of 5 March, 1920, a communication from a special correspondent in Australia. It said:

"There is much discontent too with the whole arbitration system, which official labour roundly declares to be a failure."

The Registrar brought this statement under the notice of Mr. Grayndler, the General Secretary of the Australian Workers' Union, the largest union in Australia, the union which has been the backbone of the official labour movement; and Mr. Grayndler wrote:

"The statement in the *London Times* of 5 March, 1920, viz., 'That there is much discontent too with the whole arbitration system, which official labour roundly declares to be a failure,' is quite contrary to facts. There has not been any such declaration by official labour, and by far the majority of the unions of Australia favour arbitration.

"As General Secretary of the Australian Workers' union, by far the largest union in Australia, comprising 102,000 members, I can say that my union is a strong supporter of the arbitration system. Whatever shortcomings or troubles that exist or arise, are due to the limitation of the Act itself and not to the system. Many of the defects in the Act could be remedied by legislation, and if the defects were removed or the powers of the Court enlarged the arbitration system will prove a great gain to the nation as a whole.

"The unions which have favoured the arbitration system still continue to do so, and are strongly of opinion that it is infinitely better than

³ Waterside Workers' Tribunal case, 1920—not yet reported.

the method of direct action, which, after all, very few of the unions have adopted.

"The results however obtained by the unions which have followed the arbitration system, during the last ten years, are far better than anything gained in Australia by direct action. . . ."

This statement is, at the least, explicit. The shearers in the wool industry formed the original nucleus of this union; they are piece-workers; and they have had their rates raised from 20s. or 18s. 6d. per 100 sheep in 1907 to 30s. per 100 in 1917; and the attendant shed hands, cooks, woolpressers, etc., have also gained proportionate increases. The conditions of living and working for these seasonal workers while on the sheep stations have been made far more worthy of civilized men. As for the permanent hands — the "station hands," who assist the pastoralists on the property throughout the year, their wages have been lifted from 20s. or 25s. with keep to 48s. with keep, and to 72s. per week without keep under the last award.⁴ Family life on the station has been encouraged by the award; for if the employer provides a residence, etc., he is allowed to deduct the value from the wages. The value has to be fixed with the consent of the union or of a board of reference. I have trustworthy information showing that men of a much better class than heretofore apply for employment as station hands, as a consequence of the new conditions.

This union has under its shield also the fruit pickers and others who work in the orchards, the wheat lumpers, and all kinds of employees who work in the country; and their positions have been much improved by the Court.

But let us consider the advantages gained through the Court by the seamen, firemen, and other seafaring men — probably the most helpless, the worst treated of all workers. Being always on the move, always dispersed, they have not been so able to combine as others for the improvement of conditions. The A. B. seamen have had their rates raised by the Court from £7 per month in 1911, to £12.5 per month in 1918 — 75 per cent; and the other ratings have been raised proportionately. The Court has applied to seamen, firemen, engineers, officers, the principle of the eight-hour day at sea and in port — a privilege never previously conceded to seamen, I understand, in any part of the world. Not only has the eight-hour day

⁴ Shearers' case, 11 Com. Arb. 389 (1917).

been granted, but the men get five days off per month (to compensate for lost Sundays or holidays), either in their home port or other suitable port. For every such day not granted, the men get double rates. They also have gained, from the Court, annual leave of fourteen days per annum on full pay. The marine cooks and stewards have made similar gains through the Court, although their hours cannot be regulated on exactly the same lines.

It would be impossible, without a long and laborious analysis of the awards, to give any adequate summary of the benefits which the employees have obtained through the Court; but I may state a few more which occur to me. When the Court came to deal with stokers at furnaces, and with other men engaged in continuous processes, these men had to work seven days per week, year in, year out; now, they work only six days, under rotation schemes. Men working in retort houses now get a week's annual leave on full pay. In clothing factories and shops, girls and women have had their hours reduced by the Court from 48 hours to 44 per week; and, for practical reasons, the men have to enjoy the same reduction. Females get the same minimum rates as men, when in competition with them.⁵ Workers are allowed to form such associations as they think fit.⁶ Full craftsmen are protected from unfair competition with low-paid machinists.⁷ Weekly wages have been substituted for daily or hourly, wherever possible.⁸ Workers have to be paid for all time of duty, whether the employer has work for them in all such time or not.⁹ By a system of averaging their actual hours of employment casual workers get a full living wage; for "they also serve who only stand and wait."¹⁰ The basic or living wage is computed and awarded on the principle that a normal man has a family and must earn sufficient to support it. Nor is the basic wage confined to the money necessary for the main requisite of life, — food, shelter, clothing; it allows something "to come and go on." The wage is based on civilized conditions — "the normal needs of the

⁵ Fruit case, 6 Com. Arb. 61 (1911); 13 Com. Arb. 171 (1919).

⁶ Liquor case, 12 Com. Arb. 652, 654 (1918).

⁷ Coopers, 12 Com. Arb. 427, 439 (1918).

⁸ Glass Founders case, 12 Com. Arb. 478, 486 (1918); Ship dockers, *ib.* 623 (1918); Gas, 13 Com. Arb. 454 (1919); Coopers, 12 Com. Arb. 427, 443 (1918).

⁹ Coopers, 12 Com. Arb. 427, 444 (1918); Waterside Workers, 13 Com. Arb. 620 (1919).

¹⁰ Waterside Workers, 13 Com. Arb. 603 (1919).

average employee regarded as a human being, living in a civilized community." That wage as originally granted in 1907 lifted the standard of living for the poor; and in the recent troublous years it has followed closely the increase in the cost of living. Nor is the gain slight that men can improve their working conditions without stopping work or threatening to stop it — without punishing themselves and their dependants, and the community.

THE STANDARDIZING OF CONDITIONS

(3) Even employers are at last beginning to recognise the advantages derived from the existence of an impartial tribunal, such as the Court, so far as it reduces to system and order the conditions under which human life can be used for the purposes of industry. Recently, the Metropolitan Gas Company of Melbourne published a statement as to the value of minimum rates of wages being fixed by such an authority — a statement which would certainly not have been made when the gas employees first came before the Court and the company was doing all it could to crush the infant union:

"It must be apparent that employers generally, and the controllers of public utilities in particular, must have the guidance of some constituted authority to establish rules governing the fixation of the basic wage, and that once a principle is adopted it should be adhered to until some better method is found. . . . It has been claimed by the worker that the Arbitration Court is not an ideal tribunal; but it must be admitted that up to the present it has been of inestimable benefit to the employees."

Some directors of big undertakings, such as the Metropolitan Tramways trust, have actually agreed to vary the rates from time to time according to the system adopted by the Court. Frequently — more frequently than ever before, and as to other conditions as well as to wages — the union and the employers, after a study of the system adopted by the Court in analogous cases, make an agreement without any hearing, and the agreement is certified by the Court and filed, and thereby becomes an award.¹¹ It is also quite common now for the parties to ask the decision or guidance of the Court on a few main subjects in dispute, and then to agree as to all the other items — even hundreds of items — in the light of the

¹¹ § 24.

Court's findings; anticipating the application of the Court's principles. For instance, in the Clothing case,¹² there were 485 employers respondents to the plaint. There were 1065 claims as numbered (many more if the subdivisions of the claims were reckoned) of which 987 related to piece-work rates. The respondents who appeared concurred with the union in asking the Court to decide as to the basic rates for adult male and for adult female workers — as to the maximum hours of work, as to the propriety of a distinction in the rates for "order" goods, and for "chart order" goods, and as to two or three minor matters. The Court acted on the request, gave its decision, and the parties who appeared signed an agreement as to the other matters. Then the problem arose as to the respondents who had neither appeared nor signed. The Court treated the terms to which the signing respondents had consented as being fair terms for the other respondents also (in the absence of evidence to the contrary), and awarded to the same effect against the respondents who had not signed. A similar course was adopted in the case of the liquor trade.¹³ Again, as to the pastoral industry, the Court had made an award in 1917, prescribing rates and conditions for the many hundreds of respondents cited by the union. As it was pointed out that there were other pastoralists who had not been cited, the union undertook, at the instance of the President, to make similar claims as to these others. When this was done, the Court threw on the second set of respondents the burden of showing that what was fair for the first set would not be fair for themselves; and the second award was made to the same effect as the first.¹⁴

An instance of standardising on a different class of subject is afforded in the case of the waterside workers.¹⁵ In 1915 the Court fixed the limit of weight for bagged ore to be lifted by one man at 1 cwt.; for gagged cargo to be handled by one man at 200 lbs.; for cargo on a truck (one man) at 5 cwt.; but for a single package, 6 cwt.; for cargo on a trolley (two men) at 15 cwt. All parties now concur in approving of the limitations as preventing much friction. When the matter came before the Court again in 1919, none of the

¹² 13 Com. Arb. 634 (1919).

¹³ *Ibid.*, 43 (1919).

¹⁴ Pastoralists' Anderson case, 13 Com. Arb. 364 (1919).

¹⁵ 9 Com. Arb. 293 (1914); 13 Com. Arb. 614, 622 (1919).

parties asked for any change; and the limitations are accepted even where the award does not bind. It is also well worthy of notice that on state wages boards and other tribunals appeal is constantly made to the standards prescribed by the Commonwealth Court and to the reasoning of this Court as appearing in its series of reports.

Now it is quite true, as some workers say (according to the Metropolitan Gas Company's statement in the passage quoted), that "the arbitration Court is not an ideal tribunal." It could be made much better, more beneficial to all parties and to the public, if Parliament were to adopt the improvements which are recommended by experience. I mean to refer to some of them hereafter. But all who have experience in the control of industries will recognise the immense advantage it is to the working of the industries to have definite rules laid down by some constituted authority for guidance — not only as to the basic wage, as the gas company stated, but as to other matters — always provided that the authority does not interfere with the discretion of the management rashly or stupidly.

During these last few trying years Australia has found the advantage of having set standards as to employment in industry, and of having a tribunal ready and willing to apply these standards, and of providing a means whereby employees can get justice without the cruel and self-punishing device of strike; for, though we have our troubles, we have been free from such wide-spread stoppages and disorders as have occurred in Great Britain and in America.

MINIMUM RATES

As has been explained in the previous articles, the Court fixes the minimum rate by first finding what is called the "basic wage" — the reasonable living wage for an ordinary adult labourer — and then adding the "secondary wage" — the additional sum that in practice is paid to a man for the skill or other exceptional necessary qualifications of his class.

In finding the basic wage the Court uses a rough estimate which it made in an inquiry in 1907 as to "fair and reasonable remuneration";¹⁶ and the Court varies the 7s. per day, 42s. per week, as then estimated, in the ratio that the cost of living has increased since

¹⁶ 2 Com. Arb. 1 (1907).

1907. For instance, if it now takes 30s. to purchase as much as could be purchased in 1907 for 17s. 6d., the basic wage is found by this formula:

$$17s. 6d. \therefore 30s. \therefore 7s. : 12s.$$

The latest figures for Australia as a whole seem to give 12s. 9d. per day, 76s. 6d. per week, nearly £200 per annum; but the trend of the cost of living is still upwards. Effect is given, as far as possible, to the differences in the cost of living in different localities.

The estimates of the Commonwealth statistician as to the variations in the purchasing power of money are made on scientific lines; and although often attacked on both sides by men who keep their minds fixed on the variations of some specific commodities, such as clothing, they have always stood every test. But there is no doubt that the rough estimate made by the Court in 1907 ought to be superseded or revised by a new investigation made after so many years have elapsed as to the absolute present cost of living. I had hoped — and suggested — that the government would see fit to commit the investigation to the Commonwealth statistician and his staff, as they would handle the subject coldly and impartially, aided by their experience and facilities. But the government has seen fit to entrust the ascertainment of a fit basic wage to a commission consisting of some representatives of the employers and some representatives of the employees, with a distinguished lawyer as chairman. Such an inquiry, in such an atmosphere, must inevitably elicit evidence of a rambling kind on both sides, and representatives tend to become partisans. But we must hope for the best.

The basic wage is to be fixed on family lines, on the assumption that the male adult worker has to support himself, a wife, and three dependent children. This is in accordance with the assumption of the Court in 1907; and it is also in accordance with the United States Bureau of Labor and Statistics, December, 1919. Mr. Seebohm Rowntree in England, in his thoughtful study of the subject, "The Human Needs of Labour," has worked on the same lines. He says, as to the families of all classes in the city of York, that "if we were to base minimum wages on the human needs of families with less than 3 children, 80 per cent of the children of fathers receiving the bare minimum wage would for a shorter or longer period be inadequately provided for, and 72 per cent of them would be in

this condition for 5 years or more." He even recommends a scheme whereby the states should supplement the minimum in the case of larger families. The Deputy President, Powers, J. (now resigned), has made a recommendation recently to the same effect.¹⁷ But in determining the duty of the employer to his employee the Court does not compel a basic wage calculated on more than three dependent children.

It has been urged — and fairly — that if the workers are never to get an increase in wages unless the cost of living rise and in proportion to the increase in the cost, they never get an improvement in their real wages at all — wages as represented by the commodities purchasable therewith. Of course it is in itself a great advantage that by the system of increasing the money wages in proportion to the increase in the cost of living the standard of life is not lowered — is maintained throughout these critical years. The increase in wages made by the Court is far greater and steadier than could have been achieved by strikes. But the Court has done more. By a curious piece of good fortune, the standard of life was actually raised *at the beginning*, before the application of the statisticians' figures; and the raised standard — not the previous standard — has been upheld in the long series of awards. For the very first case that came before the present President was a special inquiry in which the President had to decide (for the purpose of an Excise Tariff Act) whether certain manufacturers were giving "fair and reasonable remuneration" to their employees; and he had to make up his mind what was fair and reasonable. His conclusion was that a wage of 7s. per day, 42s. per week, was the least wage that would be sufficient for wholesome living in Melbourne, and the manufacturers were not paying so much. The wage at the time for the labourer was 5s. or 6s. per day. I think that I am close to the mark when I say that even for men in regular work the average wage was not more than 5s. 6d. per day, 33s. per week. This would mean that the standard was raised by over 27 per cent in 1907; and this raised standard has been preserved in the succeeding awards, which prescribed increases proportionate to the increase in the cost of living.

The system is now, apparently, universally accepted as just and proper. It will amuse some of my readers to know that the

¹⁷ Metalliferous mining, 13 Com. Arb. 550, 559, 572 (1919).

Court was for some years the target for numerous attacks on the ground that the Court was itself the wicked cause of the increase in the cost of living. Worried housewives were diligently instructed by certain journals that the Court was to blame. They were also taught the "vicious circle" theory — the fallacy that an increase of wages is no real benefit to the worker — that (for instance) an increase in the wages of a worker in motor-car bodies involves an equivalent increase in the price of his bread and meat. But since it became generally known that the cost of living has risen in other countries as well as in Australia — indeed, much higher than in Australia — there seems to be silence at last on this subject of the wickedness of the Court.

SECONDARY WAGE

But the secondary wage — defined as above — has to be added to the wage suitable for the unskilled labourer. The Court holds that the inducement to acquire the extra skill of the artisan must be maintained. For the purpose of ascertaining the secondary wage, the Court looks to the margin allowed for the special calling in practice before regulation; and both employers and employees willingly acquiesce in this system.

During the violent financial upheaval caused by the great war, and because of the widespread uncertainty as to what would follow, the Court has not increased the secondary wage in proportion to the increased cost of living; it has merely maintained the same absolute margin.¹⁸ True, the additional commodities to which the skilled worker is entitled have increased in price also; but they are not so absolutely essential as the commodities necessary for wholesome living. Now that the war has ended, the question arises whether this cautious and conservative course should still be followed; but as the subject is to be discussed at an early date I refrain from further comment.

MINIMUM RATES AND SCARCITY OF LABOUR

In fixing minimum rates, the Court refuses to prescribe such rates as a temporary scarcity of the class of artisans or others enables the men to secure. For instance, fully qualified coopers are

¹⁸ Merchant Service Guild, 10 Com. Arb. 214 (1915).

scarce — for various reasons; and high-class breweries are willing to give coopers higher wages than the system adopted by the Court would justify as a minimum — that is to say, the basic rate with the addition of the appropriate secondary wage for training and skill. This seems to be a proper case for the play of the forces of demand and supply. If the rates due to a temporary scarcity were to be prescribed as the minimum rate, there would be unrest produced among artisans of the same grade as to whom there is not such scarcity; and, when normal times return, there would be complications also in the employment even of coopers.¹⁹ As stated in the *Waterside Workers' case*,²⁰ a minimum rate “means the least rate which the employer shall be allowed to pay, on pain of a penalty, whatever the state of the market for labour, or the need of the employee for work, whatever his efficiency and whatever the circumstances — agreeable or disagreeable.” This does not prevent the Court, however, from prescribing, or creating machinery for fixing, a lower rate for workers who are old or infirm — in obedience to § 40 (1) (b) of the Act.

A similar problem arose in the case of seafaring men of various ratings. Owing to the risk from submarines, and other causes which I have already mentioned, the rates offered to these men in other countries were hugely enhanced; and the Australian seamen and firemen claimed in 1918 50 per cent increase in their minimum rates. The Court refused to depart from its systematic standard for the minimum, but suggested the offer of a bonus under the exceptional circumstances:

“It may be that the Australian shipowners may have to outbid America by the grant of bonuses or otherwise, in order to retain seafaring men settled in Australia. It is obviously no more an offence for an Australian seaman to ship from non-Australian ports in order to get the benefit of the higher wages than it is an offence for a merchant to sell his goods in the highest market.”²¹

But the suggestion was not heeded. The government had many ships of its own, and had nearly all the interstate ships under charter. It did nothing, and allowed things to drift to the strike to which I have already referred.

¹⁹ *Coopers*, 12 Com. Arb. 427 (1918).

²⁰ 13 Com. Arb. 608 (1919).

²¹ *Seamen*, 12 Com. Arb. 752, 756, 757 (1918).

OFFENSIVE AND OTHER JOBS

Closely allied to this subject is the subject of attempts made by unions to get extra minimum rates prescribed on the ground of the job being dirty or offensive, or risky to life or health. I have dealt with this matter in both the previous articles, and I do not want to repeat myself. But the position taken by the Court is well illustrated by a recent case as to gas-works employees. Time and a half rates were claimed for "men demolishing retort benches in close proximity to hot retorts," for "coal trimmers in fiery bunkers," for boiler cleaners. Extra pay was asked also for men working in dust or fumes, for men cleaning acid tanks, for men working at a height of 20 feet (6d. more per day), of 40 feet (1s. more per day), of 100 feet (1s. 6d. more per day), and for men working over a permanent floor or staging less than 6 feet wide — whatever the other circumstances. The Court said:

"The risks involved may, of course, enter into a bargain for rates, but they are not to be considered in fixing minimum rates. Nor is it well, in the interests of the community, that employers should be encouraged to think that the Court sanctions the putting of human life in danger if certain extra rates be paid. Such rates encourage slovenly management, and indifference to the men's safety. It would be much better for the union to ask for some regulating conditions which would prevent or diminish the risks involved. If such regulating conditions are impracticable, it might be more appropriate to ask for a reduction of hours than for increase of wages." ²²

It was shown that a Victorian wages board had prescribed a higher rate for men working at a temperature of 130 degrees Fahrenheit. This had, at all events, the merit of definiteness — a merit which the union's claim had not. But it left the men working at 129 degrees or 125 degrees to the ordinary rate; it would tend to raise disturbing contrasts, and provoke unrest.

EXCESSIVE MEN

The Court refuses to grant claims made for an unnecessary number of men for a job, where the object of the claim is merely to reduce unemployment. For instance, the Waterside workers

²² Gas, 13 Com. Arb. 455, 456 (1919).

claimed that there should be six truckers at every hatch, six men in the hold or on deck of every vessel, two stackers and two gangway men for each hatch. Admittedly, the object was to compel the owners to employ more men; but more men were not usually necessary — in some cases they could not even be used. The Court cannot solve the problem of unemployment in this way. It is not fitted to manage a business concern, and will not interfere with the discretion of the employer as to the speed at which he wants to get his work done.²³

WEEKLY HIRING — CASUAL EMPLOYMENT

The Court holds that hiring by the day is better than hiring by the hour; and that hiring by the week is better than hiring by the day — wherever practicable.²⁴ Weekly wages fit in better with considerations of subsistence, and tend to greater steadiness in the prosecution of the work required by the community. Casual work, at hourly hiring, involves much waste of time and available human energy, and is injurious to the morale and physique of the workers. I have referred in both the previous articles to the case of the waterside workers, hired by the hour. These men, it is held, serve the employer and the public not only by actual work, but by waiting in readiness for the ships to come, and they must be provided with a living wage. To be more definite, the Court sets itself to find, as well as it can, the average receipts of the average man — the man of average competence, who takes work in this industry and in no other, who works or seeks work every day at the wharves. Having found that he averaged 30 hours per week, the Court prescribed 2s. 3d. per hour, which means 67s. 6d. per week, for 30 hours' actual work.²⁵ This is as near as the Court can go to a weekly wage for this average man. There is as yet no sign of organization among the employers such as would give full time of work every day at weekly wages. The principal difficulty arises from the needs of overseas ships, as there are long intervals between their visits to our ports.

²³ *Waterside Workers*, 13 Com. Arb. 614-615 (1919).

²⁴ *Ship dockers*, 12 Com. Arb. 623, 628 (1918); *Gas*, 13 Com. Arb. 454 (1919).

²⁵ *Waterside Workers*, 13 Com. Arb. 604, 606 (1919).

PIECEWORK vs. TIMEWORK

Some unions will not submit to piecework at any price; some insist on piecework. Some theorists fancy that piecework, with its higher rates for greater speed of output, is a solution for all labor difficulties; but they are mistaken. The matter was elaborately discussed in a dispute between the Amalgamated Society of Engineers and the Commonwealth government.²⁶ The Prime Minister, being anxious to get ships built at the greatest speed in the exigencies of the war, insisted that every union concerned in his shipbuilding scheme should agree to submit to piecework if required, or be excluded from employment. This union refused to make such an agreement, and brought the dispute before the President. The Court held that the refusal was justified. The expert managers of the shipyards admitted that they did not want to put men of this occupation on piecework rates; they knew piecework to be inappropriate in such an occupation, where there is little or no repetition work and the worker has to apply his mind afresh from job to job. On the other hand, the Court refused to interfere with piecework rates, refused to award timework in the place of piecework, in the case of coal lumpers. It will hardly be believed in other countries that mechanical appliances have not yet been substituted for human labour, in a port so important as Melbourne, for the dirty and monotonous carrying of coal in bags into and from ships.²⁷ In the case of wheat lumpers on piecework rates, it was prescribed that the receipts from piecework were not to be less than $1\frac{1}{4}$ times as much as timework rates.²⁸ In the case of the coopers the union sought to prohibit piecework. It appeared that many of the members desired piecework for the easier operations, whereas in many breweries the employers preferred timework, as it meant greater care in the production of the casks. The Court adopted the device of committing to the appropriate board of reference the function of determining whether piecework should be allowed and for what operations and in what places, and what the rates should be.²⁹ This is one of the numerous cases in which it would be expedient for the Court to have power to create a shop committee for each undertaking.

²⁶ 12 Com. Arb. 386 (1918).

²⁷ Waterside Workers, 13 Com. Arb. 615 (1919).

²⁸ Wheat, 13 Com. Arb. 814 (1919).

²⁹ Coopers, 12 Com. Arb. 427, 443 (1918).

NEED FOR POWER TO APPOINT SHOP COMMITTEES, ETC.

It is not possible, in an article of this kind, to state even a tithe of the problems which are presented to the Court, still less to state the solutions which have been reached. I can only refer those who may wish more specific information to our annual reports. They will see, for instance, in the Gas case, 193 different classes of occupations to be dealt with, and 547 items in dispute — all to be considered. But I desire to say something on general subjects, such as shop committees, compulsion in arbitration, defects in the Act, special tribunals.

Frequently in disputes the union makes a claim which involves a dispute extending beyond one state, but which cannot be determined justly or fitly by imposing one common rule for all the undertakings concerned. For instance, in the Gas case³⁰ it was claimed that when retorts are charged by means of scoops or hand shovels the maximum number of retorts to be drawn or charged in a shift should be 12. Now it is the clear duty of the Court to endeavour to secure, where there is an appropriate dispute on the subject, that human powers must not be overtaxed; but such a regulation as claimed cannot be justly made by an Australian court for all gas works under all conditions. The work is trying at all times; but though 12 may be a proper maximum in the case of old and defective retorts, it is not a proper maximum in all cases. If there is to be regulation of the number of retorts to be charged, if the discretion of the manager, *primâ facie* autocratic, is to be limited, the regulation should be made by some man or men having the particular work in sight for the time being. As to such a matter (not as to all matters) there is much force in the statement attributed to a Minister that the tribunal should be local; but he does not realize the limitation of the Constitution or of the Act; he does not see that under present circumstances there can be no system of local tribunals, except so far as the power to appoint a board of reference can be applied. In such a case as this, a power to appoint a shop committee would be most useful; but the government does not ask Parliament to give the Court such a power. The Court has therefore been compelled to make such use as it can of its power to appoint a board of reference,³¹ a power which is most unsatisfactory (as

³⁰ 13 Com. Arb. 457 (1919).

³¹ § 40 A.

explained in article II), but which has been made use of, where possible, long before the Whitley report of 1917 was published in Great Britain. The employers in this case strongly opposed the conferring of such authority on a board of reference. Their main fear was, as expressed, "lest the board should decide managerial matters that ought to be left to those responsible for the administration."

Now this subject, the participation of employees in matters of management of an undertaking, is sure to be prominent in the coming years; and it needs careful consideration in all aspects. Lord Leverhulme has dealt with it cautiously but sympathetically. Mr. John D. Rockefeller, junior, another great employer, has expressed himself as being in favour of the representation of employees in industries. Mr. Justice Sankey and the three independent government nominees on the coal mines' Commission in Great Britain — at a time when they were not prepared to recommend nationalization — said:

"We are prepared, however, to report now that it is in the interests of the country that the colliery worker shall in the future have an effective voice in the direction of the mine."

So the matter has been lifted out of mere abstract speculation; but employers in Australia do not seem to recognize the growth of the movement towards some share in the responsibilities of management. Mr. John Dewey, in the *New Republic* ³² seems to me to hit a point of vital danger when he says that the success in the movement for better wages strengthens "the power of wage earners to make demands for a still larger share in material products without creating among them a feeling of responsibility for industry itself." They should share the responsibility for the continuity and success of the industry. They should have "freedom to participate in its [the industry's] planning and conduct." Let them be in a position to "exercise their minds in connection with their daily occupations." In my opinion, there can be no stable equilibrium in the present position — "Here is your work; there are your wages; it is not your business to discuss to what work you are to apply your powers." The position which the Court takes up is indicated in the case of the Marine engineers:

³² May 5, 1920.

"I attach great importance to proper boards of reference for industries. They allow the discussion of grievances; they enable the employers to see the difficulties of employees, and employees to see the difficulties of employers; they supply to some extent the crying want of our modern industrial system — the absence of co-operation between the management and the employees. They often remove causes of friction before serious industrial trouble arises. Some day it will be a matter of amazement when men look back on our times and see what a wealth of experience is rejected in the working of industries. Under the stress of war in Great Britain, there are being developed industrial councils of all kinds, councils at which employees meet the management on equal terms for the discussion of the common problems of the industry; and these boards of reference should fulfil similar functions." ³³

Unfortunately, boards of reference do not completely "fill the bill." There is need of shop committees, as elsewhere suggested by the Court; ³⁴ but there is no indication that the government has even considered the suggestion.

The provision as to boards of reference has been also applied to problems arising in connection with waterside workers. These casuals, employed by the hour, naturally expect, under certain circumstances, to be offered higher rates than the minimum prescribed, as an inducement to undertake the work. For example, a vessel arrived with her hold steamy and offensive — the vessel having been submerged after a fire, and the cargo of linseed and jute having rotted. Another vessel arrived on which there had been virulent influenza. In each case there was need for speed in discharging, but delay occurs if there is to be haggling as to the wages. The Court has provided that men who proceed forthwith with the work, leaving the rates to be settled by the union official and the foreman, or, if they differ, by the board of reference, shall be paid the rates so settled. So far, the provisions seems to work well. The work required by the country proceeds pending the decision. ³⁵

COMPULSION IN ARBITRATION

From our Australian point of view, the objections so fiercely urged in America and in Great Britain to compulsory arbitration

³³ 12 Com. Arb. 665, 681 (1918).

³⁴ 13 Com. Arb. 681 (1919).

³⁵ Waterside Workers, 13 Com. Arb. 610-621 (1919).

appear to be fanciful and irrelevant. Compulsion may be applied at either of two points: compulsion to submit to arbitration before strike, and compulsion to obey the award. I do not know how far compulsion goes in the Norwegian act, or in the recent statute of Kansas; but so far as I understand from a journalistic statement as to the effect of a bill laid on the table of the French Chamber of Deputies, it is the former kind only of compulsion that is proposed to be applied in France, even in the case of gas and other public utilities. I may be wrong, as I have not seen the bill. Under the Australian act, both kinds of compulsion are applicable; and no voices, so far as I know, are now raised against either. Regulation by tribunals of some sort is accepted; it is welcomed especially by the unions — the great majority of the unions. In the next place, while it is quite true that well-drawn collective agreements would be, as to most subjects, preferable to awards, it is generally impossible to get such agreements. Sometimes there are thousands of respondents, often hundreds; many put in no appearance and will make no agreement. Even among the respondents who do appear, there are many who will dissent from certain proposals. If the Court has no compulsory power at all, it must very often wait in vain for universal consent. There will either be no agreement at all, or the agreement must be on the lines dictated by the most obstinate. With compulsion in the background, the agreement will be on the lines which the reasonable employers favour. Under the Act, the first duty of the Court is to try to get agreement; and only if and so far as it cannot get agreement as to a claim to award. The ideal of the Court is to get such a regulation as the parties ought to put in a collective agreement; and compulsion means merely that as to claims on which the parties cannot agree, or as to which some of the parties will not agree, the Court can make an award. Very often the mere fact that the Court has a power of compulsion in reserve impels the parties to find a line of agreement; and reasonable employers are more willing to make concessions when they feel that their competitors are to be bound by the same terms. In the analogous matters of protecting workers from dangerous machinery, of providing compensation for accidents, of limiting the hours for children's work, there could have been no relief if the workers had to wait for universal agreement on the subject; and legislatures have had to make such matters the subject of direct coercive enactment.

Moreover, as stated in article II, the dread expressed by certain theorists that compulsion would end in "a servile state" — a state in which the workers would be compelled to work in return for certain guarantees as to conditions — is unfounded, so far as our experience goes. It has been established here that a worker is not compelled to take work, any more than an employer is compelled to give work. From the nature of the case, the compulsion of an award is nearly always exerted on the employers. For, as the employers have had, until lately, by far the stronger economic position for bargaining, the employers do not (except very rarely) seek the protection of the Court. The employees seek it, and take good care not to claim protection against themselves.

DEFECTS IN ACT

The experience of the Court during some fifteen years of existence shows that the Act under which it works is very defective. This fact is not surprising, for the experiment is novel. For instance, there is the defect to which I have already referred, that the Court cannot appoint shop committees or industrial councils. Even the power to create a board of reference is defective. The Court is empowered to create a board to deal with any "specified" matter which under the award may require to be dealt with, but it has been held by the Full High Court that the Court must "specify" each difficulty to be dealt with before it knows what difficulties will arise.³⁶

Another thing: the Court has no power to enforce its own awards. Parliament purported to confer this power; but according to a decision of the Full High Court the provision is invalid because the President has not a life tenure in his office.³⁷ The enforcement of awards is held to be part of the judicial power of the Commonwealth; and it is held that, under sections 71, 72, of the Constitution, no judge can exercise that power unless he has a life tenure. There is this curious result, that proceedings for enforcement come before police magistrates who have usually a tenure at the mere will of the Executive. When I say that the parties strongly desire that the Court of Conciliation should itself authoritatively enforce its own

³⁶ See article II, 32 HARV. L. REV. 189.

³⁷ *Waterside Workers v. Alexander*, 25 Com. L. R. 434 (1918).

awards, I desire not to be understood as reflecting in the slightest way on the police magistrates. But I say that the more confidence the parties can feel as to the enforcement of awards (or agreements deemed to be awards), the more they will favour the settlement of their disputes by or through the Court, and the less will they heed those who incite to strikes. So strong is the preference for the Court, that the President is frequently asked by both sides to say what ought to be done when some difference arises, both sides agreeing to carry out his decision, whatever it may be.³⁸ Even where employers are not bound by the award, they sometimes ask the President's ruling with regard thereto. The state wheat board of New South Wales had just secured a decision from the Full High Court to the effect that the Court of Conciliation had no power to bind the board, being a government agency, as to its operations; but as the board could not get waterside workers to offer themselves for work except under the conditions of the award, it asked the Court to decide a doubtful point. The President decided it, in order to aid the board.³⁹ The Court has publicly stated that this power to enforce should be given, but the federal government has not stirred.

Again: it has been held by the Full High Court that under section 28 of the Act there can be no new dispute entertained by the Court of Conciliation during the specified period of an award, on a subject which has been dealt with in that award — even though quite new circumstances have arisen, though the actual claims in respect of the subject are different, and though there are parties to the new dispute who were not parties to the old dispute. Even if, since the award was made, the cost of living should have unexpectedly increased by 100 per cent and new claims made, the Court can give no relief; the employees must be left to the old way of seeking relief by strike.⁴⁰ Moreover, when the court, after the expiration of an award is in a position to make a new award, it cannot make the new award apply to the whole time of the actual dispute — *e. g.*, if increased rates be granted they must not apply to the time before the new award is actually made. Before this ruling was given, the Court was frequently able to get the men to offer for work, to continue the

³⁸ *E. g.*, 13 Com. Arb. 178, 194 (1919).

³⁹ Waterside Workers, 13 Com. Arb. 176 (1919).

⁴⁰ Gas, 27 Com. L. R. 72.

operations required by the country, by assuring them — generally with the consent of the employers — that the new rates would apply as from the beginning of the dispute. Such an assurance was a potent aid to continuity of operations; but it cannot now be given. The deputy-president as well as the President has called public attention to the crying need for an amendment of section 28; and the Full High Court has strongly recommended the Government and Parliament to give attention to the subject. But all the appeals are unavailing.

Further: it is of the utmost importance that the expense incidental to proceedings before the Court should be reduced as far as possible. Those who favour "direct action," the weapon of strike, are continually pointing to the expense of seeking relief through the Court. The main item of expense is that of bringing witnesses from long distances, and of keeping them until they have given their evidence. Lawyers are usually the scapegoat when people complain of expense; but, inasmuch as in the hearing of a dispute lawyers cannot appear except by unanimous consent, lawyers' costs do not usually affect seriously the aggregate of expenditure. But much expense could be saved if a separate application to the High Court to decide as to jurisdiction were made unnecessary. In 1914, Parliament certainly did service to the objects of the Act by putting an end to the practice, previously so common, of parties fighting the union on the merits, and then, if dissatisfied, applying to the High Court for prohibition — usually on the ground that there was no "dispute extending beyond the limits of any one State." By a new section, section 21AA, Parliament provided that the decision of a justice of the High Court, on an application separate from the arbitration, should be conclusive on the subject. But in place of allowing the President or deputy-president — both of whom are justices of the High Court — to decide this point of jurisdiction when the case is called on for conciliation and arbitration, Parliament has required a separate application. Not only are there costs of lawyers on this application, but the mere expense of serving every respondent with the summons is formidable. An application has to be made for leave to substitute service by letter instead of personal service; and each letter has to be sent by post and registered. Where there are, as often there are, hundreds or thousands of respondents, the expense is very substantial. The President

has recommended an amendment of the Act; but nothing has been done.

Then the judicial staff of the Court should undoubtedly be increased. At present, there is but one deputy-president; and the two justices are unable to overtake the increasing work. Industrial disputes will not brook "the law's delay." Claims for industrial relief are so live and urgent in these times of unrest that they cannot be postponed as Lord Eldon would postpone a decision involving the application of the Rule in Shelley's case. It is encouraging to find the unions — and the employers — so eager for the Court's assistance; but the assistance often comes too slowly. In New South Wales, the industrial Court of the state has three judges; in Queensland there are two at least; yet this Court, which has all Australia within its jurisdiction, has only two — sometimes one. It may be doubtful whether the Act allows more than one deputy; if doubtful, the Act should be amended. The President has appealed for more assistance — but the appeal is apparently not heeded.

The few defects which I have mentioned are defects which could be cured by parliamentary action, and Parliament, on such a subject, has to be led by the government. The government, however, is either unable to understand the need for amendment or is unwilling to aid the Court in its efforts for the public good. I can find no other possible explanation. But an alteration of the Constitution would be necessary if we are to put the regulation of industrial matters on a thoroughly satisfactory basis. At present the state Parliaments have control of the whole subject of labour with the exception of disputes extending beyond one state; employers are often harassed by having two sets of laws, state and federal, as to labour; and in a big undertaking there are often a dozen or score of awards to be obeyed, each drawn up independently, not harmonized with the others. In the first session of the first federal Parliament a resolution was unanimously passed in both Houses in favour of entrusting the federal Parliament with the whole subject of labour; and, if I may judge the views of the Prime Minister from certain amendments of the Constitution which he submitted to the country, but which the country has rejected for political reasons, he sees clearly that this is the true goal. I feel free to say something on this subject because of an application which came before me officially under section 20 in a recent case as to the pastoralist

industry.⁴¹ Disputes relating to shearers and shedhands have always been recognized as being peculiarly fitted for this Australian Court, and have been settled in this Court hitherto. The men move from north to south, from state to state, from pastoral station to station, as the season advances. The work throughout is substantially the same. The Queensland industrial Court, however, has this year — in pursuance of its undoubted power — prescribed (amongst other things) 44 hours per week as the maximum number of hours for Queensland stations. In 1917 the Australian Court did not see fit to depart from the Australian standard of 48 hours. It is easy to conceive the friction which this conflict of the awards creates. A shearer passing over the invisible line of boundary from Queensland into New South Wales will object to working 48 hours; and the shearers in New South Wales, Victoria, and South Australia will claim 44 hours as in Queensland. According to the newspapers, they are actually refusing to accept work except on the Queensland terms, as to hours and other conditions. Obviously, all the conditions of such labour should be subject to one final, co-ordinating Australian authority, such as would prevent invidious comparisons and unnecessary causes of discontent. In short, the conditions should be regulated on one system, though the system may allow suitable difference in detail.

This view is not at all inconsistent with the suggestion made by some federal Ministers that there should be local tribunals for local disputes. But, as the Constitution stands, the federal Parliament cannot create such tribunals — the disputes would not extend beyond one state. It is quite true that for certain points of difference local tribunals are the best — especially for such points of difference as boards of reference or shop committees might well deal with as above stated. At the same time, it has to be borne in mind that employees jealously watch any privileges which employees in other localities or other undertakings enjoy, and which they do not enjoy themselves; and it is clear that such other local tribunals ought to be subject to Australian revision. This means co-ordination to be effected by the tribunal which is Australian in its scope. At present, the unions are only too apt to treat the state and federal courts as competing shops, and they resort to the shop which is likely to grant them the most.

⁴¹ Pastoralists, 1920 — not yet reported.

SPECIAL "TRIBUNALS"

It is bad enough for the state and the federal Parliaments to be simultaneously dealing with the same subject of labour conditions; but there is "confusion worse confounded" when a government creates, or purports to create, novel special "tribunals." The first instance, I think, was that of the coal miners; the facts are set out in article II, and I do not feel justified in repeating here the sad story. The community was deprived of the coal it wanted, and as the President refused to arbitrate unless the Prime Minister left him judicially free, the Prime Minister appointed a tribunal which granted the miners' claims without evidence and without argument. The consequences of this yielding to strike, under the veil of a "tribunal," have been, as I pointed out in article II, disastrous; and the coal miners are now threatening a general strike unless further demands which they make be conceded.

Last year there was the seamen's strike, which I have already described. A Minister sat in private conference, and granted to the strikers all the wages they claimed, and other things. In its inception, this conference could not fairly be called a "tribunal;" for the government was, as before stated, the principal shipping employer in Australia; and an employer must always be free to confer with his employees or their union. But, as the Minister forced the other shipping employers to agree to the same terms as the government accepted, the conference became in effect a tribunal. The grave consequences of granting the concessions claimed without granting equivalent concessions to the men of other ratings who had not struck have already been stated. When the marine engineers struck, in order to get as good concessions as the seamen had got, the government then, and not till then, yielded along the whole line to nearly the full extent of the claims, but left it to a special tribunal, having an eminent soldier as chairman, to say how much of the balance of the claim should be granted. The tribunal sat; and the public have been informed that the members of the union are still discontented, as they did not get all that they asked.

Then there was the case of the waterside workers' "tribunal." The Court had refused, in 1918, to restore to the members of the union a right to preference in employment, or to restore the old practice of engagement at the wharves.⁴² The employers had

⁴² 12 Com. Arb. 277 (1918).

granted this preference in 1911 by agreement, but had duly terminated it in 1917 in consequence of the members having struck work in sympathy with New South Wales State Railway employees; and they also established bureaux for engagement, for the protection of the men who offered for work during the strike. The Court, finding that the work of the country was being done under the new arrangements, refused to interfere with them. The Ministers appointed a gentleman under a royal commission to inquire into the bureau system in Melbourne. It turns out now that his report was unfavourable to the abolition of the system; but in the meantime, and without disclosing the report, the Ministers announced that the bureau system was to be abolished. There is no pretence that this abolition was effected with the consent of the other shipowners. Then the Sydney members of the union pressed for a similar decision for Sydney; and the Prime Minister requested the shipowners to nominate representatives to sit on a "tribunal" which he had decided to create "with a view to effecting a settlement of matters in dispute on similar lines to those adopted in the case of Melbourne wharf workers." Some of the shipowners have objected, well knowing how such a tribunal, created *ad hoc*, would be likely to act; and the proposal for such a tribunal has, up to the present time, miscarried.

Next there is the Gas case, where the Melbourne gas employees struck work (as set out in the previous part of this article) in June, 1920. The Premier of Victoria was strongly pressed to create a special tribunal to decide as to the difference between what the Melbourne companies offered, and what the union claimed; but he has evidently seen the danger of allowing such "tribunals," and has refused to tread the primrose way which gives present ease and manifold greater troubles hereafter.

Apart from the unconstitutionality, the illegality, of such special tribunals (for the Crown, the Executive, has no power without an Act of Parliament to create novel tribunals), the practice of creating (or purporting to create) them is most unwise, most disastrous in its effects on industry, and on continuity in industrial operations. A special tribunal is really a device whereby the government tries to "save its face" when yielding to a strike. The tribunal is expected to grant the claims, just or unjust, so far as is necessary to induce the strikers to resume work. It secures present ease by

encouraging further and far greater trouble. As a child who finds that the more he cries the more he gets his way, will cry the more; so with men who strike. When Parliament provides a fair and even sympathetic tribunal to consider grievances, the government will not prevent but will actually induce stoppages, if it holds out the prospect of a second tribunal to supplement or supersede the decisions of the legitimate tribunal. If a government wanted to destroy the system of conciliation and arbitration, and to encourage unions to adopt the course of seeking remedies by holding up the community, it could not do so more effectually than by this practice of special tribunals. The proper course is obviously to watch and correct any defects in the legitimate tribunal; to make access to it easy and speedy and cheap; to take away from the employees all inducement to strike, all excuse for striking; to satisfy public opinion that for every real grievance there is a remedy on lines of reason; and never to yield anything to force, to strike.

THE AMOUNTS INVOLVED

It is evident that some people do not yet realize the importance of this great experiment, or the responsibility which rests on those who administer the Act, and, I must add, on those who interfere with its administration. It may be worth while to consider some figures. It appeared in the course of a case that in 1918 the interstate ships alone (apart from the overseas ships and State coastal ships) paid to waterside workers about one million pounds sterling. The rates were then increased from 1s. 9d. to 2s. 3d. per hour; so it may fairly be inferred that the increase of 6d. per hour would cost the interstate shipowners £285,714 per annum more at least. In another case, that of the pastoralists in 1917, some newspaper alleged that the increases in rates prescribed by the award involved the transfer of four million pounds per annum from the pastoralists to the employees. This statement was not verified; no person stands sponsor for it; but it was repeated as if gospel truth from newspaper to newspaper, from mouth to mouth. "How shocking that any Court should have such power." But the greater the amounts involved, the greater the necessity for giving to the Court all the assistance that it needs. The truth is that the Court transfers more money and affects directly more human lives than all the ordinary Courts of Australia taken together.

Assuming it to be established that the Court has greatly aided in securing the continuity of industrial operations in these troublous and critical times, that it has produced great improvements in the conditions of the workers, and that it has largely reduced to system and standardized the use of human life for industrial processes, the question yet remains, has the work of the Court any permanency for good? At this point, many generous, public-spirited theorists part company. Some of them have come to the conclusion that the remedy for all our industrial troubles lies in some socialistic scheme in which the whole wage system is to be abolished. Now I am far from deprecating idealism. There is no aspiration, no prayer, so ennobling as "Thy kingdom come." But though we think we see our distant objective, though we look with longing for that which is great and complete, as there float to our eager senses the "murmurs and scents of the infinite sea," we cannot confine the course of human movement to the exact channel which we mark out for it. What is to be deprecated is the opposition of idealists to any channel towards the ocean that is not of their own selection. The water must and will take its own course. In industrial unrest there is much more than mere wages. If the wage system could be abolished to-morrow, everywhere, if it were just and possible for the workers to get "the whole product of labour," there would still be need for regulation of the conditions under which human life — the most valuable thing in the world — is to be safeguarded from deterioration and degradation, is to get full opportunity for the full development of its powers. Where there are more wills than one, there must come collisions of will — and disputes; and even if the directors of industry were to be elected there still would be need for regulation. Regulation has come to stay.

Henry Bournes Higgins.

MELBOURNE, AUSTRALIA, July 31, 1920.

Since I wrote this article, the policy of the government has been announced in Parliament. I have been left to the newspapers of July 30th for information as to the policy. It is proposed in the bills (*inter alia*) to create special tribunals at the will of the government; and a minister may even refer to a tribunal a question whether something that a union has failed to obtain from the Court should be granted:

O navis referent in mare e novi Fluctus . . .

Nunc desiderium curaque non levis.

H. B. H.

NOTICE IN EQUITY

THE doctrine of notice as developed by the English courts of equity is simple, logical, and easily applied,¹ but in this country no other equity topic of equal importance is involved in so great confusion. In the use of terms and in the analysis of the subject the American authorities are in hopeless conflict. For this confusion certain text writers are mainly responsible, and while in their discussions of the subject the judges have followed these authorities, there is little conflict in the actual decisions of the courts. From these decisions it is believed that the doctrine of notice in equity as actually applied by the American courts may be reduced to a simple and logical statement.

Much of the confusion in the discussions of the subject has grown out of the failure to make some very simple distinctions, especially the distinction between notice in equity and notice in some other branches of the law. Notice is sometimes requisite to perfect a right, to fix or to prevent a liability, or to put in default the person to whom notice is given. Instances of such cases of notice are notice to a tenant to quit, notice to fix the liability of an indorser

¹ The English doctrine of notice in equity avoids all the artificial and confusing distinctions introduced by some of the American authorities. Notice, as affecting the *bona fides* of a purchaser is distinguished as express, implied, or imputed, all having the same effect as actual notice in American law. See JENKS' DIGEST, §§ 1314-1317. According to this authority, "A purchaser has express notice, for the purpose of § 1314, of an equitable interest, if, at the time when value was given by him, he was in fact aware of the existence of such interest. He has implied (or constructive) notice of such interest, if he would have discovered its existence, had such inquiries and inspections been made as ought reasonably to have been made by him. He has imputed notice of such interest, if, in the same transaction, such notice in fact came to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." (§ 1316.) "The inquiries and inspections referred to in § 1316 include: (i) an investigation of the property purchased, for the proper period, i. e., forty years prior to the date of the contract to purchase; (ii) an inspection of the land itself; (iii) an examination of the title deeds." (§ 1317.) See, generally, *Jones v. Smith*, 1 Hare 43 (1841); *Espin v. Pemberton*, 3 DeG. & J. 547 (1859); *Ware v. Egmont*, 4 DeG., M., & G. 460; (1854); *Bailey v. Barnes*, L. R. [1894] 1 Ch. 25.

of commercial paper, notice of loss to be given to an insurer, notice of the revocation of the authority of an agent, and the like. All these are governed by special rules not usually applicable to notice in equity.

Notice in equity is of interest only in connection with the determination of priorities or of the good faith of a party. In most cases the question of notice arises with reference to the right of a subsequent purchaser or creditor to assert his claim to property as against some earlier conflicting claim. This may, and usually does, involve the question of the good faith of such purchaser or creditor. This question may also arise in connection with sales and conveyances alleged to be fraudulent, in which the important point is whether the grantee acquired title with notice of the fraud. In all these cases notice is an essential factor in determining whether the party is a *bona fide* purchaser. So also in the case of an occupant of real estate, the question of his right to recover for improvements made by him as against an adverse claimant, may turn upon whether or not such improvements were made with notice of the adverse claim. In view of the difference in function or effect between notice in equity and some other kinds of notice, discussions of the former should not be complicated by the consideration of special rules applicable only to the latter, but notice in equity should be dealt with as an independent proposition.

The failure to make this distinction has given rise to the notion that there is something artificial or technical in the equitable doctrine of notice, as in the case of other kinds of notice, a notion which has involved the doctrine in much inconsistency and confusion. Occasionally the courts have given countenance to this notion, but it is mainly the work of the text-writers. This is conspicuously true of Mr. Pomeroy, whose discussion of notice is probably the most elaborate to be found in the books. He insists that "it should be most carefully borne in mind that the legal conception of 'notice,' as contained in the settled doctrines and rules of equity, is somewhat artificial and even technical."² The value of his discussion is seriously impaired by his approach to the subject from this point of view. As a matter of fact, except in a few instances of constructive notice, there is nothing artificial or technical about the equitable conception of notice. Questions of notice

² POMEROY, EQUITY JURISPRUDENCE, § 592, p. 1104.

have been decided by courts of equity in accordance with the principles of plain common sense. Furthermore, any attempt to invest the equitable conception of notice with artificiality or technicality is contrary to the fundamental spirit of equity, which looks at the substance rather than the form, and which, in the accomplishment of its ultimate purpose to do justice, brushes aside all matters of form or technicality except when controlled by statutory requirements.

In this spirit the courts have developed and administered the equitable doctrine of notice. In the words of a California judge,³

"The rules in respect to notice to purchasers of adverse titles or claims, other than such as is imparted by the records, are not founded upon any arbitrary provisions of law, but have their origin in the considerations of prudence and honesty which guide men in their ordinary business transactions."

In similar strain an English judge remarks:⁴

"The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and although this limitation has some times been lost sight of, still the limitation is as important and as well known as the doctrine itself."

I purpose to submit in this paper a brief analysis of the equitable doctrine of notice differing materially from any presentation I have seen, but which I believe has the merit of simplicity and consistency, and which presents the actual doctrine of the courts as exhibited in the decisions made as distinguished from theoretical discussions of the subject. Every position taken in this paper is abundantly supported by direct judicial authority, both in actual decisions and in the language used by the courts, though in some particulars the overwhelming weight of authority as found in text-books and judicial *dicta* is opposed to the views here expressed. Any originality that may be found in this presentation lies in the analysis and arrangement of the subject and in the interpretation of the decisions; the specific propositions dealt with are elementary and even commonplace.⁵ I shall begin with a definition of notice.

³ Rhodes, J., in *Lawton v. Gordon*, 37 Cal. 202, 206 (1869).

⁴ Lord Cranworth in *Ware v. Egmont*, 4 DeG., M. & G. 460 (1854).

⁵ I deem it unnecessary to cumber this paper with extended citation of authorities in support of elementary propositions.

Notice in equity is knowledge of a fact either actually possessed by a person or imputed to him by law. The foundation of notice is *knowledge*. It is because the subsequent purchaser knew of the prior unrecorded mortgage that he is held to take subject thereto, and the grantee in a fraudulent conveyance is required to surrender the property to the defrauded creditor because he knew of the fraud. The term knowledge is here used in its ordinary sense, and means actual knowledge. By actual knowledge is meant in equity, as in ordinary use, not absolute certainty, but such a belief in the existence of the fact in question as a reasonably prudent man would act upon in the ordinary affairs of life.⁶ Nor does it mean complete knowledge; it is not necessary that a subsequent purchaser or encumbrancer of property should know all the details of a prior adverse title, claim, or right, in order that he take subject thereto; it is enough that he knows that such title, claim, or right exists. With such knowledge he takes subject to whatever the rights of the adverse claimant may be in fact.

Discussions of notice in equity would be greatly simplified if the true nature of such notice as consisting simply of knowledge of the conflicting claim were always kept in mind. Except for a few cases of so-called constructive notice, the term "knowledge" might be substituted for "notice" as being precisely synonymous therewith, and judges in fact frequently use the two terms interchangeably.

Notice is of two kinds, actual and constructive. In general, notice consisting of actual knowledge is actual notice, and notice imputed by law is constructive notice. The recognition of two kinds of notice, actual and constructive, while necessary, is to some extent confusing. Notice as a purely equitable concept is primarily actual notice, the few cases of so-called constructive notice being special cases based upon independent and peculiar grounds. It would be conducive to clearness to omit them entirely from the

⁶ The actual notice required by the statutes is not certain knowledge, but such information as men usually act upon in the ordinary affairs of life. *Curtis v. Mundy*, 3 Metc. (Mass.) 405 (1841); *Vaughn v. Tracy*, 22 Mo. 415 (1856).

The words "actual notice" do not always mean in law what in metaphysical strictness they import. They more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. *Pope v. Nichols*, 61 Kan. 230, 59 Pac. 257 (1899).

discussion of notice in general and treat them separately as special cases. The force of this suggestion will appear when we consider the cases of constructive notice.

The identity of notice and knowledge is denied by leading text-writers, notably Mr. Pomeroy. Thus, after asserting the artificial and technical character of the legal conception of notice, he says: ⁷

"In this purely artificial sense, notice is by no means synonymous with knowledge; *although the effects produced by it are undoubtedly the same which would result from actual knowledge.* [Italics his.] In other words, while the doctrines of equity on the subject do not assume that notice is knowledge, nor even that it is necessarily followed by knowledge, they still often impute to it the very same consequences which would flow from actual knowledge acquired by the party. As the notice spoken of by the rules is not knowledge, there may be notice without knowledge, and knowledge without notice.

The same distinction is made, though less pointedly, by Mr. Bispham, who says: ⁸

"Notice, then, in its technical sense, is the legal cognizance of a fact. It differs from knowledge, for knowledge may exist without notice, and there may be notice without any actual knowledge. Thus a court, in the consideration of a cause, may be bound to take judicial notice of facts of which no actual proof whatever exists; and, on the other hand, a judge or jury may be compelled to disregard known facts, because although proved to exist, they cannot be judicially recognized in the determination of the particular issue. So, also, there may be no technical *notice* of a right or title, although knowledge of the right or title may exist; and again, there may be notice of another's right although there is no knowledge whatever that any such right is claimed."

It is plain that both these distinguished authors are speaking of notice in a general sense. Their statements are not all true of notice in equity. Mr. Bispham, for example, refers to the doctrine of judicial notice in the law of evidence. That there may be notice in equity without actual knowledge is true, as in the case of constructive notice (which, however, is only to a limited extent notice *in equity*), but it is not true in equity that there may be actual knowledge without actual notice. In the law of negotiable instruments there may be knowledge without notice. Notice of dishonor

⁷ POMEROY, § 592, p. 1104.

⁸ BISPHAM, PRINCIPLES OF EQUITY, § 263.

to bind an indorser must be given by the right party and in proper form or the indorser will not be bound, although he may have actual knowledge that the note was dishonored. In such case actual knowledge is not notice. Text-writers who assert that there may be knowledge without notice in equity have evidently been unconsciously influenced by the rules governing notice in the law of negotiable instruments and similar cases. Certainly no equity judge would hold that a purchaser of land with actual knowledge of a prior outstanding title is in any case a purchaser without notice. Knowledge is always notice in equity, that is, actual knowledge is actual notice.

But is actual notice always actual knowledge? May there not be actual notice without actual knowledge? It must be admitted that the overwhelming weight of authority as found in text-books and judicial opinions is that there may be. Innumerable statements may be found to this effect. In some of the cases, however, in which the court so declares there was in fact actual knowledge. Such cases are therefore authority only for the proposition that actual knowledge is actual notice as held by the court. In some other cases the declaration has reference merely to the character of the evidence by which actual notice may be proved, it being held that actual notice need not be proved with absolute certainty but may be inferred from circumstantial evidence. But after all allowances are made, it remains true that in very many cases it has been held, and rightly held, that a subsequent purchaser may be dealt with as if he were in legal contemplation a purchaser with actual notice although it may be proved that he had no knowledge of the prior claim. It will be seen, however, that these decisions do not necessarily conflict with the position that actual notice and actual knowledge are in equity synonymous terms. Upon this basis, for the present at least, we may define actual notice as follows:

Actual notice in equity is actual knowledge of the prior conflicting interest, claim, or right. It is immaterial how, when, or from whom the party charged with notice acquired his knowledge;⁹ it is enough that at the time of acquiring his own interest he knew of the existence of the prior claim. In this connection it should be borne in mind that in some other branches of the law the *giving*

⁹ *Lawton v. Gordon*, 37 Cal. 202 (1869); *Butcher v. Yocum*, 61 Pa. St. 168 (1869).

of the proper notice is often the material thing, and especially is it important that the notice should come from the proper source; in equity it is the fact that the party *has* notice when he acquires his title that is material.

Mr. Pomeroy completely misses this point and deals with notice in equity, as a technical conception, as being of the same general nature as notice in the law of negotiable instruments. Thus he says:¹⁰ "Actual notice is information concerning the fact, — as, for example, concerning the prior interest, claim, or right, — directly and personally communicated to the party." Throughout his discussion he distinguishes between information and knowledge, a distinction not made by the courts. Writing of technical actual notice he says:¹¹

"Where an actual notice is relied upon, in order to be binding it must come from some person interested in the property to be affected by it; and it is said that it must be given and received in the course of the very transaction itself concerning the property in which the parties are then engaged. As a necessary consequence, no mere vague reports from strangers, nor mere general statements by individuals not interested in the property, that some other person claims a prior right or title, will amount to an actual notice so as to bind the conscience of the party; nor will he be bound by a notice given in some previous and distinct transaction, which he might have forgotten."

From this language it seems clear that Mr. Pomeroy was influenced by the conception of notice as a means of perfecting a right or of putting a person in default.¹² His use of the article before the term is one indication of this. He writes of "an actual notice," and "a notice," and defines actual notice as information "directly and personally communicated to the party." All this is inappropriate to notice in equity. After carefully defining and explaining the technical conception of actual notice in equity, he goes on to explain that the effect of actual knowledge, however and from whomsoever acquired, is usually precisely the same as that of actual notice, "actual notice" being treated "as a representative

¹⁰ POMEROY, § 595.

¹¹ *Ibid.*, § 602.

¹² Mr. Pomeroy expressly recognizes this distinction in § 603, without, however, perceiving the impropriety of treating notice in equity as if it were subject to the technical rules applicable to some other kinds of notice.

of or substitute for actual knowledge," and "therefore in its essential nature inferior to knowledge." Further, actual knowledge "is often a most essential element in making out a fraudulent intent, where a mere technical notice would not be sufficient."¹³ It is submitted that the distinction made by Mr. Pomeroy, which appears not to be recognized by the courts, is of no practical value and tends to confuse the subject.

The existence of actual notice is purely a question of fact, and like any other fact, notice may be proved either (1) directly, by evidence bringing the fact of knowledge of the prior claim home to the party, or (2) indirectly, that is, by circumstantial evidence. Notice directly proved is sometimes called express actual notice, and notice indirectly proved has been called implied actual notice, though these terms are neither very useful nor very appropriate.

Proof of actual notice by direct evidence calls for no special comment. Proof by indirect evidence is effected by proof of facts from which actual knowledge of the outstanding claim may be inferred. The indirect evidence may come under one or the other of three heads. (1) The fact of notice may be established by proof of circumstances showing that the party had the opportunity of learning of the outstanding claim, and from this it may be inferred that he learned of it.¹⁴ (2) There may be circumstances of general notoriety pointing to the existence of the prior claim, and of these circumstances the party may be presumed to be cognizant.¹⁵ (3) It may be proved that the party knew of facts or circumstances sufficient to put a reasonable man upon inquiry as to whether there was not some prior adverse claim to the property, which facts or circumstances, if investigated, would probably have led to actual knowledge of the prior claim.

Notice based upon knowledge of facts or circumstances putting one upon inquiry is one of the most familiar and important instances of notice.¹⁶ Upon proof of such knowledge four possible

¹³ POMEROY, § 603, p. 1139.

¹⁴ Such as close relationship, personal intimacy, or business connections between the subsequent purchaser and the holder of the adverse claim. See POMEROY, § 600.

¹⁵ For example, the dedication of a street, the laying out of a town, etc. See *Rowan v. Portland*, 8 B. Mon. (Ky.) 232 (1847); *Carter v. Portland*, 4 Ore. 339 (1873).

¹⁶ As to actual notice arising from facts putting one upon inquiry, see *Clarke v. Ingram*, 107 Ga. 565, 33 S. E. 802 (1899); *Field v. Campbell*, 36 Ind. App. 549, 67 N. E. 1040 (1903); *Phillips v. Reitz*, 16 Kan. 396 (1876); *Charles v. Whitt*, 218 S. W.

cases may arise: (1) The evidence may show further that the party made the inquiry called for in the circumstances and actually learned of the prior claim. In such case he has actual knowledge and hence actual notice, and this case is brought under the head of actual notice directly proved. (2) It may be shown that the party made the proper inquiry and nevertheless failed to obtain knowledge of the prior claim.¹⁷ Such failure may result from the party's receiving some other satisfactory explanation of the facts suggesting the existence of an adverse claim, or from the insufficiency or untruth of the replies made by the adverse claimant upon inquiry, or from other cause. In any case where after due inquiry the party fails to learn of the prior claim, he cannot be charged with notice. (3) The party may have made no inquiry or an insufficient inquiry, and so in fact failed to learn of the adverse claim. (4) The evidence may prove only that the party knew of the facts or circumstances putting one upon inquiry, there being no evidence as to whether he made inquiry or not. These last two cases are the troublesome ones and call for special examination.

The case where there has been no inquiry, or an insufficient inquiry, is a very common one and has often been considered by the courts. In such case the party, of course, does not acquire knowledge of the prior claim, and if actual knowledge is literally required to constitute actual notice, the party has no actual notice. Without exception, so far as the writer knows, all the authorities hold that the subsequent purchaser in such case takes subject to the prior claim, but they do not agree as to the precise ground upon which it is so held. Usually the party is deemed to be a purchaser with notice, but not infrequently the decision of the court is based in part at least upon the purchaser's want of good faith in not making the inquiry called for in the circumstances.¹⁸

(Ky.) 994 (1920); *Connecticut Mut. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623 (1893); *Morrison v. Juden*, 145 Mo. 282, 46 S. W. 994 (1898); *Levins v. W. O. Peebles Grocery Co.*, 38 S. W. (Tenn.) 733 (1896).

For exceptionally fine opinions on this subject, see *Knapp v. Bailey*, 79 Me. 195, 9 Atl. 122 (1887); *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287 (1889); *Williamson v. Brown*, 15 N. Y. 354 (1857); *Pringle v. Dunn*, 37 Wis. 449 (1875); *Brinkman v. Jones*, 44 Wis. 498 (1878).

¹⁷ *Jones v. Smith*, 1 Hare 43 (1841); *Espin v. Pemberton*, 3 DeG. & J. 547 (1859); *Williamson v. Brown*, 15 N. Y. 354 (1857); *Kelly v. Fairmount Land Co.*, 97 Va. 227, 33 S. E. 598 (1899).

¹⁸ *Wilson v. Miller*, 16 Iowa 111 (1864); *Knapp v. Bailey*, 79 Me. 195, 9 Atl.

The purchaser may fail to make the proper inquiries either wilfully, as where, being afraid that he might find something the matter with the title, he abstains from making inquiry in order that he may avoid notice, or his failure may be due to negligence. In either case the effect is the same. He is not a *bona fide* purchaser without notice. That he is not a purchaser in good faith is clear, and this of itself is enough to postpone his rights to those of the prior claimant. Knowing of facts suggesting the existence of a prior adverse claim, he is charged with the duty of making the proper inquiry. This duty, however, he owes not to the prior claimant but to himself. If he wishes to claim as a *bona fide* purchaser he must act in good faith; he must make the proper inquiry or take the consequences.¹⁹

The prevailing view, however, is that in such case the purchaser should be deemed a purchaser with notice. Where, as is usually the case, actual and constructive notice have the same effect, it is immaterial whether the notice with which he is charged be classed as actual or constructive; but where it is necessary to prove actual notice in order to postpone the subsequent purchaser, it will not suffice to call this constructive notice. If notice is relied upon by the prior claimant, it must be actual notice. Otherwise the subsequent purchaser might avoid the burden of a prior claim of the existence of which he has some evidence by omitting to make the proper inquiries, thus profiting by his own wrong. Usually the courts call this constructive notice, meaning a notice which is not actual knowledge but which is imputed by law. This is reasonable and is accurate enough where proof of actual notice is not required. But to meet the full requirements of the situation the notice should be called actual or notice should be eliminated entirely and the prior claimant should rely upon the purchaser's want of good faith, or invoke the doctrine of estoppel.

Mr. Pomeroy calls this actual notice. He says: ²⁰ If "it appears

¹²² (1887); *Pringle v. Dunn*, 37 Wis. 449 (1875); *Brinkman v. Jones*, 44 Wis. 498 (1878).

In *Knapp v. Bailey*, *supra*, p. 203, the court said: "It amounts substantially to this, that actual notice may be proved by direct evidence, or it may be inferred, or implied, (that is, proved) as a fact from indirect evidence — by circumstantial evidence. A man may have notice or its legal equivalent. He may be so situated as to be estopped to deny that he had actual notice."

¹⁹ See *Bailey v. Barnes*, L. R. [1894] 1 Ch. 25, 35.

²⁰ POMEROY, § 597.

that the party has knowledge or information of such facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then also the inference of actual notice is necessary and absolute." This, of course, would be actual notice without actual knowledge. In England, where the distinction between actual and constructive notice is ordinarily immaterial, the notice in this case is usually called constructive or implied notice. So far as the writer knows there is no American case in which under a statute requiring actual notice a purchaser who has failed to make the proper inquiry is held to be a purchaser without notice. This means, of course, that there may be actual notice within the meaning of such a statute without actual knowledge, provided notice is relied upon as postponing the rights of the subsequent purchaser.

But in the present case, while the purchaser did not have actual knowledge of the prior claim, it was his own fault that he did not have such knowledge. He had the means of obtaining knowledge, and, in the words of Mr. Justice Strong,²¹ "means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself." Or as an English judge puts it:²² "A person who ought, according to the rule of courts of equity, either personally or by his agent to have known a fact is treated in equity as if he actually knew it." He adds, however, "and he cannot escape the consequences of this constructive notice by employing a dishonest solicitor," thus terming the notice constructive notice, which, however, in the case before him served as well as actual notice. It will be observed that the means of knowledge are in equity equivalent not to notice but to *knowledge*, and the party is held to have actual notice because he has the legal equivalent of knowledge. But it is a serious mistake to call this constructive notice, which, under statutes requiring actual notice, will not suffice unless the term "constructive" is here used to denote a special kind of actual notice, which, of course, introduces confusion.²³

²¹ *Cordova v. Hood*, 17 Wall. (U. S.) 1, 8 (1872).

"[Notice] is actual when the purchaser either knows of the existence of the adverse claim or title; or is conscious of the means of knowing, although he may not use them." *Speck v. Riffin*, 40 Mo. 405 (1867).

²² *Joyce, J.*, in *Berwick v. Price*, L. R. [1905] 1 Ch. 632.

²³ In *Kirkham v. Moore*, 30 Ind. App. 549, 65 N. E. 1042 (1903), decided under a

In the opinion of the writer it would be better not to call this a case of notice at all, but, for the purpose of postponing the subsequent purchaser, to rely upon the principle of estoppel or the purchaser's want of good faith. Since it was his own fault that the purchaser did not have actual notice, he is estopped to set up the want of such notice. This satisfies the requirements of the case and avoids the practical difficulty resulting from the adoption of a technical definition of actual notice as distinct from actual knowledge, or from a special use of the term "constructive" to denote a variety of actual notice. However, as the principal thing is to get rid of this improper use of the term "constructive," it is not necessary to insist upon the complete identification of actual notice and knowledge, and we may frame our definition somewhat differently as follows: Actual notice in equity of a prior interest, claim, or right is actual knowledge thereof, either in fact possessed by the party to be charged or by his agent, or which but for the fault of such party or agent might have been so possessed.

The fourth case of notice based upon knowledge of facts or circumstances putting one upon inquiry is less complicated. Where it is shown only that the party knew of such facts and circumstances, and there is no evidence as to whether or not any inquiry was made, it will be found as a matter of fact that the party had actual knowledge, and hence actual notice, of the prior claim. Upon proof of knowledge of facts putting one upon inquiry, it will be inferred that the subsequent purchaser did what any reasonably prudent man would have done in the circumstances and made the proper inquiry, and thus actually learned of the prior claim. In the absence of evidence to the contrary, this is the legitimate and natural inference of fact. The purchaser either made the inquiry or he did not; if he made it, presumably he obtained actual knowledge of the prior claim; if he did not make it, he is not a purchaser

statute requiring actual notice, the proposition that knowledge and actual notice are synonymous was expressly denied. In this case the prior claimant was in open, visible, and exclusive possession of the land in question, and it was held that the notice conveyed by such possession was sufficient to satisfy the statutory requirement, the court remarking: "It can make little difference whether the notice thus given is denominated 'constructive,' or 'implied'; it is none the less effectual." The precise terms of a statute seem unimportant when so loosely dealt with. In this case the possession was held sufficient to put the purchaser upon an inquiry, which, if made, would have led to actual knowledge of the prior claim.

in good faith and is estopped to set up the want of actual notice. Under either alternative he loses. This was well put in a leading case as follows:²⁴

"The true doctrine on this subject is, that where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."

This doctrine was well stated also by the Missouri court in a case arising under a registration statute providing that, "No such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." The court said:²⁵

"The actual notice required by the statute is used in contra-distinction to the constructive notice given by a record. It does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it — facts and circumstances coming to his knowledge that would put a man of ordinary circumspection upon inquiry — should go to the jury as evidence of such notice. The second sale by one who has already conveyed the property is necessarily fraudulent; and if it appears in evidence that the purchaser knows that the holder of the unrecorded deed is in possession of the property as owner, or that he is informed that such holder has bought the property, the jury has a right to infer full knowledge or voluntary ignorance; and if he buy with such knowledge, or such means of knowledge, he becomes a party to the fraud, and will not be permitted to take advantage of it. [Authorities.] Proof of actual knowledge of the existence of the former deed has never been held to be necessary; but the jury has the right to infer such knowledge from facts that would naturally suggest it; and from which the actual relation of the prior purchaser of the land might be reasonably inferred."

It is in connection with the distinction between actual and con-

²⁴ *Per* Selden, J., in *Williamson v. Brown*, 15 N. Y. 354, 362 (1857).

²⁵ *Per* Bliss, J., in *Maupin v. Emmons*, 47 Mo. 304 (1871). See also *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287 (1889).

structive notice that most of the confusion in discussions of notice is found. As already stated, notice in equity is primarily and usually actual notice, and consists of actual knowledge either in fact possessed by the party or his agent, or which but for the fault of himself or of his agent he might have possessed. In English law, except notice by registration and by *lis pendens*, no other kind of notice is recognized in equity. The term "constructive notice" is frequently applied to the notice with which one is charged who did not in fact personally know of the prior claim, but who had the means of obtaining knowledge which he failed to use, or who acted through an agent who had such knowledge. This kind of notice is also called "imputed" or "implied" notice, these terms being used as synonymous with "constructive." But in all these cases notice in English law is based upon actual knowledge or its legal equivalent. Where it was the subsequent purchaser's own fault that he did not have actual knowledge, he is not a *bona fide* purchaser without notice. In such case it is perhaps more logical to treat him as a purchaser in bad faith rather than a purchaser with notice, but the same result will, of course, be reached in either case,—he will take subject to the prior claim.

For practical purposes usually no harm is done by treating a purchaser whose want of knowledge of the prior claim is due to his own fault as a purchaser with constructive notice, as is customary, but this will not suffice under statutes or conditions making actual notice necessary. It is only where the effect of actual and constructive notice is the same that the distinction between the two kinds becomes unimportant. Since actual and constructive notice usually have the same effect in postponing the rights of the subsequent claimant, it is not surprising that the courts are not careful to distinguish precisely between the two kinds of notice, and often use the terms actual notice and constructive notice almost interchangeably with resulting confusion in terminology. But wherever the effect of actual notice, in the sense of actual knowledge, and constructive notice, meaning technical notice irrespective of actual knowledge, is not the same, it becomes important to distinguish with precision between actual and technical notice. The distinction, as suggested, is between knowledge and a technical notice not based on knowledge.

The distinction is necessary in two general classes of cases:

(1) where it is necessary to fix upon a party a charge of bad faith. In such case the notice of the prior claim must be such as to affect the conscience of the party; a mere technical or constructive notice will not suffice. The party must have actually known of the prior conflicting claim when he acquired his own interest, or he must have had the means of knowledge. Cases of this sort arise where the grantee in a fraudulent conveyance knew or could have known of the fraud on creditors, or where an occupant of real property makes improvements on the property with actual or potential knowledge that another claims the property. So also under a statute making unrecorded interests void as to subsequent purchasers and encumbrancers, without excepting subsequent claimants with notice, a subsequent purchaser who purchases with actual notice of a prior unrecorded claim, takes subject thereto on the ground that he purchased in bad faith. (2) Proof of actual notice is also necessary under statutes providing that unrecorded interests are void except as against subsequent purchasers, etc., "with actual notice." These statutes are fairly common in the United States. Under these, and similar statutes expressly providing for actual notice, it is essential to distinguish accurately between actual and constructive notice.

Actual notice has already been defined as actual knowledge or its legal (and moral) equivalent; and, as already stated, constructive notice is not a sub-division of notice equal in dignity to actual notice. With the exception of notice imparted by registration, which is statutory and not a creature of equity, the few special cases of notice falling under the head of constructive notice are comparatively unimportant. All of these may be included under the following definition:

Constructive notice is notice imputed by law without any reference to whether the party charged therewith had or might have had actual knowledge or not. It is based upon the assumption that the party did not have actual knowledge of the prior claim, — with such knowledge he would have actual notice. Constructive notice is a legal inference from established facts, and the inference is, or should be, always conclusive. In each of the several instances of constructive notice a subsequent purchaser or encumbrancer, *for reasons of public policy*, is charged by law with knowledge of a prior conflicting claim, and proof that the party did not have

such knowledge, or could not have had it, will not prevent him from being a party with constructive notice. A simple illustration is afforded by the recording acts. Upon proof that a mortgage was recorded it is conclusively inferred as a matter of law that all subsequent purchasers of the property have knowledge of the terms of such mortgage, although as a matter of fact the record may have been at once destroyed by fire so that actual knowledge thereof was unobtainable by an examination of the record.

The recognized instances of constructive notice are connected with each other by no common principle, but each rests upon its own peculiar foundation. Upon examination it will be found that practically all the instances of constructive notice are either statutory or are as much legal as equitable, and are therefore not strictly cases of notice in equity. It may be added that, with the exception of notice by registration, constructive notice is looked upon with disfavor by courts and legislatures. Courts of equity in modern times have refused to extend the doctrine of constructive notice, and two conspicuous instances of such notice, notice by possession and notice by *lis pendens*, have in some states been abolished by statute.

The several species of constructive notice which have been recognized by the authorities are as follows: (1) notice based upon actual knowledge of facts or circumstances putting one upon inquiry; (2) notice by possession of real estate; (3) notice by recitals or references in instruments constituting chain of title; (4) notice by *lis pendens*; (5) notice by registration, including registration of memoranda of *lis pendens* and of judgments; (6) notice to agent.

1. Notice based upon knowledge of facts or circumstances putting one upon inquiry has already been considered as a species of actual notice. Such it undoubtedly is where it is shown that the party made the inquiry and obtained actual knowledge of the prior claim. Where, however, there is no evidence as to whether or not the purchaser made any inquiry, or where it is shown that he fraudulently or negligently failed to make proper inquiry, many courts have held or declared that the purchaser is charged with constructive notice.

In the case where there is no evidence as to whether or not an inquiry was made, it seems to the writer to be most natural and reasonable to infer actual notice. This will probably in the great

majority of cases be in accordance with the fact. Probably most of the decisions and judicial *dicta* are to the effect that in this case actual notice is to be inferred. Mr. Pomeroy considers the notice actual or constructive according to the character of the facts putting the party upon inquiry. If they do not directly tend to show that information of the prior conflicting claim was personally brought home to the consciousness of the party affected, the notice is constructive, the court as a presumption of law inferring constructive notice; but if the facts do directly tend to show such information, the notice is actual, the jury or other tribunal argumentatively inferring actual notice as a conclusion of fact.²⁶ This distinction, which Mr. Pomeroy calls "plain and natural" seems to the writer impossible to apply in practice, for how is one to know when a fact tends directly to show that information was brought home to the party and when it does not so tend? The illustrations given by Mr. Pomeroy throw little light on this question.²⁷ It may be added that the confusion in the discussion of this species of notice is increased by regarding it sometimes as conclusive and sometimes as rebuttable constructive notice.²⁸

Where it is shown that the subsequent purchaser fraudulently or negligently failed to make proper inquiry, there is more ground for saying that he has constructive notice. The law deals with him as if he actually had the knowledge which he would have obtained by inquiry, thus in effect imputing to him knowledge. But for the necessity of actual notice under some of the statutes, no harm would come from calling this constructive notice, or either con-

²⁶ POMEROY, § 596.

²⁷ In a note to § 596 Mr. Pomeroy enumerates as illustrating the distinction made in his text the familiar cases of constructive notice, namely, notice by possession and by recitals in title deeds, notice to agent, and notice by registration. In § 600 certain cases are cited as illustrating actual notice, and in § 611 the same cases are cited as illustrating constructive notice. In other words, certain facts directly tend to show that information was brought home to the party so as to charge him with actual notice, and the same facts do not directly so tend and hence constitute constructive notice. In § 610 the author says: "Whatever may be the language of judicial dicta, it is settled beyond a doubt that in one case the actual notice is argumentatively inferred as a conclusion of fact, by the jury or other tribunal, from the circumstances which put the party upon an inquiry; and in the other case the constructive notice is inferred by the court as a presumption or conclusion of law from the same kind of circumstances, in the absence of contrary evidence." The author's whole discussion of his "plain and natural" distinction is most difficult to follow.

²⁸ See POMEROY, §§ 606-608.

structive notice or imputed notice as is done in England. But as already pointed out, it seems better to hold that the purchaser has no notice but is estopped to set up the want of actual notice. He is not a purchaser in good faith. While calling this constructive notice, the courts give it the effect of actual notice.

In some states statutes defining notice class notice based upon facts putting one upon inquiry as constructive notice, but these statutes appear to have amounted to little in clearing up the subject.²⁹

2. That the visible and notorious possession of real property constitutes notice to all the world of the rights of the occupant is well settled, and such notice is usually called constructive. This is undoubtedly the proper classification where the subsequent purchaser, without fault on his part, was ignorant of the fact of possession. In such case notice of all facts that might naturally have been learned by inquiry had the fact of possession been known, is imputed by law to the subsequent purchaser. Naturally very few such cases can be found. In practically every case a prospective purchaser knows or could easily find out who is in possession of the property. At all events he must assume that *someone* is in possession, and he ought to find out who that person is if he does not know. Otherwise he should bear the consequences should it happen that a stranger is in possession under a claim of right. Possession of land by a stranger is a most impressive fact putting one upon inquiry, and where the fact of possession is known, the case becomes the common one already considered of notice based upon such facts.³⁰

²⁹ For example, the Oklahoma statute provides:

"Sec. 10. Notice is either actual or constructive.

"Sec. 11. Actual notice consists in express information of a fact.

"Sec. 12. Constructive notice is notice imputed by the law to a person not having actual notice.

"Sec. 13. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." (Wilson's Rev. & Ann., 1903, §§ 2788, 2789, 2790, 2791, sub-secs. 10-13.) As to the construction of Section 13, see *Cooper v. Flesner*, 24 Okl. 47, 103 Pac. 1016 (1909). According to the court in this case, the term "constructive notice" in this section means "implied actual notice." It is not clear how the situation is improved by a statute of this sort. As to a similar statute in California, see *Prouty v. Devin*, 118 Cal. 258, 50 Pac. 380 (1897).

³⁰ On possession as notice, see *Holmes v. Powell*, 8 DeG., M., & G. 572 (1856);

But in rare cases the subsequent purchaser may, without fault, be ignorant of the fact of possession. Such a case might arise, for example, where the property is a hotel or large rooming-house and the owner under an unrecorded deed occupies one or more rooms,³¹ or where pending the purchase of land there is a sudden change of possession. In such a case a purchaser might be excusable for not learning of the possession. Nevertheless he would be charged with constructive notice of the occupant's rights. This is a harsh doctrine and has been abolished in some states by statute.

3. The rule that a purchaser of real property is chargeable with notice of every matter affecting the estate which appears by recital, reference, or otherwise upon the face of every instrument in his chain of title, is well established and this is a true case of constructive notice. It is immaterial that the purchaser did not know of these recitals, etc., or of the rights indicated by them. He is conclusively charged with notice of all the facts that might have been learned by inquiry along the lines indicated by the recitals and references. Of course if he actually knew of the recitals the case might become one of actual notice.

4. Notice by *lis pendens* is usually classed as constructive notice, and in so far as it is notice at all, this is the proper classification where the party affected did not actually know of the pendency of the suit. If he knew of the *lis pendens*, he is, of course, put upon inquiry, and the case comes under the head of actual notice. *Lis pendens* is perhaps better referred to the familiar rule of public policy upon which the doctrine is based, that there shall be finality in litigation, and not counted as a species of notice.³² The doctrine of *lis pendens* is regarded as a harsh one and has been abolished by statute in some states. The notice afforded by its statutory substitute, registration of a memorandum of *lis pendens*, comes under the head of notice by registration.

5. Notice by registration requires no special comment. This is, of course, wholly statutory. It is, however, true constructive notice; it is immaterial that the subsequent purchaser did not know

Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463 (1899); Tate v. Pensacola, Gulf Land & Devel. Co., 37 Fla. 439, 20 So. 542 (1896); Kirkham v. Moore, 30 Ind. App. 549, 65 N. E. 1042 (1903); Vaughn v. Tracy, 22 Mo. 415, 25 Mo. 318 (1857); Maupin v. Emmons, 47 Mo. 304 (1871).

³¹ Phelan v. Brady, 119 N. Y. 587, 23 N. E. 1109 (1890).

³² Newman v. Chapman, 2 Rand. (Va.) 93 (1823).

or could not have known of the prior right, provided such right had been properly and legally made a matter of record. Independently of statute, judgments and decrees are not notice, except as to parties to the suit and purchasers *pendente lite*. Docketed judgments and decrees are generally made constructive notice by statute. This is merely an instance of notice by registration. Where a record has been actually seen by the subsequent purchaser, he is, of course, a purchaser with actual notice.

6. Notice to agent has from an early date been recognized in equity as notice to principal.³³ In the words of Lord Northington,³⁴ "it is a fixed and settled principle that notice to an agent is notice to the principal. If it were held otherwise it would cause great inconveniences, and notice would be avoided in every case by employing agents."

Notice to agent is by the American authorities almost universally called constructive notice to principal.³⁵ In England notice to agent is usually called either constructive or imputed notice, but, without regard to terminology, the English courts, so far as the writer knows, consider notice to agent in every respect the same as notice to the principal personally, actual notice to agent being treated as actual notice to principal.³⁶ So it was in the leading case of *LeNeve v. LeNeve*.³⁷ And although in England, the

³³ *Merry v. Abney*, 1 Ch. Cas. 38 (1663).

³⁴ *Sheldon v. Cox*, 2 Eden 224 (1764).

The same idea is expressed by Lord Brougham in *Kennedy v. Green*, 3 Myl. & K. 699, 719 (1834), when he says that, the "policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge."

³⁵ STORY, EQUITY JURISPRUDENCE, § 408; BISPHAM, § 268; POMEROY, § 669, n. 2. Mr. Pomeroy says: "There can be no greater misconception of its legal meaning, and no more complete confusion of the distinctions between the two kinds of notice, than to call the notice imputed to a principal through his agent, an 'actual' notice."

³⁶ "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is a part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of." *Per* Lord Hatherley in *Rolland v. Hart*, L. R. 6 Ch. 678, 681, 682 (1871).

³⁷ The case of *LeNeve v. LeNeve*, Ambler 436 (1747), arose under the registration act for the county of Middlesex providing that, "every such deed or conveyance that shall at any time after," etc., "be made and executed shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering

question of terminology seems to be academic, the propriety of calling notice to agent constructive notice to principal has been questioned. Thus Lord Chelmsford said:³⁸ "The notice, which a client is supposed to receive from his solicitor is generally treated as constructive notice. I think it would tend very much to clearness in these cases, if it were classed under the head of actual notice."

In this country the fact that the effect of actual and of constructive notice is ordinarily the same has usually rendered it unnecessary for the courts to make a discriminating examination of the question, and in most cases no harm has resulted from a wrong classification. But where it is necessary to establish the bad faith of the subsequent purchaser, and under registration statutes requiring actual notice of an unrecorded instrument, the distinction becomes vital. If actual notice to agent is only constructive notice to principal, one has but to employ an agent to avoid the effect of actual notice, and the inequitable result may be reached that a purchaser may acquire a perfect title to property subject to an unrecorded claim, although his agent, through whom the purchase was made, had full knowledge of the existence of such claim. This has actually happened.³⁹

of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." The object of the suit was to enforce the execution of a marriage settlement executed by Edward LeNeve in 1718, but not registered as required by the statute. The defendants claimed under another settlement executed by LeNeve upon his second marriage in 1743, this settlement being registered. The second wife, at the time of her marriage, knew nothing of the first settlement, but her agent, who arranged the second settlement, had a copy of the first settlement and knew its terms, but did not communicate his knowledge to his principal. It was held that the first settlement should prevail over the second, notwithstanding the non-compliance with the statute. This decision was placed upon the ground that the second wife was not entitled to the protection of the statute because she purchased in bad faith, the knowledge of her agent being imputed to her. In so holding, Lord Hardwicke said: p. 446, "The taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser. . . . This is a species of fraud and *dolus malus* itself, for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate." It will be observed that in this case, although the protection of the statute was not in terms limited to purchasers without notice, a purchaser with actual notice was not protected by it; further the actual knowledge of the agent was charged to the principal.

³⁸ *Espin v. Pemberton*, 3 DeG. & J. 547, 554 (1859). Lord Chelmsford says further: "I should therefore prefer calling the knowledge which a person has, either by himself or through his agent, actual knowledge; or if it is necessary to make a distinction between the knowledge which a person possesses himself, and that which is known to his agent, the latter might be called imputed knowledge."

³⁹ As in the Virginia case of *Easley v. Barksdale*, 75 Va. 274 (1881). This case

Such a doctrine is not only inequitable in operation but is unsound in principle. It is opposed to the philosophic foundation of the law of agency, including the rule that notice to agent is notice to principal. Several reasons for this rule have been assigned. One is the practical reason stated by Lord Northington, that otherwise one might avoid notice in every case by employing an agent. Another reason is found in the duty of the agent to communicate his knowledge to his principal and the legal presumption that he has performed this duty. This reason is unsatisfactory because this presumption is in many cases admittedly false in fact.

It would seem that the true foundation for the rule that notice to agent is notice to principal is the principle underlying the whole doctrine of agency, that, *quoad* the agency, agent and principal are one person. As has been aptly said, the agent is the *alter ego* of the principal. If in law agent and principal are one person, it follows that actual notice to agent is actual notice to principal; and even disregarding the fiction of identity, if it be admitted that what one does through an agent he does himself, it should equally be allowed that what one knows through an agent he knows himself. Philosophically and practically the only sound view is that actual notice to agent is actual notice to principal. This proposition has repeatedly received judicial support, either expressly or by necessary implication,⁴⁰ and the contrary decisions are extremely few.⁴¹

arose under a statute providing that no *lis pendens* or attachment shall bind or affect a *bona fide* purchaser of real estate for valuable consideration "without actual notice" of such *lis pendens* or attachment, unless a memorandum thereof be left with the clerk of the court for record. An agent purchased for his principal land which was in litigation as was actually known to the agent but not to the principal. No memorandum was filed as specified by the statute, and it was held that the principal had only constructive notice and therefore got a good title. Oddly enough the court cited LeNeve v. LeNeve as authority. This decision seems clearly wrong, but was cited with approval by the Virginia court in the recent case of Steinman v. Clinchfield Coal Corp., 121 Va. 611, 93 S. E. 684 (1917).

⁴⁰ Actual notice to agent is actual notice to principal under statutes expressly requiring actual notice. Mayor of Baltimore v. Whittington, 78 Md. 231, 27 Atl. 984 (1893); Rhodes v. Outcalt, 48 Mo. 367 (1871); Hedrick v. Beeler, 110 Mo. 91, 19 S. W. 492 (1892); Cowen v. Withrow, 111 N. C. 306, 16 S. E. 397 (1892); Kirklin v. Atlas Sav. & Loan Assoc., 60 S. W. (Tenn.), 149 (1900). Also under a statute requiring actual notice in order to charge a subsequent purchaser with bad faith. LeNeve v. LeNeve, Ambler 436 (1747).

⁴¹ See Easley v. Barksdale, 75 Va. 274 (1881). This is the only case found by the writer in which notice to agent was held to be constructive and not actual notice to principal, where the decision turned upon this distinction.

It may be added that where nothing depends upon it, it is neither unnatural nor improper to call actual notice to agent constructive notice to principal, for it is only by construction of law that agent and principal are one person, and by construction, therefore, that the acts and knowledge of the agent are the acts and knowledge of the principal. The full statement of this notion, however, is that, since by construction of law agent and principal are one, by construction of law actual notice to agent is actual notice to principal. The more compact form of statement should never be employed at the expense of justice and in disregard of sound equitable principles.

Summing up: Notice in equity is knowledge of a fact either actually possessed by a person or imputed to him by law. Notice is either actual or constructive, but as a purely equitable concept is primarily and properly actual notice, the foundation of which is actual knowledge. Actual notice in equity of a prior interest, claim, or right is actual knowledge thereof, either in fact possessed by the party to be charged or by his agent, or which but for the fault of such party or agent might have been so possessed.

Notice is a fact to be proved, like any other fact, by evidence. Notice may be proved either (1) directly, by evidence bringing the fact of knowledge of the prior claim home to the party, or (2) indirectly, by circumstantial evidence. Actual notice may be inferred, as a matter of fact, from proof of circumstances showing that the party had the opportunity to learn of the existence of the outstanding claim, or of circumstances of general notoriety pointing to the existence of such claim, or from proof that the party knew of facts or circumstances sufficient to put a reasonable man upon inquiry as to whether or not there was some prior adverse claim to the property in question, which facts or circumstances, if investigated, would probably have led to actual knowledge of the prior claim. Upon proof that the party knew of such facts or circumstances, it will be inferred, in the absence of other evidence, that he made the investigation and actually learned of the prior claim and thus had actual notice thereof. But if it be shown that he made such investigation with due diligence, but nevertheless failed to learn of such claim, he will be held to be without notice. If, however, it be shown that he wilfully or negligently failed to make such investigation and therefore did not learn of the prior claim,

he will be dealt with as if he had had actual notice. In such case, while strictly speaking without notice, he has not acted in good faith and also he will be estopped to set up the want of notice.

Notice to agent, within certain well recognized limits, is notice to principal, and in equity notice to agent has, within these limits, precisely the same effect as notice to principal, actual notice to agent being actual notice to principal.

Besides notice proper, there are several cases of so-called constructive notice. Constructive notice is notice imputed by law, and is wholly independent of knowledge; indeed there can be true constructive notice only in the absence of knowledge, with knowledge the party would have actual notice. The cases of constructive notice are few and special and each rests upon its own peculiar ground. These cases are (1) notice by possession of real estate, where such possession is not known to the party charged with notice; (2) notice by recitals in title deeds; (3) notice by *lis pendens*; and (4) notice by registration. With the exception of notice by registration, which is statutory, none of these cases of constructive notice are of much importance, and the first and third have in some states been abolished by statute.

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JURISDICTION OF THE UNITED STATES COURT OF CLAIMS

AT the time of the Armistice, November 11, 1918, all business of any magnitude in the United States was conducted by the government, or with the government as principal customer, or under detailed and rigid governmental regulation and supervision. Enormous obligations were incurred by the government in payment for ships, lands, transportation lines, and goods taken over with or without agreement as to the amount of compensation. Contracts and orders for the manufacture of war goods were placed by the War and Navy Departments to the value of billions of dollars, a large part of which were unfulfilled November 11, 1918, and were thereafter partially or wholly canceled. Out of these transactions, claims against the government running into the hundreds of millions have arisen, some of which, probably the greater part, have been or will be amicably settled or compromised by the departments. Other claims will not be satisfactorily adjusted and the question will be asked, What redress has the claimant against the United States?¹

Few people, relatively few lawyers even, realize that it is possible to sue the United States and obtain a judgment. The Court of Claims, in which this can be accomplished, is perhaps better known as an investigating commission to aid Congress in dealing with private bills, but its real judicial function is so unfamiliar that a former assistant attorney-general, who defended many cases before it, has described it as "The Unknown Court."² As the United States, which is always the defendant in this court, is sued here only by its consent, and only to the extent to which it has consented to be sued, it is important to anyone who has a claim against the United States and who contemplates suit to know just what jurisdiction the United States has consented to confer on this

¹ In preparation of this article I have been aided by suggestions from members of the Court of Claims Bar, including William H. Stayton, Esq., of Washington, D. C.

² Houston Thompson, now a member of the Federal Trade Commission.

court, and what concurrent jurisdiction, limited in amount and less frequently exercised, has been conferred on the District Courts.³

1. THE CLAIM

First of all a legal claim must exist. Legal obligations of the United States and obligations on which suit may be brought against it in a court are not identical classifications. Justice Brandeis recently observed that "The United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy."⁴ Nearly ninety years ago a Justice of the same Supreme Court said, "It is true, the payment of a debt cannot be enforced against the government by suit; but claims against it are none the less legal or equitable on that account."⁵ As early as 1797 the existence of legal claims against the government was recognized in a statute permitting them to be set off in suits by the government against claimants.⁶

Claims arise from two principal sources: (a) a legal transaction of the government, *e. g.*, a contract; and (b) a statute expressly creating a liability. As to contracts, the United States has, as an incident of statehood, contractual capacity. Congress has distributed the power to contract throughout the various departments, and prescribed the method of its exercise.⁷ If the United States by its lawfully authorized representatives makes a promise under circumstances which would in the case of a business corporation constitute a contract there is no reason why the agreement should not be called a contract by the United States. Regardless

³ JUD. CODE, 1911, § 24 (20). It has finally after much uncertainty been decided that an appeal lies directly from the District Courts to the Supreme Court in cases under this jurisdictional heading. *J. Homer Fritch, Inc., v. United States*, 248 U. S. 458 (1919).

⁴ *United States v. Babcock*, 250 U. S. 328, 331 (1919).

⁵ *Heirs of Emerson v. Hall*, 13 Pet. (U. S.) 409 (1839). See also *United States v. Bank of the Metropolis*, 15 Pet. (U. S.) 377 (1841).

⁶ Act of March 3, 1797, c. 20, § 4, 1 STAT. AT L. 515.

⁷ *Dugan v. United States*, 3 Wheat. (U. S.) 172 (1818); *United States v. Tingey*, 5 Pet. (U. S.) 115 (1831); *United States v. Bradley*, 10 Pet. (U. S.) 343 (1836); *United States v. Lane*, 3 McLean (U. S.) 365 (1844); *Dikes v. Miller*, 25 Tex. 281 (1860). Important features in the exercise of the power to contract are that contracts for purchase and construction in normal times must be made after advertisement and bids, and that contracts must be in writing, signed by both parties and duly filed. U. S. REV. STAT. 3744.

of direct enforceability against the state by judicial process, federal and state bonds have been treated as property, and as negotiable instruments by the courts.⁸ By drawing a draft, the United States has been held to assume the usual obligations of a party to a negotiable instrument.⁹ The statutes creating the Court of Claims, in providing that it shall have jurisdiction over claims based on contract,¹⁰ tacitly assume that the United States enters into contracts, thus creating legal obligations against itself.

Takings of private property give rise to many claims. A taking is a legal transaction. Even where there is no actual agreement as to compensation, in view of the constitutional requirement that no property be taken without payment of "just compensation,"¹¹ it is a fair inference as a matter of fact that the government intends to assume a contractual obligation when it takes what it recognizes to be private property. The courts have found an "implied contract" in such cases.

The second class of claims is based on statutes. The United States may assume a liability not based on a legal transaction and to which it was not previously legally bound. For example it may grant a pension, which is essentially a gratuity, in the legal sense, or it may create for itself an obligation to make compensation for a tort of its servants, something for which it is not inherently liable, as in case of collision between a warship and private vessel,¹² or infringement of patent.¹³

A conspicuous group of claims which might be made against a private corporation but cannot be made against the United States, save where expressly assumed by statute, are torts of a representative. It was recently asserted "Government must pay where it wrongs. There are no arguments against it save, on the one hand, the dangerous thesis that the state-organs are above the law, and,

⁸ *Bonaparte v. Appeal Tax Court of Baltimore*, 104 U. S. 582 (1881); *Plummer v. Coler*, 178 U. S. 115 (1900).

⁹ *United States v. The Bank of the Metropolis*, 15 Pet. (U. S.) 377 (1841).

¹⁰ Act of February 24, 1855, 10 STAT. AT L. 612; JUD. CODE, 145.

¹¹ UNITED STATES CONSTITUTION AMENDMENT, 5. ". . . nor shall private property be taken for public use without just compensation."

¹² 37 STAT. AT L. 1285; 19 STAT. AT L. 89. See *The Hesperos*, 252 Fed. 858 (1918); *Boyers Sons v. United States*, 195 Fed. 490 (1912); "Admiralty Claims against the Government," George De Forest Lord, 19 COL. L. REV. 467.

¹³ Act of June 25, 1910, 36 STAT. AT L. 851. See *Cramp & Sons v. International Co.*, 246 U. S. 28 (1918).

on the other, the tendency to believe that ancient dogma must, from its mere antiquity, coincide with modern need."¹⁴ It is submitted that there is a *petitio principii* in the first sentence quoted. It is assumed that government has wronged, that in cases of tort "*qui facit per alium fecit per se*" is a literal statement of fact, instead of a dogmatic legal fiction used to describe vicarious responsibility.¹⁵

The doctrine of *respondeat superior* is an exception to the usual rule of torts that responsibility is confined to the proximate consequences of wrongful act. It is commendable in its common-law application. The employer who for his personal profit, or for the gratification of any personal interest, causes a servant however well chosen or well instructed to act and to come into contact with strangers, should support the risk of injuries incident to his activities, rather than the injured strangers. Numerous instances of torts by servants are not within the rule of *respondeat superior*. A fellow servant's tortious injury does not create liability on the part of the master because the injured servant in entering the employment is supposed to assume the risk,¹⁶ according to the leading case. It may also be said that he is not within the class for which the *respondeat superior* rule is devised. He is not a stranger, but a member of the group for whose benefit the enterprise is conducted, whether he receive certain wages, or uncertain profits. The patient in a hospital cannot recover against it for injuries caused by negligence of a nurse,¹⁷ while a stranger run over by a careless ambulance driver has a cause of action.¹⁸ A university is not liable to a student injured in the laboratory by a negligent instructor.¹⁹

Fellow servants and beneficiaries of charitable institutions are not strangers, but more or less participants in enterprises carried on in part for their benefit. The individualistic common law applies the assumption of risk formula. However it may be with *subjects*, the *citizen* is in a similar category. He is part of the en-

¹⁴ "The Responsibility of the State in England," H. J. Laski, 32 HARV. L. REV. 447, 453.

¹⁵ Justice Holmes' Essay, "Agency," 5 HARV. L. REV. 1, 20-21; 3 SELECT ESSAYS ANGLO-AMERICAN LEGAL HISTORY, 411.

¹⁶ *Priestly v. Fowler*, 3 M. & W. 1 (1837).

¹⁷ *Powers v. Massachusetts Hospital*, 101 Fed. 896 (1899).

¹⁸ *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626 (1910).

¹⁹ *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991 (1905).

terprise of organized democratic government. He is part of the operating force, as he helps directly or indirectly to put public servants in office, and they are there for the benefit of each and every citizen. He is not in the position of a stranger to the proprietor of a private business conducted for profit. As regards him, there is not the same reason for asserting as a short-cut formula that he has been wronged by the *government* when a public servant has in the negligent or abusive exercise of his functions injured him.

It is submitted that governmental non-liability in tort is not a doctrine whose only justification is that it is, but that it is a doctrine characteristic of the individualism of the common law, as it existed down to the end of the nineteenth century prior to the era of "socialization"²⁰ of the law.

It is in accord with the spirit of the times to assert the justice and expediency of general state liability for torts.²¹ A tendency of the several states to assume liability for torts in certain instances can be noted.²² The United States has recently assumed liability in several matters of a tortious nature. The holder of a patent is protected against infringement by a servant of the government.²³ A Workmen's Compensation Act²⁴ protects federal employees. Persons injured by government operation of the railroads have the same remedy as before.²⁵ Vessels of the Shipping Board leased or chartered to private operators and used as merchant ships may be libeled in event of liability incurred in operation just as a privately owned vessel.²⁶ Congress has even directed the War and Navy Departments to adjudicate claims for property damages done by training operations including use of airships,²⁷ and to compensate for damages done by the expeditionary forces in allied countries in accordance with the law of those countries.²⁸

²⁰ "Socialization" occasionally meets with vigorous protest from the more conservative. See "Reconstruction," R. D. Weston, 28 HARV. GRAD. MAG. 193.

²¹ 32 HARV. L. REV. 447; 30 HARV. L. REV. 20; 19 COL. L. REV. 467.

²² 30 HARV. L. REV. 25, note 21.

²³ See note 13.

²⁴ U. S. COMP. STAT., 1916, § 8932.

²⁵ Act of March 21, 1918, 40 STAT. AT L. 456, § 10. See *Dahn v. McAdoo*, 256 Fed. 549 (1919).

²⁶ 39 STAT. AT L. 529, § 9. See *The Lake Monroe*, 250 U. S. 246 (1919); *The Florence H.*, 248 Fed. 1012 (1918).

²⁷ Act of July 11, 1919, chaps. 8, 9.

²⁸ Act of April 18, 1918, 40 STAT. AT L. 532.

2. ESTABLISHMENT OF THE COURT

Though a state may incur an obligation, its consent is necessary for a judicial remedy. As Justice Gray has said:

" . . . it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury."²⁹

To permit the same remedies against the government as against a private corporation, attachment, garnishment, execution, injunction, would be inexpedient. But no substantial inconvenience or detriment seems to have resulted from the limited remedies which have thus far been afforded.

In England, suit against the Crown in cases of contract and takings of private property follow as a matter of course, the filing of the "Petition of Right."³⁰ We have no sovereign person in the United States to whom such a petition could be addressed. Claimants unable to get satisfactory treatment by the auditors in the appropriate departments, or to set off against a debt due the government under the Act of 1797,³¹ have been obliged to petition Congress. Congress has usually referred petitions to committees and if the claim is ever reported back for action made up for long delay in process by generosity in the award. In a few instances suit in the courts has been authorized.³²

It seemed desirable that there be a permanent commission of a judicial character to investigate claims submitted to Congress, and to submit findings in judicial form, and decrees in the form of bills ready for enactment. Thus claimants would be assured some measure of certainty and prompt action, and the country protected against imposition and over-impulsive generosity. In 1855³³ the Court of Claims was established to "hear and determine all

²⁹ *Briggs v. Lightboats*, 11 Allen (Mass.) 157, 162 (1865).

³⁰ 32 HARV. L. REV. 447; *Feather v. Regina*, 6 B. & S. 257 (1865).

³¹ See note 6.

³² *United States v. Clarke*, 8 Pet. (U. S.) 436 (1834); *Clark v. Clark*, 17 How. (U. S.) 315, 317 (1854); *Van Ness v. United States*, 4 Pet. (U. S.) 232 (1830).

³³ 10 STAT. AT L. 612.

claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, . . . which may be referred to said court by either house of Congress." It was not to give judgments, but to report its findings and opinions to Congress, and in case it approved of a claim, prepare a bill for its payment. In 1863³⁴ the court was authorized to render judgment, subject to appeal to the Supreme Court and an estimate by the Secretary of the Treasury of the amount required to pay the judgment. The latter provision was held by the Supreme Court inconsistent with possession by the Court of Claims of judicial character, and it therefore declined appellate jurisdiction.³⁵ The provision was then repealed by Congress³⁶ and thereafter it has not been doubted that the Court of Claims is an authentic, genuine court.³⁷

3. JURISDICTION OF THE COURT

As the government can be sued only in the instances and under the conditions to which it has consented³⁸ the claimant must find warrant for his petition under some of the Acts of Congress which enumerate the subjects of jurisdiction in the court. The latest statement of the permanent jurisdiction is in the Judicial Code of 1911, Sections 145 and 162.³⁹ The various headings will be described in detail.

³⁴ 12 STAT. AT L. 765.

³⁵ *Gordon v. United States*, 2 Wall. (U. S.) 561 (1864); Opinion, Taney, J., adopted by the court after his death, 117 U. S. 697 (1864); *Montgomery v. United States*, 49 Ct. Cl. 575, 601 (1914).

³⁶ 14 STAT. AT L. 9; *Degroot v. United States*, 5 Wall. (U. S.) 419 (1866).

³⁷ *United States v. Klein*, 13 Wall. (U. S.) 128 (1871); *O'Grady's Case*, 22 Wall. (U. S.) 641 (1874).

³⁸ *United States v. Babcock*, 250 U. S. 328 (1918); *Ill. Cent. R. v. Pub. Utilities Com.*, 245 U. S. 493, 504 (1918).

³⁹ Act of March, 1911, 36 STAT. AT L. 1087-1169.

"Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court

A. "ALL CLAIMS (EXCEPT FOR PENSIONS) FOUNDED UPON
THE CONSTITUTION OR ANY LAW OF CONGRESS"⁴⁰

Pensions being a gratuity⁴¹ are more appropriately dealt with by Congress and an executive department than by a court. So far as a pension granted has accrued it is a claim founded on a law of Congress which would be within the jurisdiction of the court but for this express exception. The War Risk Insurance Act has provided for jurisdiction in the District Courts.⁴² It is submitted that the jurisdiction of the Court of Claims is not excluded by implication.

The principal contribution from the Constitution is the provision "Nor shall private property be taken for public use with-

jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department or commission authorized to hear and determine the same.

"Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the government in said court. *Provided*, That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

"Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

"Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled 'An Act to provide for the collection of Abandoned property and for the prevention of frauds in insurrectionary districts within the United States' and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, and statutes of limitations to the contrary notwithstanding."

⁴⁰ The exception of pensions was introduced by the Tucker Act, 1887, 24 STAT. AT L. 505. Claims founded on the Constitution were added.

⁴¹ *Harrison v. United States*, 20 Ct. Cl. 122 (1885); 21 R. C. L. 242.

⁴² Act of September 2, 1914, 38 STAT. AT L. 711; Act of October 6, 1917, 40 STAT. AT L. 410.

out just compensation.”⁴³ If there is agreement for compensation of course there is express contract. If without agreement, the government takes, recognizing the title of the owner and not claiming adversely, the law presumes an implied contract.⁴⁴ Where the government claims title to the property taken, it incurs no liability.⁴⁵ The owner has a remedy against the government representative who acted unlawfully, as he is not protected by his office from personal liability.⁴⁶

The question of what is a taking causes some difficulty. There is no liability for merely consequential damage,⁴⁷ nor for occasional trespass where no intention of continued use is shown.⁴⁸ But a permanent destruction, as by flooding, constitutes taking.⁴⁹ In-

⁴³ AMENDMENT, Art. V.

⁴⁴ *United States v. Great Falls Mfg. Co.*, 16 Ct. Cl. 160 (1880), 112 U. S. 645 (1884); *United States v. Lynah*, 188 U. S. 445, 464 (1903); *Morris v. United States*, 30 Ct. Cl. 162 (1895); *Hersch v. United States*, 15 Ct. Cl. 385 (1879).

⁴⁵ *Hill v. United States*, 149 U. S. 593 (1893); *Tempel v. United States*, 248 U. S. 121 (1918). A taking of a vessel found in a belligerent port erroneously as captured enemy property is perhaps a tort, but gives rise to no liability on the part of The *Herrera v. United States*, 222 U. S. 558 (1912). A purchase from a person other than claimant is not a taking of his property. *Jackson v. United States*, 27 Ct. Cl. 74 (1891).

⁴⁶ *Lane v. Watts*, 234 U. S. 525 (1914); *Philadelphia v. Stimson*, 223 U. S. 605, 619 (1912); *Belknap v. Schild*, 161 U. S. 10, 18 (1896). But one cannot by suit against an official get in substance relief against the United States, where it is not liable. *Oregon v. Hitchcock*, 202 U. S. 60 (1906); *Louisiana v. McAdoo*, 234 U. S. 627 (1914); *United States v. Daniels*, 231 U. S. 218 (1913).

⁴⁷ *Gibson v. United States*, 166 U. S. 269 (1897); *Scranton v. Wheeler*, 179 U. S. 141 (1900); *Bedford v. United States*, 36 Ct. Cl. 474 (1901), 192 U. S. 217 (1904); *MacArthur v. United States*, 29 Ct. Cl. 191 (1894); *Hayward v. United States*, 30 Ct. Cl. 219 (1895); *Johnson v. United States*, 31 Ct. Cl. 262 (1896).

⁴⁸ *Peabody v. United States*, 46 Ct. Cl. 39 (1911), 231 U. S. 530 (1913).

⁴⁹ “It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee is vested.” *Brewer, J.*, in *Lynah v. United States*, 188 U. S. 445, 470 (1903); *Williams v. United States*, 104 Fed. 50 (1900); *King v. United States*, 58 Fed. 9 (1893); *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166, 181 (1871). It would seem that the practical operation of the Volstead Act is analogous to the flooding cases. Though there is no taking of possession, or of title, or direct physical invasion, there is an act of the United States which necessarily and foreseeably “takes away the use and value” of machinery and of intoxicating liquors lawfully manufactured and owned. The result is intentional and so complete as to be more than consequential damage.

fringement of patent was not considered a taking⁵⁰ and created no liability prior to the Act of 1910.⁵¹

Damages for taking is ordinarily the commercial market value,⁵² with interest from the time of actual taking to the time of a rendition of judgment.⁵³ It is an interesting question of immediate importance, whether in case of taking of property in such extraordinary demand as ships during the war emergency the very high offered prices in the market are to be the criteria of "just compensation." Another interesting question is whether prices fixed by the fuel administration,⁵⁴ less than could have been obtained in a free market, are conclusive in cases of requisitions by the War and Navy Departments.

An unlawful interference with the constitutional rights of the person does not give rise to an enforceable claim.⁵⁵

Jurisdiction may be based on a law of Congress, where a statute creates an obligation to pay money to claimant: for example, the statutes requiring return of excess payments for public lands⁵⁶ or excess taxes.⁵⁷ Specific performance of an obligation to do some act other than payment of money cannot be obtained in this court.⁵⁸

⁵⁰ *Schillinger v. United States*, 155 U. S. 163 (1894); *Harley v. United States*, 198 U. S. 229 (1905); *Farnham v. United States*, 49 Ct. Cl. 19 (1913), 240 U. S. 537 (1916). Compare *Crozier v. Krupp*, 224 U. S. 290, 305 (1912).

⁵¹ 36 STAT. AT L. ch. 423, p. 851.

⁵² "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted: that is to say, what is it worth from its availability for valuable uses?" Field, J., in *Boom Co. v. Patterson*, 98 U. S. 403, 407 (1878); *United States v. First National Bank*, 250 Fed. 299 (1918); *Northern Pac. Ry. Co. v. No. Amer. Tel. Co.*, 230 Fed. 347 (1915), 254 Fed. 417 (1918); *United States v. Chandler-Dunbar, W. P. Co.*, 229 U. S. 53 (1913). Value is to be determined as of the time of taking. *United States v. Gill*, 20 Wall. (U. S.) 519 (1874). Consequential damages to other than parcel taken not to be considered. *Sharp v. United States*, 191 U. S. 341 (1903).

⁵³ *United States v. Rogers*, 257 Fed. 397 (1919).

⁵⁴ *United States v. Pa. Cent. Coal Co.*, 256 Fed. 703 (1918).

⁵⁵ *Basso v. United States*, 49 Ct. Cl. 700 (1914), 239 U. S. 602 (1916).

⁵⁶ *United States v. Laughlin*, 249 U. S. 440 (1919).

⁵⁷ *United States v. Realty Co.*, 237 U. S. 28 (1915).

⁵⁸ *United States v. Jones*, 131 U. S. 1 (1889). The act provides for the enforcement of claims, refers to amounts in controversy, sums due by judgments, leading to the conclusion Congress intended the court to do nothing other than decree payment of money.

The War Emergency legislation creates many claims, some of which are expressly referred to the Court of Claims for adjudication, if the department concerned cannot effect amicable settlement.⁵⁹ Other acts do not refer to the court, but clearly provide for the creation of claims over which it would have jurisdiction.⁶⁰ Still other acts concurrently with creating the claims provide exclusive jurisdiction for their settlement in some executive department.⁶¹

B. REGULATIONS OF AN EXECUTIVE DEPARTMENT

Regulations issued by the head of a department under authority vested in him by Congress and acquiesced in by Congress have the force of law.⁶² They are important as limiting the obligation to

⁵⁹ Act of March 1, 1918, authorizing Shipping Board to acquire land, houses, buildings, for use of employees in shipyards. 40 STAT. AT L. 438, ch. 19.

Act of April 26, 1918, authorizing Secretary of Navy to take over land for purpose of ordnance proving grounds. 40 STAT. AT L. 537.

Act of May 16, 1918, authorizing President to acquire land and buildings for housing of workers in war industries. 40 STAT. AT L. 550.

Act of April 22, 1918, authorizing President to take over street railways for transportation of shipyard workers. 40 STAT. AT L. 535.

Act of July 10, 1918, authorizing President to take over telegraphs, telephones, and cables. 40 STAT. AT L. 904.

Act of July 18, 1918, authorizing President to requisition use or services of vessels and of docks and shipping facilities. 40 STAT. AT L. 913, 915.

Act of October 5, 1918, authorizing President to take over mines, smelters, minerals, etc. 40 STAT. AT L. 1009.

Act of March 21, 1918, authorizing President to take over transportation systems. 40 STAT. AT L. 451.

Act of October 6, 1917, commissioner of patents to withhold patent in public interest; inventor to recover royalty if device used by government. 40 STAT. AT L. 420.

Act of June 15, 1917, authorizing President to acquire ships, plants, etc. 40 STAT. AT L. 182.

⁶⁰ Act of August 25, 1919. Act for relief of contractors and sub-contractors under pre-war contracts with government who have been hampered by increased costs and priority rulings. Claims to be submitted to Secretary of Treasury.

Act of July 11, 1919, ch. 809, authorizing war and navy departments to pay claims for damage to property incident to training operations.

See as to exclusiveness departmental remedy, *McLean v. United States*, 226 U. S. 374 (1912); *Mitchell v. United States*, 21 Wall. (U. S.) 350 (1874); *Purcell v. United States*, 46 Ct. Cl. 509 (1911); *United States v. Babcock*, 250 U. S. 328 (1919).

⁶¹ Act of March 2, 1919, authorizing Secretary of Interior to settle claims for research on war materials, without jurisdiction in any court. 40 STAT. AT L. 1272, 1274.

⁶² *Harvey v. United States*, 3 Ct. Cl. 38 (1867); *Maddux v. United States*, 20 Ct. Cl. 193 (1885).

which the government is committed by implied contract,⁶³ and as against the contractor when acted on by him constituting terms of express contract.⁶⁴

C. CONTRACT EXPRESS OR IMPLIED

Like a corporation the United States has capacity to enter into contracts in the exercise of its constitutional powers. Like a corporation it acts through representatives. Unlike a representative of a corporation, the representative of the government can bind in express contract only to the extent of his actual authority.⁶⁵ There is no application of doctrines of apparent authority and estoppel. One dealing with a government representative is charged with knowledge of the particular statutes and regulations creating his authority and prescribing the manner of its exercise.⁶⁶

An important rule of statutory law in government contracts is the requirement that they must be in writing, duly executed by the government and by the contractor.⁶⁷ Unless so executed there is no right created against the government, so far as the contract is executory. Owing to the haste necessary in the placing of war orders the Armistice found many manufacturers who had made commitments and commenced performance of so-called "informal contracts" who were left high and dry by cancellations without the technical right to hold the government for a breach and without even the benefit of the adjustments provided for by the cancellation clauses in formal contracts. For their relief Congress

⁶³ *Arthur v. United States*, 16 Ct. Cl. 422 (1880); *N. Y., N. H. & H. R. v. United States*, 251 U. S. 123 (1919).

⁶⁴ *Gulf Transit Co. v. United States*, 43 Ct. Cl. 183 (1908).

⁶⁵ *Filor v. United States*, 9 Wall. (U. S.) 45 (1869); *Whiteside v. United States*, 93 U. S. 247 (1876); *Camp v. United States*, 113 U. S. 648 (1885); *Hazlett v. United States*, 115 U. S. 291 (1885); *Cartas v. United States*, 48 Ct. Cl. 161 (1913), 250 U. S. 545 (1919).

⁶⁶ *Curtis v. United States*, 2 Ct. Cl. 144 (1866); *Strong v. United States*, 6 Ct. Cl. 135 (1870); *Thompson v. United States*, 9 Ct. Cl. 187 (1873); *Sprague v. United States*, 37 Ct. Cl. 447 (1902); *Smoot v. United States*, 38 Ct. Cl. 418 (1903).

⁶⁷ 12 STAT. AT L. 411. This affects the remedy against the government, not the substantive validity or remedy against the contractor. *Clark v. United States*, 95 U. S. 539 (1877); *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159 (1903); *United States v. Andrews*, 207 U. S. 229 (1907); *United States v. S. S. Co.*, 239 U. S. 88 (1915). The statute does not affect the verbal extension of a contract, *Salomon v. United States*, 19 Wall. (U. S.) 17 (1873), nor reformation of mistake; *Ackerlind v. United States*, 240 U. S. 531 (1916).

passed the Act of March 2, 1919, authorizing the Secretary of War to "adjust pay or discharge" such agreements "upon a fair and equitable basis," no award, however, to include "prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a *reasonable remuneration* for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order."⁶⁸ In event of failure to settle in the department, the claimant may have recourse to the Court of Claims.

The War Department, through the Board of Contract Adjustment, has ruled that this statute is applicable to agreements express or implied between the government and a contractor containing these three essentials: (1) entered into for a purpose connected with the prosecution of the war; (2) performed in whole or in part, or expenditures made or obligations incurred upon the faith thereof prior to November 12, 1918; and (3) not executed in the manner prescribed by law.⁶⁹

Implied contract is difficult to define. It does not include all classes of contracts implied by law as between private persons, and yet it is somewhat broader than contract implied in fact, *i. e.*, a real consensual agreement not expressed in words. It is restricted to cases in which the government has received some consideration as a result of a consensual transaction, or has taken property under circumstances from which it may be inferred that it intends to pay compensation therefor, or has received money charged with a duty to repay it, as when money is paid by mistake.⁷⁰

The most frequent instances of implied contract, aside from takings, which may also now be made the basis for claim under the Constitution, are cases of partial or complete performance by claimant of what was intended as an express contract, but which is unenforceable as such, as for informality of execution. The contractor may in such cases recover the fair value of services or materials furnished.⁷¹ If the government rescinds an express con-

⁶⁸ Act of March 2, 1919; 40 STAT. AT L. 1272. Italics are writer's.

⁶⁹ Decisions Board of Contract Adjustment, page 46. See "Notes on Jurisdiction of the Secretary of War," Govt. Printing Office, January 1, 1920.

⁷⁰ *Knote v. United States*, 95 U. S. 149 (1877).

⁷¹ *Salomon v. United States*, 19 Wall. (U. S.) 17 (1873); *United States v. Gill*, 20

tract for fraud after partial performance, the contractor may recover under implied contract.⁷² A contract is not implied where the whole transaction can be brought under an express contract.⁷³ Services voluntarily rendered without expectation of reward afford no basis for implied contract.⁷⁴ Unexpected expenses of a contractor in providing false work to enable performance of his contract do not support implied contract.⁷⁵ Actual enrichment of the government which from the circumstances, it appears, it did not intend to pay for, as improvements to land held under a void patent possession of which is resumed by the government, creates no implied contract.⁷⁶ While in an action on an express contract for royalties the government cannot show invalidity of claimant's patent,⁷⁷ it can set up that defense when sued in implied contract,⁷⁸ this illustrating the foundation of enrichment necessary for implied contract. A voluntary payment to the government without duress or mistake cannot be recovered,⁷⁹ nor if it be made in

Wall. (U. S.) 517 (1874); *Clark v. United States*, 95 U. S. 539 (1877); *Grant v. United States*, 5 Ct. Cl. 71 (1869); *Adams v. United States*, 7 Ct. Cl. 437 (1871); *Wilson v. United States*, 23 Ct. Cl. 77 (1888).

⁷² *Crocker v. United States*, 240 U. S. 74 (1916). It would seem that the same right should exist if by fraud or misrepresentation of a governmental representative, a contractor is induced to give value under an express contract. The United States has been held in contract for extra expense incurred by contractors because of natural conditions not being as represented. *United States v. Stage Co.*, 199 U. S. 414, 424 (1905); *Hollerbach v. United States*, 233 U. S. 165 (1914); *Christie v. United States*, 237 U. S. 234 (1915); *Atlantic Dredging Co. v. United States*, 35 Ct. Cl. 463 (1900); *Atlantic Dredging Co. v. United States*, 53 Ct. Cl. 490 (1918). U. S. Sup. Ct. Adv. Op. 1919-20, 498. Fraud in the cause of a legal transaction should give the remedy of rescission as between private persons.

⁷³ *Ceballos v. United States*, 42 Ct. Cl. 318 (1907), 214 U. S. 47 (1909). The United States may be held in implied contract for benefits received after session of the Philippine Islands under a contract between the Spanish government and a cable company. *Eastern Extension Tel. Co. v. United States*, 231 U. S. 326 (1913). But see *Eastern, etc. Co. v. United States*, 251 U. S. 355 (1920).

⁷⁴ *Carroll v. United States*, 20 Ct. Cl. 426 (1885); *Utica, etc. Ry. Co. v. United States*, 22 Ct. Cl. 265 (1887).

⁷⁵ *Christie v. United States*, 237 U. S. 234 (1915); *Day v. United States*, 245 U. S. 159 (1917).

⁷⁶ *Bradford v. United States*, 47 Ct. Cl. 141 (1911); *Jefferson Lime Co. v. United States*, 48 Ct. Cl. 274 (1913).

⁷⁷ *Harvey Steel Co. v. United States*, 38 Ct. Cl. 662 (1903); 196 U. S. 310 (1905).

⁷⁸ *Farnham v. United States*, 49 Ct. Cl. 19, 38 (1913).

⁷⁹ *Chesebrough v. United States*, 192 U. S. 253 (1904); *United States v. S. C. Co.*, 200 U. S. 488.

compromise of a dispute,⁸⁰ but if made under illegal duress it is recoverable.⁸¹

Implied contract results from dealings with a government representative only where he has authority as representative to enter into such relation in behalf of the United States.⁸²

D. DAMAGES LIQUIDATED OR UNLIQUIDATED IN CASES
NOT SOUNDING IN TORT

This clause added by the Tucker Act⁸³ has not very much affected the jurisdiction. The qualification "Not sounding in tort" applies to this clause only, and does not prevent jurisdiction of a claim based on a statute arising out of tort.⁸⁴ The reference to equity does not confer general equity jurisdiction. It does not authorize the court to decree specific performance⁸⁵ nor to set aside a conveyance,⁸⁶ nor to cancel a judgment lien.⁸⁷ Judgments are still only for a sum of money. In enforcing a contract the court may however reform it.⁸⁸ Under this clause admiralty jurisdiction of the federal courts may be invoked where a substantive right to payment of money exists. In this connection there has been an instance of damages recovered as not sounding in tort nor in contract, a case of salvage of goods on which duty had been paid which would have been refunded had claimant not saved the goods from destruction.⁸⁹

⁸⁰ *Savage v. United States*, 92 U. S. 382 (1875); *Healey v. United States*, 29 Ct. Cl. 115 (1894); *Sweeny v. United States*, 17 Wall. (U. S.) 77 (1872).

⁸¹ *De Bow v. United States*, 11 Ct. Cl. 672 (1875) (*sub nom.* *United States v. Norton*) 97 U. S. 164 (1877).

⁸² *Hooe v. United States*, 43 Ct. Cl. 245 (1908), 218 U. S. 322 (1910).

⁸³ 24 STAT. AT L. 503, § 1.

⁸⁴ *United States v. Lynah*, 188 U. S. 445, 475 (1903); *Christie Street Com. Co. v. United States*, 136 Fed. 326 (1905); *Walton v. United States*, 24 Ct. Cl. 372 (1889).

⁸⁵ *United States v. Jones*, 131 U. S. 1 (1889).

⁸⁶ *United States v. Holmes*, 78 Fed. 513 (1897).

⁸⁷ *South Boston Iron Works v. United States*, 34 Ct. Cl. 174 (1899); *Milliken Imprinting Co. v. United States*, 40 Ct. Cl. 81 (1904).

⁸⁸ *Aetna Cons. Co. v. United States*, 46 Ct. Cl. 113 (1911).

⁸⁹ *United States v. Cornell S. S. Co.*, 137 Fed. 455 (1905), 202 U. S. 184 (1906). Another salvage case treated as one of contract is *United States v. Morgan*, 99 Fed. 570 (1900), 180 U. S. 638 (1900).

E. SET-OFFS AND COUNTERCLAIMS, LIQUIDATED AND UNLIQUIDATED

This clause was first introduced in 1863.⁹⁰ The court may give judgment against the claimant if the set-off exceeds the claim,⁹¹ but not if the petition be dismissed for lack of jurisdiction,⁹² nor against an assignee.⁹³ Though not pleaded, it has been held that the set-off may be set up and deducted from the judgment,⁹⁴ but not if it has been pleaded and rejected by the court.⁹⁵

F. DEPARTMENTAL REFERENCE CASES

Pending claims in departments may be transmitted to the court by the department heads for examination, and report of findings of fact and law.⁹⁶ If the claimant consent to the transmission or if it appear to the court that the claim be within its jurisdiction as established by law for the rendition of judgments against the United States, it shall proceed to render judgment.

G. CONGRESSIONAL REFERENCE CASES

The original purpose of the court, that it aid Congress in investigation of claims submitted to it, has been retained. Either House may refer a pending bill for investigation and report. Here, too, if it appear that the claim is within the judicial jurisdiction of the court it shall render judgment.⁹⁷ Thousands of claims were referred under this clause and the court lacking any power to institute investigation of its own motion, being dependent on the initiative of claimants, many have lain dormant for years. Most of the claims referred were barred by the Statute of Limitations, and therefore could not have been instituted by the claimants in

⁹⁰ 12 STAT. AT L. 765, *Allen v. United States*, 17 Wall. (U. S.) 207 (1872); *Fendall v. United States*, 12 Ct. Cl. 305 (1876).

⁹¹ JURIDICAL CODE, § 146; *McElrath v. United States*, 102 U. S. 426 (1880); *Huske v. United States*, 46 Ct. Cl. 35 (1910).

⁹² *B. & O. Railroad v. United States*, 34 Ct. Cl. 484 (1899).

⁹³ *Dickson v. United States*, 31 Ct. Cl. 399 (1896).

⁹⁴ 18 STAT. AT L. 481. (*Quere*, is this repealed by J. C. 297?)

⁹⁵ *Bonnafon v. United States*, 14 Ct. Cl. 484 (1878).

⁹⁶ JURIDICAL CODE, § 148. See *United States v. New York*, 160 U. S. 598 (1895) (26 Ct. Cl. 467 (1891)); *Balmer v. United States*, 26 Ct. Cl. 82 (1890); *In re Wright*, 50 Ct. Cl. 19 (1914).

⁹⁷ JURIDICAL CODE, § 151. See *Montgomery v. United States*, 49 Ct. Cl. 575 (1914) for a history of this phase of jurisdiction. On meaning of "legal or equitable," see *Sac & Fox Indians*, 220 U. S. 481 (1911).

the court. The Crawford Amendment to the Omnibus Claims Act, March 4, 1915, prevents hereafter an adjudication of claims barred by the provisions of any law.⁹⁸

The court has from time to time had other important jurisdiction of a temporary nature, as the Civil War Claims, Indian Depredation Claims, Chinese Indemnity Claims. Other special jurisdiction will doubtless be given it in the future. If indemnity is collected from Germany, its distribution might naturally be entrusted to the Court of Claims. If Congress decides to purchase the unconsumed stocks of alcoholic beverages or the distilling and brewing machinery which it has in effect "taken" in so far as it has rendered it valueless to its owners, the determination of prices would naturally fall to this court.

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⁹⁸ 38 STAT. AT L. 996; Chase v. United States, 50 Ct. Cl. 293 (1915).

SET-OFF IN CASES OF IMMATURE CLAIMS IN INSOLVENCY AND RECEIVERSHIP

INTRODUCTION

WHEN insolvency takes place and an assignee or equitable receiver takes charge of the assets of the insolvent, settles and adjusts claims and distributes the assets to creditors and those entitled to receive them, the matter of set-off frequently presents some difficulties. When a creditor owes the insolvent payable *in futuro*, and the insolvent owes such creditor payable *in presenti*, the American authorities almost without exception allow a set-off.¹ When a creditor owes the insolvent and the insolvent owes the creditor *in futuro*, many American cases refuse to allow such creditors a set-off.² Some cases, however, do under such circumstances allow a set-off.³ However, since in certain cases, of insolvency and bankruptcy a natural equity demands the set-off of present obligations, even though payable *in futuro*,⁴ it is difficult to conceive that the principles or the usages and rules of equity devised for securing justice and equity should raise up barriers to the working out of this natural equity. And it is difficult to see how the American

¹ *Lindsay v. Jackson*, 2 Paige (N. Y.) 581 (1831); *Bradley v. Angel*, 3 N. Y. 475 (1850); *Smith v. Felton*, 43 N. Y. 419 (1871); *Hughitt v. Hayes*, 136 N. Y. 163, 32 N. E. 706 (1892); *Fera v. Wickham*, 135 N. Y. 223, 31 N. E. 1028 (1892); *Scott v. Armstrong*, 146 U. S. 499 (1892); *Yardley v. Clothier*, 51 Fed. 506 (1892).

² *Lindsay v. Jackson*, 2 Paige (N. Y.) 581 (1831) (*obiter*); *Spaulding v. Backus*, 122 Mass. 553 (1877); *Hannon v. Williams*, 34 N. J. Eq. 255 (1881); *Fera v. Wickham*, 135 N. Y. 223, 31 N. E. 1028 (1892); *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 219, 67 N. E. 439 (1903); *Groff v. Friedline*, 14 N. Y. Misc. 23, 35 N. Y. Supp. 755 (1895); *Chipman v. Ninth Nat. Bank*, 120 Pa. St. 76, 13 Atl. 707 (1888); *Homer v. Nat. Bank*, 140 Mo. 225, 41 S. W. 790 (1897); *Taylor v. Weir*, 63 Ill. App. 82 (1895); *Ellis v. First National Bank*, 22 R. I. 565, 48 Atl. 936 (1901). (Statute involved.)

³ *Kentucky F. Co., Assignee v. Mer. Nat. Bank*, 90 Ky. 225, 13 S. W. 910 (1890); *Nashville Trust Co. v. Bank*, 91 Tenn. 336, 18 S. W. 822 (1891); *Georgia Seed Co. v. Talmadge*, 96 Ga. 254, 22 S. E. 1001 (1895); *Ainsworth v. Bank of Cal.*, 119 Cal. 470, 51 Pac. 952 (1897); *Thomas v. Exchange Bank*, 99 Iowa 202, 68 N. W. 780 (1896); *Colton v. Drovers Bldg. Assn.*, 90 Md. 85, 45 Atl. 23 (1899); *Richardson v. Anderson*, 109 Md. 641, 72 Atl. 485 (1909); *Hayden v. Citizens Nat. Bank*, 120 Md. 163, 87 Atl. 672 (1913); *Brown v. Sheldon State Bank*, 139 Iowa 83, 117 N. W. 289 (1908).

⁴ Lord Mansfield in *Greene v. Farmer*, 4 J. Burr. 2214 (1768).

cases can consistently allow a set-off to a creditor whose present claim is payable the day insolvency is declared and refuse to allow a set-off to a creditor whose present claim against the insolvent is payable a day after insolvency is declared. There must be some way of working out this natural equity just referred to without offending any equitable principles or any of the usages and rules of equity. It is our purpose in this article to analyze the contradictory decisions on the subject of equitable set-off in cases of insolvency declared and receiver appointed, and try to reach an understanding of the underlying principles involved.

At common law no set-off existed,⁵ because simplicity and rigidity of procedure militated against any variation or adjustment of plaintiff's claim against defendant. The first statutes providing for a set-off at common law were enacted without specific reference to solvency or insolvency, and as a matter of convenience. Courts of equity have from an early date recognized the right of set-off.⁶ They did so before common law statutes of set-off were passed, and before the bankruptcy statutes of set-off existed. The first bankruptcy statutes allowing a set-off were passed, because as Lord Mansfield said, natural justice and equity demand that in certain cases when insolvency and bankruptcy take place, cross demands should compensate each other by deducting the less sum from the greater, and the difference is the only sum which is justly due.⁷ Courts of equity have generally followed courts of law in their construction of set-off statutes.⁸ They have rarely, if ever, broken in upon the decisions of law unless some other equity intervened, which justified them in granting relief beyond the rules of law. This has been true in England, and the American courts have generally adopted the same principles in so far as the statutes of set-off of the respective states have enabled them to act.⁹

An equitable set-off is a remedial right, in that, if successfully pleaded, it is a bar to a recovery either *in toto* or *pro tanto*.¹⁰ How-

⁵ Central Appalachian Co. v. Buchanan, 90 Fed. 454, 459 (1898); Lord Mansfield in *Greene v. Farmer*, 4 J. Burr. 2214 (1768).

⁶ *Greene v. Farmer*, 4 J. Burr. 2214 (1768); *Ex parte Stephens*, 11 Vesey 24 (1805); Central Appalachian Co. v. Buchanan, 90 Fed. 454, 459 (1898).

⁷ Lord Mansfield in *Greene v. Farmer*, 4 J. Burr. 2214 (1768).

⁸ *Greene v. Darling*, 5 Mason (U. S.) 201, 212 (1828); *Howe v. Sheppard*, 2 Sumner (U. S.) 409, 412 (1836).

⁹ *Greene v. Darling*, 5 Mason (U. S.) 201, 212 (1828).

¹⁰ *Sovereign Life Insurance Co. v. Dodd* [1892], 2 Q. B. 573, 578.

ever, every remedial right must be based or granted on a showing of some substantive right by one who demands the remedial right. As between solvent parties, the allowance or disallowance of a set-off is largely a matter of convenience; as between a solvent and an insolvent party, or the estate of an insolvent, it is more than a matter of convenience, because the rights of various creditors become involved. If a claimant has a lien, charge or equity against certain of the insolvent's property before insolvency, the act of insolvency or the death¹¹ or the assignment or receivership cannot change these substantive rights.¹² If a claimant has a substantive right or claim against the insolvent himself before insolvency or assignment or receivership, with few exceptions of a personal nature, these substantive rights cannot be divested by insolvency or assignment or receivership or death. A court of equity cannot change the contracts and rights of a claimant which existed before insolvency declared; it cannot take these away nor add to them,¹³ nevertheless, the act of insolvency resulting in a breach of contract to pay either presently or in the future, may be the occasion for a court of equity to apply the remedial right of set-off based on an implied contract.¹⁴ The court overcomes the shortsightedness of individuals by finding a contract to set-off when the transactions are such between them as would justify the court in so doing.

The theory of equitable set-off may be said to have been adopted from the civil law.¹⁵ Under the civil law there existed what was called "compensation." When two cross demands of a nature substantially the same and due from A to B, existed in the same right, that is to say, when the one was a creditor in his own right and a debtor also in his own right to the other, then according to the civil law the debts were deemed *suo jure* set-off or extinguished *pro tanto*. Equity follows the civil law to a certain extent, but gives the party

¹¹ *Ainsworth v. Bank*, 119 Cal. 470, 51 Pac. 952 (1897); *Schwarz v. Harris*, 206 Fed. 936, 939 (1913); *Traders Nat. Bank v. Cresson*, 75 Tex. 298, 12 S. W. 819 (1889); *Ford Admr. v. Thornton*, 3 Leigh (Va.) 695 (1832).

¹² *In re Receivership Lord & Polk Chemical Co.*, 7 Del. Ch. 248 (1895); *Central Appalachian Co. v. Buchanan*, 90 Fed. 454 (1898); *Johnson v. Garner*, 233 Fed. 756 (1916).

¹³ *Quincy, etc. Ry. v. Humphries*, 145 U. S. 82 (1892); *Central Appalachian Co. v. Buchanan*, 90 Fed. 454 (1898).

¹⁴ See subject of Implied Contracts discussed in 1 WILLISTON ON CONTRACTS, § 3. See also note 35, *infra*.

¹⁵ *Duncan v. Lyon*, 3 John. Ch. (N. Y.) 351, 357 (1818).

from whom payment is demanded the right of set-off in the proper case if he chooses to exercise it, but if he does not, the debt is left in full force to be recovered in an adversary suit.¹⁶ The substantive right of set-off may be created by express contract, in which case it must be recognized by a court of law and by a court of equity. If A owes B and B owes A, and they expressly agree that neither at any time of settlement shall have a claim against the other for a sum or amount greater than a balance struck between them, then if one sues the other, the amount of his actionable claim is in equity only a balance struck as agreed. On the other hand, if no express agreement as to set-off exists between A and B, yet when the circumstances and the dealings between A and B are presented to the court, the court finds that it can imply a contract between them that each shall have a claim against the other at any time for only a balance struck, then we have a basis for an equitable set-off even though no express contract of set-off between the parties has been shown.¹⁷

An apparent difficulty, however, arises when it is discovered that although the claims or debts on either side are present obligations, nevertheless, one or both of these present obligations may be payable *in futuro*. Our contention is that if a court of equity can find an implied contract between the insolvent and the creditor or debtor to set off their respective obligations, one against the other, from time to time, then the fact that one or the other of these present obligations may be payable *in futuro* does not in case of insolvency and anticipatory breach of contract prevent a set-off. In cases where the creditor owes the insolvent *in futuro* the question must present itself as follows: Has the creditor entered into a present obligation owing *in futuro* with the understanding and on the faith and expectation that any advances that he may make to the other party although not in the direct form of payment of this future payable obligation, shall be credited as part payment on his future obligation? When we say advances to be credited as payments on the future payable obligation, we include of course, any obligation running in favor of the party who credits the same. In other

¹⁶ *Greene v. Darling*, 5 Mason (U. S.) 201, 212 (1828).

¹⁷ *In re Receivers of the Globe Ins. Co.*, 2 Ed. Ch. (N. Y.) 625 (1836); *Greene v. Darling*, 5 Mason (U. S.) 201, 215 (1828); *Carr v. Hamilton*, 129 U. S. 252, 262 (1888); *Central Appalachian Co. v. Buchanan*, 90 Fed. 454 (1898).

words, if A owes B subsequently, and B owes A presently, then in case of insolvency of B the circumstances of their transactions may authorize the court to imply a contract entitling A to apply toward the payment of his obligation any advances he makes to B, or any obligations B incurs in favor of A.

However, if A owes B presently, and B owes A subsequently, in case of the insolvency of B the court may also find an implied contract entitling A to apply towards the payment of his claim any advances he makes to B or any obligations B creates in favor of A. Before insolvency and breach of contract on the part of B, A's claim was due and payable *in futuro*, but the anticipatory breach by B has created a present right and claim in A which has a measurable value and should be set off to the extent of this value against what A owes presently. If there has been an anticipatory breach, does the holder of such an obligation against the insolvent have to wait until the maturity of his obligation to present his claim or bring suit against the insolvent or his estate any more than he would have to wait until a time subsequent to an anticipatory breach of any other contract entered into and breached? If the obligation entered into by the insolvent has been breached, the holder of such an obligation is entitled to compensation against the party breaching the contract. In the case of a life insurance policy contract breached by the insurer before maturity, the value of this policy at the time of breaching is the measure of the policy holder's compensation.¹⁸ The value of a contract to pay money at a future time is easily measured if no interest is agreed upon, and if interest is agreed upon, the measure is the face of the claim plus the interest up to date on the contract, or a rebate of interest, if interest has been paid in advance.¹⁹ The fallacy which those courts make which refuse to allow a set-off to a creditor who has a claim against the insolvent payable *in futuro*, lies, we believe, in their failure to recognize a measurable obligation owing from the insolvent at the time of his insolvency, and also an implied contract to set off this obligation.

Of course, difficulties arise as to what transactions between the parties and what course of dealings will justify a court of equity in finding an implied contract of set-off between the parties. The best light we can get on this subject is to refer to the English bank-

¹⁸ *In re Albert Life Assn. Company*, L. R. 9 Eq., 706, 716 (1870).

¹⁹ *Thomas v. Western Car Co.*, 149 U. S. 95, 117 (1893).

ruptcy statutes covering a set-off. If the bankruptcy statutes were founded on natural justice and equity, as stated by Lord Mansfield, we may look to such statutes and follow their development to determine what is natural justice and equity in the matter of a set-off in cases of insolvency followed by a present or future repudiation of debts and final distribution of the estate. The English bankruptcy statute, on the subject of set-off, started out by allowing mutual debts to be set off. The words "mutual debts," it was found, did not cover certain transactions between the parties which natural justice and equity dictated should be the subject of a set-off. Wherefore, later on, the word "credits" was added. The words "mutual debts and credits" were intended to comprise all ordinary transactions between two persons in their individual capacities. Later on, it was thought that the words "mutual debts and credits" were not broad enough to cover all cases justifying a set-off, whereupon the statute was changed to read "mutual debts, credits and mutual dealings." The words "mutual dealings" were added to get rid of any questions which might arise whether a transaction would end in a debt or not. The additional words "mutual dealings" were intended to give a more extended right of set-off than previously existed.²⁰ As indicating the belief of the English Parliament that the same rights of set-off allowed in bankruptcy proceedings should be allowed in insolvency proceedings and in winding up of corporations, the English Judicature Act of 1873 and 1875, by Section 10, specifically provided that in such cases the right of set-off as allowed and provided for in cases of bankruptcy should avail.

Our American bankruptcy act uses the words "mutual debts" or "mutual credits." Although courts of equity in the United States are not bound by the English bankruptcy statutes, or even the American bankruptcy statutes on the subject of set-offs, nevertheless, courts of equity may find a great deal of light on the subject of equitable set-off by investigating the questions of set-off as worked out by the English and American bankruptcy acts and by the decisions under those acts.

The fact that the set-off claimed is based on a legal right of action does not in most jurisdictions prevent its being set up as a

²⁰ Booth v. Hutchinson, L. R. 15 Eq. 30 (1872).

defense either to a suit at law or an action in equity.²¹ The Civil Codes of the several states generally abolish the formal distinctions between suits at law and actions in equity and permit all defenses, counterclaims and set-offs, whether formerly known as legal or equitable. The courts of the United States now by statute permit an equitable defense to be interposed by answer, plea or replication to a legal action,²² and Equity Rule No. 30 permits a legal or equitable claim to be set up in answer to an action in equity. The fact that the claim of set-off may be unliquidated, is no objection in a court of equity to allowing it as a set-off.²³

Coming to the question of whether or not mere insolvency will be sufficient to authorize a court to allow an equitable set-off, a number of authorities, including the Supreme Court of the United States, hold that insolvency of the party against whom the set-off is claimed, is a sufficient ground for equitable interference and the allowance of a set-off.²⁴ The courts of Massachusetts, however, hold that insolvency unaccompanied by a formal adjudication of the debtor's insolvency, or bankruptcy, or making of an assignment for the benefit of creditors, is not sufficient to authorize a court of equity to allow an equitable set-off in the case of a debt payable in the future by the insolvent.²⁵ Our understanding of the situation is, that it is the anticipatory breach of his contract to pay by the insolvent which authorizes a court of equity to apply the equitable remedy of set-off, and insolvency except in a few cases always is a present or anticipatory breach of a contract. It is inequitable for the insolvent to breach his contract to pay in the future and at the same time demand that the other party to the transaction comply with his contract and pay over presently to the insolvent or to the insolvent's estate money or property.²⁶ We believe the United States Courts, when they say insolvency is a sufficient ground for equitable interference, must use the word in the sense that insolvency means a breach of contract to pay debts both present and

²¹ *Stone v. Fargo et al.* 55 Ill. 71 (1870); *Scott v. Armstrong*, 146 U. S. 499 (1892); *Central Appalachian Co. v. Buchanan*, 90 Fed. 454 (1898).

²² Act of March 3, 1915, c. 90, 38 STAT. AT L. 956.

²³ *Central Appalachian Co. v. Buchanan*, 90 Fed. 454 (1898).

²⁴ *Rolling Mill Co. v. Ore and Steel Co.*, 152 U. S. 596 (1894).

²⁵ *Spaulding v. Backus*, 122 Mass. 553 (1877); *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655 (1903); *Jump v. Leon*, 192 Mass. 511, 78 N. E. 532 (1906).

²⁶ *Nashville Trust Co. v. Bank*, 91 Tenn. 336, 18 S. W. 822 (1892).

future. On the other hand, when the Massachusetts courts restrict the term "insolvency" to mean insolvency or bankruptcy proceedings, or assignment for the benefit of creditors, they are restricting the term too much. Insolvency proceedings, bankruptcy and assignment for the benefit of creditors, may be evidence of a breach of contract to pay on the part of the insolvent; nevertheless, there may be insolvency and breach of contract to pay in other cases not covered by the above proceedings. If the insolvent is a corporation and is dissolved and all its assets are distributed, it certainly is impossible for the corporation to pay obligations which are payable *in futuro*.²⁷ The same thing holds true when the estate of a deceased is declared to be insolvent.²⁸ In the case of the estate of an insolvent individual or partnership, of course, the making of an assignment and the appointment of receiver does not necessarily put it out of the power of the insolvent to acquire property subsequently and pay an obligation when it becomes due. It therefore becomes the duty of the court distributing the assets to determine whether or not there has been an anticipatory breach of an executory contract, and whether a right of set-off accrues to the other party by reason of the breach by the insolvent party.

SET-OFF WHEN CLAIM OF INSOLVENT NOT DUE

In the United States the cases almost without exception hold that a debtor to the insolvent's estate whose debt is a present obligation but is not due and payable at time of insolvency declared, can set off as against this debt a claim of the insolvent against this debtor, when the insolvent's claim is due and payable at time of insolvency declared.²⁹ The reason generally given is, that equity will compel a set-off in such a case on the theory that the creditor to the insolvent, or to the insolvent's estate, is entitled to waive time of payment and to have the assignee or receiver restrained from holding such a claim as an investment, or from disposing of the same and distributing the proceeds among the general creditors.

The leading case on the subject is *Lindsay v. Jackson*,³⁰ wherein

²⁷ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721, 743 (1912).

²⁸ *Ford v. Thornton*, 3 Leigh (Va.) 695, 698 (1832); *Camden Nat. Bank v. Green* (18 Stew.) 45 N. J. Eq. 546, 17 Atl. 689 (1889).

²⁹ See note 1, *supra*.

³⁰ 2 Paige (N. Y.) 581 (1831).

the complainants on or about May 1831, gave to the defendants two negotiable promissory notes for \$1500 each, payable six months from date without interest; and the defendants about the same time became indebted to the complainants on an acceptance, payable in June 1831. A few days before this acceptance became due the defendants became insolvent and stopped payment, but no assignment was made, neither was any receiver appointed. In July of the same year, the complainants filed their bill in equity to restrain the defendants from negotiating or transferring notes, and prayed that the amount to become due be set off or applied in part satisfaction of the money due on the acceptance. The trial court allowed an injunction as prayed for. Chancellor Walworth refused to dissolve the injunction on appeal, saying among other things, as follows:

"As the notes are not on interest, there can be no injustice in compensating the defendants for the amount to become due thereon at a future day by a present payment. The complainants alone had any interest in obtaining the time of credit which was given on these demands. It might present an entirely different question if the defendants' debt was now due from the complainants, who were seeking to compensate it by a claim against the defendants, payable at a future day. . . . Here, the defendants could not claim present payment of their notes, due six months hence, and therefore it would be inequitable for them, by an off-set, to compel the complainants to pay those notes before they became due. But as the debt of the defendants is due, and if they paid it immediately, according to their agreement, the complainants might, without any injustice to the other party, waive the time of credit which was for their own benefit, and pay the notes immediately with the money thus received, the defendants have no cause to complain of such a mode of compensating one debt by another."³¹

In the case of *Lindsay v. Jackson*, the justification of the Chancellor in restraining the defendants from disposing of the notes, seems to rest on the fact that without such a restraint the notes might get into the hands of innocent purchasers for value without notice, and therefore the makers of the notes be unjustly deprived of their defense of set-off. Such a restraining order may have been necessary in *Lindsay v. Jackson*, because there is no showing that an assignment had been made or receiver appointed. If such had been

³¹ 2 Paige (N. Y.), 584-585.

the case, the injunction might not have been necessary, because an assignee or receiver does not take as innocent purchaser for value without notice, but any infirmities or defenses good against an assignor of a negotiable instrument must be good as against such assignee or receiver, and any purchaser from any assignee or receiver cannot very well take without notice.³² As for the statement made by Chancellor Walworth that the plaintiffs may waive the time of credit, this statement appears to us to be in conflict with the fundamental principles and usages and rules of equity that the court appointing the receiver cannot change or alter the contract between the parties, and if the court cannot do this, neither a creditor or debtor of the insolvent can do it, nor can the assignee or receiver do it. The making of an assignment or the appointment of a receiver does not take away any substantive contractual rights which belonged either to the insolvent, or to the creditor, or debtor of the insolvent, previous to insolvency declared. If, before insolvency, the debtor has no right to pay his obligations at once against the insolvent's wishes nor to restrain the insolvent from disposing of his investment by sale or otherwise, it follows that after insolvency the debtor has no contractual right to pay the assignee or receiver ahead of time nor to restrain him from disposing of the claim or investment by sale or otherwise,³³ unless such obligation or negotiable security is about to be transferred in such a way as to cut off the maker's defense of set-off or other meritorious defense.³⁴

If, however, Chancellor Walworth could have found an express or implied contract between the complainant and the defendant to the effect that the obligations entered into by the complainants, payable in the future, were made with the faith and understanding that any advances or indebtedness running to the complainants from the insolvent were by an implied agreement to be from time to time or on demand credited *pro tanto* on the complainant's indebtedness, and such indebtedness be reduced accordingly, then the court could have allowed the set-off without resorting to the waiver theory, and without forcing a change or alteration of the

³² *Smith v. Felton*, 43 N. Y. 419, 423 (1871).

³³ *In re Commercial Bank Corporation of India and the East*, L. R. 1 Ch. 538, 543 (1866).

³⁴ *Rolling Mill Co. v. Ore and Steel Co.*, 152 U. S. 596, 615 (1894); *Schwarz v. Harris*, 206 Fed. 936, 939 (1913); *Central Appalachian Co. v. Buchanan*, 90 Fed. 454 (1898).

contract between the parties.³⁵ Chancellor Walworth, besides deciding the case before him, says as follows:

"It might present an entirely different question if the defendants' debt was now due from the complainants, who were seeking to compensate it by a claim against the defendants, payable at a future day."³⁶

These remarks just quoted were *obiter dictum*, but nevertheless they seem to have been grasped by future courts as an authority for refusing to allow a set-off in an otherwise proper case wherein a present debt owed by the insolvent was due and payable subsequent to the time when the assignee or receiver was appointed.

The case of *Bradley v. Angel*³⁷ follows with approval *Lindsay v. Jackson*, and allows a set-off to a creditor who owes the insolvent an obligation payable *in futuro*. This case is subsequently followed in 1892 by *Hughitt v. Hayes*.³⁸ The leading case in the Supreme Court in the United States on this subject is *Scott v. Armstrong*.³⁹ In this latter case the note admitted to be set off did not mature until subsequent to the receivership of a National Bank. A claim against the deposit in the National Bank was due and payable at time of receivership. Chief Justice Fuller allowed the holder of a

³⁵ Said Chief Justice Fuller:

"Indeed natural justice would seem to require that where the transaction is such as to raise the presumption of an agreement for a set-off it should be held that the equity that this should be done is superior to any subsequent equity not arising out of a purchase for value without notice."

Armstrong v. Scott, 146 U. S. 499, 508 (1892).

Said Parker, C. J.:

"It is quite common for those who have given negotiable securities to make advances to their creditors on the faith and expectation of an allowance and adjustment, although not in the direct form of payment of their notes. Death or insolvency of the payee often occurs, and manifest injustice is done if the party so advancing is to be treated as a debtor to the whole amount, and as a creditor for what he may have so advanced. If his note is transferred while unimpeached, it is but right that he should suffer, for he has promised every *bona fide* holder according to the face of the note. But he who takes it with notice of grounds of defense, or after it is due, which the law charges as notice, is holden to take it altogether on the credit of the indorser, knowing, or being presumed to know, that if the promisor had any dealings with the payee which would justify a defense, the note is chargeable with that defense in his hands."

Sargent v. Southgate, 22 Mass. (5 Pick.) 312, 317 (1827).

³⁶ 2 Paige (N. Y.) 581, 585 (1831).

³⁷ 3 N. Y. 475 (1850).

³⁸ 136 N. Y. 163, 32 N. E. 706 (1892).

³⁹ 146 U. S. 499 (1892).

claim against the bank as depositor to set off this claim against his note which was payable at the bank subsequently. The court said among other things, as follows:

"It was, therefore, the balance upon the adjustment of the accounts which was the debt, and the Farmers' Bank [creditor asking for a set-off] had the right, as against the receiver of the Fidelity Bank, although the note matured after the suspension of that bank, to set off the balance due on its deposit account, unless the provisions of the national banking law were to the contrary."⁴⁰

Chief Justice Fuller's language seems to be broad enough to cover a debt due from the insolvent after insolvency declared, provided the transactions between the parties were entered into with the faith and understanding that advances should be credited on future payable obligations. At least, Chief Justice Fuller does not deny such to be the case. Furthermore, he puts his decision on the theory of an implied contract between the parties, and not on the theory of waiver as had the New York case, saying,

"Indeed natural justice would seem to require that where the transaction is such as to raise the presumption of an agreement for a set-off it should be held that the equity that this should be done is superior to any subsequent equity not arising out of a purchase for value without notice."⁴¹

The true test of allowing a set-off in cases of present obligations of a creditor, payable *in futuro*, seems to us to be this: Can the court find an implied contract between the insolvent and a creditor that the present obligation of the creditor payable in the future was entered into on the faith and understanding and expectation that any advances made by the creditor, or any considerations flowing from the creditor, resulting in obligations of the insolvent were made or allowed on the faith and understanding and expectation that they should be considered by the insolvent as an allowance and adjustment, although not in the direct form of payment of the present obligation payable in the future? If the obligation is a non-negotiable one it passes to a transferee encumbered with the right of set-off. If a negotiable note is transferred to one having notice of the right of set-off, or held to have notice, then the note is chargeable

⁴⁰ 146 U. S. 508.

⁴¹ *Ibid.*, 508.

with the defense of set-off in the hands of the transferee.⁴² The situation of the parties is as follows:

A owes B subsequently
B owes A presently
B becomes insolvent

The court finds that it is the express or implied understanding between A and B that any advances made by A or any obligations running from B to A shall be considered as and credited on the obligation of A to B and reduce it *pro tanto*. It is difficult to conceive why such advances should be credited against a present obligation payable presently and not against a present obligation payable *in futuro*. If the court can imply an understanding and contract as stated above, we believe a set-off should be allowed. If on the other hand the transactions between the parties positively oppose such an understanding, then no set-off can be created by a court of equity any more than it can itself create any other contractual right.

SET-OFF WHEN CLAIM AGAINST INSOLVENT IS NOT DUE

What are the rights of set-off belonging to a claimant who owes the insolvent presently due when the obligation of the insolvent is absolute but not due and payable at time when insolvency is declared?⁴³

One of the first cases of great importance on the subject in the United States is *Spaulding v. Backus*,⁴⁴ wherein the court, speaking on the subject of set-off of immature claims, says;

"For, assuming that a court of equity may enforce a set-off in favor of a plaintiff, to whom a debt is due, against an insolvent debtor, who holds a claim not due, it by no means follows that it would be equitable to protect a plaintiff from the payment of his debt according to his contract, simply because the defendant, against whom he has a claim due

⁴² *Sargent v. Southgate*, 22 Mass. (5 Pick.) 312-318 (1827); *Smith v. Felton*, 43 N. Y. 419, 423 (1871); *Chance v. Isaacs*, 5 Paige (N. Y.) 592 (1836); *Colton v. Drovers Bldg. Assn.*, 90 Md. 85, 45 Atl. 23 (1899).

⁴³ Cases refusing to allow a set-off. See note 2, *supra*. Cases allowing a set-off. See note 3, *supra*.

⁴⁴ See note 2, *supra*.

at a future day, is at the time insolvent. In the one case, an insolvent debtor, refusing to pay his own debt already due, would be simply restrained from holding a claim, not due against the plaintiff, as an investment, or for the purpose of paying or preferring creditors, and might be compelled to set it off, if the plaintiff were ready to anticipate payment. In the other, the plaintiff would be relieved from the performance of his contract presently due, and be allowed to obtain payment of his own claim before it is due by the terms of his contract.”⁴⁵

In reply to such a statement we may say that by allowing a set-off in either case, the court is allowing the creditor demanding the set-off to be paid otherwise than according to his contract and in preference to other creditors, unless the court can find an implied contract between the parties to the effect that neither party shall have a right to recover from the other party an amount in excess of a balance struck between them, covering their mutual debts, mutual credits or mutual dealings, and unless the declaration of insolvency has created an occasion for a set-off to be invoked and applied. When the court in *Spaulding v. Backus* says, that to allow a set-off when the plaintiff owes the insolvent a debt presently due as against a debt from the insolvent subsequently due, would be to relieve the plaintiff from his performance of his contract and to obtain payment before it is due, our answer is as follows: When the insolvent can no longer perform his contract to pay in the future, and by insolvency declares this to be the case, then the other party to the contract certainly is relieved of his agreement to wait for payment which will never take place, and has some rights when the repudiation is made. We cannot say correctly, that the maturity of the obligation is anticipated or hastened, because a court of equity cannot change the contract between the parties; but when the obligation is a present absolute one with the time of payment postponed, the anticipatory breach of the contract to pay must certainly give rise to a present claim for compensation and set-off if the dealings of the parties are not inconsistent with an implied contract to set off. However, what the court says in *Spaulding v. Backus* concerning a set-off of a debt of an insolvent payable in the future, is not applicable to all insolvent estates being administered, because *Spaulding v. Backus* involved a mere assignment of a chose in action and bankruptcy took place subsequently. Says the court, “Nor are the rules

⁴⁵ 122 Mass. 553, 557 (1877).

relating to the settlement of insolvent estates of persons living or deceased, or to actions brought by assignees under an assignment for the benefit of creditors to have application to the claim of an assignee of a chose in action."

In 1892 the Supreme Court of the State of New York decided the case of *Fera v. Wickham*,⁴⁶ which was the case of an assignment for the benefit of creditors. This was a case wherein the claim of the plaintiff against the insolvent had not matured at time of insolvency declared, but matured subsequently even before the demand held by the assignee had matured. In other words, before distribution was made, the claims to and from the insolvent had matured; yet the New York Court refused to allow a set-off, because at time of insolvency declared the claim against the insolvent had not matured. The New York Court says among other things:

"But after the estate has passed to an assignee upon a trust to hold for and to distribute among creditors, the former and natural equity disappears in superior equities vesting in the general body of creditors."

In other words, it is stated that the assignor by making an assignment has taken away natural equities, formerly existing in favor of one of his creditors. If an implied contract to set-off existed between the parties before assignment, then according to *Fera v. Wickham* this right of set-off is taken away by making the assignment, and the assignment itself gives the whole mass of creditors certain equitable rights which they did not have before. These propositions, although held in other cases in the state of New York,⁴⁷ are not in accord with the most recent rulings of the Circuit Court of Appeals⁴⁸ for the southern district of New York, nor with the most recent rulings of the Supreme Court of the United States.⁴⁹ *Fera v. Wickham* refers to the case of *Rothschild v. Mack*.⁵⁰ The Rothschild case allowed a set-off in favor of a claim against the insolvent due subsequent to assignment. The court in the Rothschild case held that the money was procured by the insolvent by fraud, and therefore, even though not in one sense due and payable

⁴⁶ See note 1, *supra*.

⁴⁷ See Author's Article on "Contingent and Immature Claims in Receivership Proceedings" 29 YALE L. J., 481, 488.

⁴⁸ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721, 743 (1912).

⁴⁹ *William Filene's Sons Co. v. Weed*, 245 U. S. 597, 602 (1918).

⁵⁰ 42 Hun (N. Y.) 72, affirmed 115 N. Y. 1, 21 N. E. 726 (1889).

at time of insolvency; nevertheless, an action of assumpsit arose at once in plaintiff's favor for the recovery back of the money. The law implied a promise to repay that amount. *Fera v. Wickham* refuses to follow the Rothschild case because fraud was not shown. The court said that in the Rothschild case an action of assumpsit existed at the time of insolvency. We say that in *Fera v. Wickham* and other cases where a breach of contract to pay in the future is found, that breach of contract creates a present right and an occasion for a court of equity to allow a set-off, provided the dealings between the parties are not inconsistent with such an implied contract to set off. If the Rothschild case is good law, we think that *Fera v. Wickham* should have been decided differently, and that a set-off should have been allowed therein.

A number of cases in the United States follow with approval the case of *Spaulding v. Backus* and *Fera v. Wickham*.⁵¹ A number of cases, however, with or without citing *Fera v. Wickham*, hold that a debt from the insolvent payable subsequent to insolvency may be set off.⁵² The court in the case of *Nashville Trust Company v. The Bank*⁵³ says:

"Does it lie in the mouth of an insolvent to say that his contract is violated and thereby defeat so manifest an equity when it is apparent that he cannot himself perform that contract?"

When the court speaks of an equity, it must mean an equitable right to a set-off. The case of *Schuler v. Israel*⁵⁴ holds that a garnishee holding funds, and also holding a claim payable in the future and against the party garnisheed, will not be forced to give up these funds, but may hold them as a set-off.

IMMATURE CLAIMS HELD AND OWING BY BANKS

When insolvency is declared a bank may owe the insolvent presently on a general deposit account or a certificate of indebtedness or other claim and at the same time hold notes or other obligations against the insolvent which are payable *in futuro*. On the other hand, the bank may owe the insolvent on certificates of indebtedness or other obligations payable *in futuro* and hold notes or other obligations of the insolvent due and payable presently. It is

⁵¹ See note 2, *supra*.

⁵² See note 3, *supra*.

⁵³ See note 3, *supra*.

⁵⁴ 120 U. S. 506 (1887).

frequently said that a bank has a lien on all moneys and funds in its possession belonging to the depositor to secure any balance due the bank from such depositor.⁵⁵ Such a statement would indicate that a bank holds a superior position to an ordinary party under the same conditions. However, as between a bank and its general depositors, the bank occupies the relation of debtor to the depositor, and the depositor is a creditor of the bank. The funds of a general depositor in the bank are the property of a bank. A lien in equity practice is not equivalent to title to the property, it is neither a *jus in re* or a *jus ad rem*.⁵⁶ Although there may be possession of the thing by the lien holder, nevertheless, one cannot well have a lien on his own property. A bank having in its possession the property of another, may have a lien on that property, but a bank holding general deposits which belong to a bank, cannot have a lien on these deposits to secure a claim which it has against the debtor of the bank. The right of a bank to pay a debt owed to the bank by a creditor by cancelling a claim of that debtor against the bank is really a set-off, arising from the relations of the bank to its depositor or customer or any other party dealing with the bank. This right is independent of the statute of set-off, because it is an equitable right of set-off arising from the mutual dealings or transactions of the bank and the other party. Since it has been the custom for banks to deal with depositors and customers with the understanding and on the faith and expectation that a set-off shall be allowed, and since such dealings are generally understood to be part of the business of banking, courts of equity may the more readily find an implied contract when a bank is involved, than in other cases. After the implied contract is found, set-off will be allowed.⁵⁷

A debtor to the bank, whose debt was not due at time of making assignment, has been held to have the authority to waive the time of credit which was secured for his own benefit, and pay his debt at once in money or by way of set-off of the amount due him from the estate.⁵⁸ When the courts say the debtor to the bank has

⁵⁵ *Gibbons v. Hecox*, 105 Mich. 509, 513, 63 N. W. 519 (1895).

⁵⁶ *Ex parte John S. Foster*, 2 Story (U. S.) 131 (1842).

⁵⁷ See Bank cases of set-off, notes 2 and 3, *supra*.

⁵⁸ *Oatman v. Bank*, 77 Wis. 501, 46 N. W. 881 (1890); *Mechanics Bank v. Stone*, 115 Mich. 648, 651, 74 N. W. 204 (1898); *Thompson v. Union Trust Co.*, 130 Mich. 508, 512, 90 N. W. 294 (1902).

a right to waive the time of payment, they must mean we believe that the debtor has a right by express or implied contract to credit on his debt any advances he makes or any obligations which may run from time to time from the insolvent in favor of such debtor. If an individual can thus set off against an insolvent bank, of course, a bank can set off against an insolvent individual. The bank can set off an account or a certificate of deposit or other future indebtedness. The courts in the United States are almost all in accord with allowing a set-off under the circumstances mentioned above. However, if an insolvent bank owes an individual an amount payable in the future, a great many authorities hold that the individual must pay whatever he owes to the insolvent bank, and cannot set off the indebtedness due from the bank in the future.⁵⁹ Putting the shoe on the other foot, many authorities hold that a bank holding an unmatured obligation of an insolvent cannot set this off against a present debt of the bank, whether he be a depositor or other party.⁶⁰ The cases thus holding, follow the New York case of *Fera v. Wickham*, and most of them give the reasons which were given in that New York case. It has been held that even though action on the note unmatured at time of insolvency declared, was not commenced until it had matured and become due, that did not make any difference.⁶¹ In spite of a long line of cases to the contrary, we believe natural equity demands that an express or implied contract to set-off should be carried out by the courts of equity when insolvency takes place. That at the time when the estate of the insolvent is being distributed and conflicting claims between the insolvent and other parties are finally settled up, the claims on one side and the other side should be balanced, and only the balance become payable one to the other. This is so if the result of insolvency declared and receiver appointed is to put it out of the power of the insolvent to pay the debt in the future. This results in bankruptcy proceedings, and it generally results when a receiver is appointed of an insolvent to wind up his affairs. It is for the court to determine of course, in each case, whether or not it is no longer possible for the insolvent to pay his debts, and therefore, whether a breach of a contract to pay in the future has

⁵⁹ See note 2, *supra*.

⁶⁰ See 2 MORSE ON BANKING, § 134 (2 b) and cases cited.

⁶¹ *Fera v. Wickham*, note 1, *supra*.

taken place. If this has taken place it is impossible to settle claims without balancing obligations which exist *in presenti*, even though payable *in futuro*, and it makes no difference whether these obligations are due to or from the insolvent, provided we can determine with reasonable certainty and without undue delay the present value of these conflicting obligations.

Ralph E. Clark.

CINCINNATI, OHIO.

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THE LAW SCHOOL. — The total enrollment in the school is now 945, which exceeds by 62 that of last year and is the largest in the school's history. It is interesting, as showing the national character of the school, to note that 174 different colleges are represented and that approximately three quarters, or 76 per cent, of the men in the entering class come from outside of New England.

The following tables show the registration in the school for the last twelve years, the geographical source from which the last twelve entering classes have been drawn, and the colleges represented in the present first-year class:

	Massachusetts		New England outside of Massachusetts		Outside of New England		Total in Class
	Number	Percentage	Number	Percentage	Number	Percentage	
1911	72	29	33	14	137	57	242
1912	78	25	45	14	189	61	312
1913	65	22	32	11	200	67	297
1914	73	25	44	15	172	60	289
1915	59	21	34	12	194	67	287
1916	59	22	23	9	179	69	261
1917	65	23	29	10	194	67	288
1918	81	26	39	12	188	62	308
1919	70	21	26	8	239	71	335
1920	25	26	5	5	66	69	96
1921	6	27	4	18	12	55	22
1922	77	18	51	11	307	71	435
1923	49	14	37	10	277	76	363

	1910-11	1911-12	1912-13	1913-14	1914-15	1915-16
Res. Grad. . . .	2	3	6	4	5	8
Third year . . .	178	219	176	169	167	177
Second year . .	238	217	186	197	197	226
First year . . .	296	289	287	260	288	308
Unclassified . .	82	76	84	64	68	66
Specials	3	4	5	1	5	1
	<u>799</u>	<u>808</u>	<u>744</u>	<u>695</u>	<u>730</u>	<u>786</u>

	1916-17	1917-18	1918-19	*1919-19	1919-20	1920-21
Res. Grad. . . .	10	5	3	—	8	11
Third year . . .	213	73	37	67	156	196
Second year . .	234	87	24	66	221	285
First year . . .	335	96	36	153	438	363
Unclassified . .	64	31	13	21	59	90
Specials	2	0	1	—	1	—
	<u>858</u>	<u>292</u>	<u>114</u>	<u>307</u>	<u>883</u>	<u>945</u>

* These figures are for the special session which began on February 3, 1919, and ended on August 30, 1919.

In the present first-year class one hundred and seventeen colleges and universities are represented, as follows:

Harvard, 74; Princeton, 22; Brown, Yale, 15; Williams, 11; Dartmouth, 9; Univ. of Illinois, Johns Hopkins, 7; Univ. of California, Cornell Univ., Univ. of Michigan, Univ. of Pennsylvania, Univ. of Rochester, 6; Univ. of Chicago, 5; Amherst, Bowdoin Coll., Univ. of Georgia, Univ. of Minnesota, Mt. Union Coll., Washington and Lee Univ., Wittenberg Coll., 4; City Coll. (N. Y.), Clark Coll., Univ. of Missouri, Univ. of Nebraska, Univ. of North Carolina, Univ. of Notre Dame, Oberlin Coll., Trinity Coll. (N. C.), Univ. of Utah, Univ. of Virginia, Wesleyan Univ. (Conn.), 3; Boston Coll., Catholic Univ. of America, Univ. of Cincinnati, Colgate Univ., Univ. of Colorado, DePauw Univ., Fisk Univ., Grinnell Coll., Haverford Coll., Howard Univ., Indiana Univ., Lehigh Univ., Leland Stanford Jr. Univ., Middlebury Coll., Univ. of Mississippi, Ohio Wesleyan Univ., Univ. of South Carolina, Univ. of the South, Syracuse Univ., Trinity Coll. (Conn.), 2; Alabama Polytechnic Institute, Univ. of Akron, Alberta Univ., Assumption Coll., Boston Univ., Biddle Univ., Butler Coll., Case School of Applied Science, Center Coll. (Ky.), Coll. of Charleston, Columbia Univ., Delaware Coll., Earlham Coll., Eastern Coll., Univ. of Florida, Franklin Coll., Georgetown Coll. (Ky.), Georgetown Univ., Hamilton Coll., Hamline Univ., Havana Univ., Heidelberg Univ., Hiram Coll., Indiana State Normal School, Iowa State Coll., Kalamazoo Coll., Knox Coll., Univ. of Lausanne, Lawrence Coll., Lincoln Univ. (Pa.), Loyola Univ., Univ. of Maine, Mississippi Coll., Mount Allison Univ., Nebraska Wesleyan Univ., Univ. of Nevada, New Hampshire State Coll., New York Univ., Univ. of North Dakota, Northwestern Coll., Oglethorpe Univ., Ohio State Univ., Pennsylvania State Coll., Univ. of Pittsburgh, Reed Coll., Rice Institute, Richmond Coll., Rutgers Coll., St. Josephs Coll. (N. B.), St. Lawrence Univ., St. Marys Coll. (Kans.), Univ. of Santa Clara, Tarkio Coll., Univ. of Tennessee, Univ. of Texas, Tulane Univ., Union Coll., United States Naval Academy, Valparaiso Univ., Virginia Military Institute, Wabash Coll., West Virginia, Wesleyan Coll., Whitman Coll., Wofford Coll., Univ. of Wyoming, 1.

CONSIDERATION AND THE NEW YORK TRANSFER TAX. — The scope of inheritance taxation, though it has been the subject of much legislation

and litigation, is not yet accurately limited. A tax on succession to property at the death of the owner naturally includes succession by will or intestate laws; but it cannot be confined to such succession without inviting evasion by means of agreements *inter vivos* and gifts.

It is a common provision of inheritance tax statutes that transfers by deed, grant, bargain, sale, or gift, intended to take effect in possession or enjoyment at or after the death of the grantor, vendor, or donor, shall be subject to taxation. The New York statute so provides.¹ Such legislation is an effective bar to this method of evasion; but the courts, in construing the statutes, have felt that the words, taken literally, tend too strongly to restrict legitimate transfers *inter vivos*, and are unfair to those who have already paid full value.² Accordingly, it has been held that the words "deed, grant, bargain, sale, or gift" mean simply "gift";³ and that such transfers, when made for consideration, are not taxable.⁴

Having swung to its limit in this direction, the pendulum has recently started to swing back. In 1918 the Court of Appeals had before it a case, *Matter of Orvis*,⁵ in which two partners had agreed to set aside a fund, to be owned by them in common during their joint lives, the survivor to take the whole. The court held that there was a valid contract, supported by consideration, but that nevertheless the transfer of the decedent's interest was taxable as being in its nature donative. The test laid down is whether "in the light of reason or of ordinary intelligence and judgment" the transfer is "beneficent and donative" or is "for money's worth." If the former, it is taxable.

In view of this decision, the Appellate Division seems to have reached the wrong conclusion in *Matter of Schmoll*,⁶ recently decided. It was there held that the children of the decedent, who took one third of the community estate of the decedent and his wife under an antenuptial agreement, took free from the tax. The basis of the decision was that there was consideration for the father's agreement. That is true; and it is true also, as the court said, that such an agreement is enforceable in equity by the children.⁷ But it is submitted that neither fact is conclusive. On the authority of *Matter of Orvis* the decisive question is whether the transfer was donative.

The contract in *Matter of Schmoll* was a contract for the benefit of a

¹ See 1909 NEW YORK LAWS, c. 62, § 220 (4); CONSOL. LAWS, c. 60, art. 10.

² "The legislature did not intend that a purchaser who had paid full value for the property transferred should directly or indirectly pay the tax besides. . . . The statute was not intended to restrict or burden the right of persons to transfer property in all legitimate ways, and for all the usual and manifold purposes and objects of trade, commerce, and purchase. . . ." *Matter of Orvis*, 223 N. Y. 1, 7, 119 N. E. 88, 89 (1918).

³ *Blair v. Herold*, 150 Fed. 199 (1907); *Hagerty v. State*, 55 Oh. St. 613, 45 N. E. 1046 (1897).

⁴ *Matter of Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390 (1903). Some statutes specifically except transfers for adequate consideration, e.g., ". . . except in cases of a *bona fide* purchase for full consideration in money or money's worth." 1909 MASSACHUSETTS ACTS, c. 490, Pt. IV, § 1.

⁵ See note 2, *supra*.

⁶ 191 App. Div. 435, 181 N. Y. Supp. 542 (1920). See RECENT CASES, p. 221, *infra*.

⁷ *White v. White*, 20 App. Div. 560, 47 N. Y. Supp. 273 (1897). See BANNING, MARRIAGE SETTLEMENTS, 1 ed., 1, 2.

third person, of the "sole beneficiary" type.⁸ Such an agreement is in reality a contract to make a gift. Since someone else has furnished the consideration, the transfer is "beneficent and donative," even though the beneficiary can enforce it; and there is no reason why a gift of this kind should not be as clearly subject to the tax as any other.

This result, moreover, seems correct on principle. The New York transfer tax is a tax on the right to receive the property of the decedent.⁹ It is levied on the amounts received by individual beneficiaries, not on the estate of the decedent as a whole.¹⁰ It is reasonable, therefore, to require that if a transfer is to be free from taxation because consideration has been given for it, the consideration must move from the beneficiary. If he has given nothing, it is not unfair that his succession should be taxed.

It must be admitted that there is some authority against the view advanced here. There is one case directly in point¹¹ which supports the decision of the Appellate Division; but it was decided in the Surrogate's Court, and its authority is not binding. The cases which hold that a party to an antenuptial agreement may take under it tax free¹² are not in point, since the consideration moves from the one who receives the benefit.¹³ The strongest support for the principal case is to be found in the life insurance cases. A contract of insurance, where the policy is payable to a beneficiary, is a contract for the benefit of a third person, of the same type as the agreement in *Matter of Schmoll*. The receipt by the beneficiary of the proceeds of such a policy is not taxable.¹⁴

The argument by analogy from these cases is strong. But the law of inheritance taxation is still somewhat confused, and reliance on analogies is dangerous. It is submitted that a development of the law along the lines laid down in *Matter of Orvis* will most nearly achieve the legitimate purpose of the statute.

FORFEITURE OF AUTOMOBILE SEIZED WHILE CARRYING INTOXICATING LIQUOR. — Effective enforcement of the law sometimes requires legislative enactments making property, itself illegal or used for illegal purposes, subject to forfeiture. This power has been freely exercised by

⁸ See 1 WILLISTON, CONTRACTS, § 357.

⁹ See *Matter of Penfold*, 216 N. Y. 163, 167, 110 N. E. 497, 498 (1915). See GLEASON AND OTIS, INHERITANCE TAXATION, 2 ed., 694.

¹⁰ See 1909 NEW YORK LAWS, c. 62, § 243, as amended by 1910 LAWS, c. 706; CONSOL. LAWS, c. 60, art. 10. There is an exemption of \$5,000 on the succession of certain individuals, and the rate of taxation varies according to the relationship of the beneficiary to the decedent. See 1909 NEW YORK LAWS, c. 62, §§ 221, 221A, as amended by 1916 LAWS, c. 548; CONSOL. LAWS, c. 60, art. 10.

¹¹ *Matter of Demers*, 41 Misc. (N. Y.) 470, 84 N. Y. Supp. 1109 (1903).

¹² *Matter of Baker*, *supra*; *Matter of Vanderbilt*, 184 App. Div. 661, 172 N. Y. Supp. 511, *aff'd* 226 N. Y. 638, 123 N. E. 893 (1919).

¹³ Under the doctrine of *Matter of Orvis*, *supra*, the transfer might be taxable in spite of this, if it were in fact donative. Whether it is or not does not concern us.

¹⁴ *Matter of Elting*, 78 Misc. (N. Y.) 692, 140 N. Y. Supp. 238 (1912); *Tyler v. Treasurer and Receiver General*, 226 Mass. 306, 115 N. E. 300 (1917). The distinction that in the life insurance cases the payment is made by the insurer, and not out of the estate of the decedent, is not important. The beneficiary gets from the decedent's contract a right to the proceeds, and this right takes effect in enjoyment after the decedent's death.

Congress, notably against property used to evade the internal revenue laws.¹ A similar provision has been incorporated in the prohibition laws of many of our states and is now found in the Volstead Act for the enforcement of nation-wide prohibition.² It is usually provided, not only that all intoxicating liquors shall be forfeit, but also that any automobile or other vehicle carrying such liquor shall be seized and, after condemnation proceedings, shall be sold for the benefit of the public treasury.

Within the past few years numerous cases have arisen in the state and federal courts involving the extent of this liability to forfeiture under the various statutes in force — deciding, for example, whether the rights of an owner or mortgagee ignorant of the offense may be prejudiced by the forfeiture.³ Each case presents, primarily, a question of statutory interpretation, but there is some diversity of opinion as to the principles of construction proper to apply. Some courts hold that these statutes, being remedial, should be liberally construed according to the intention of the legislature.⁴ If the policy behind the enactment of a statute is effectively to curb violation of the law, doubts should be resolved in favor of the government, even though this construction works hardship. Some courts, on the other hand, laying emphasis upon the criminal nature of these proceedings, adhere to the general rule that criminal statutes should be construed strictly.⁵ An act involving a penalty or forfeiture should be interpreted in favor of the owner of the chattel. The latter seems the better view; if the legislature feels that a harsh rule is expedient, it should expressly so provide.

Two methods of approach should be distinguished. The first is one based upon the fact that, procedurally, actions for condemnation are usually civil actions, strictly *in rem*.⁶ In accord with this, the courts have adopted a theory similar to that which obtains in admiralty law;⁷ viz., that the property itself is the offender.⁸ If one were to adopt the premise that the chattel is really the offender, it would naturally follow

¹ *Dobbins Distillery v. United States*, 96 U. S. 395 (1877); *United States v. One Bay Horse and One Buggy*, 128 Fed. 207 (1904). (See U. S. REV. ST. §§ 3450, 3453; 13 STAT. AT L. 240; 14 STAT. AT L. 111, 151.)

² See 41 STAT. AT L. 315. This section provides for forfeiture of a vehicle only after conviction of the person who was in charge, and subject to all *bona fide* liens held by innocent persons. In view of the argument advanced in cases arising under stricter statutes, that such leniency would render a statute practically ineffective because of the chance for fraud, it will be interesting to watch the cases which are certain to arise under the Volstead Act.

³ *One Packard Automobile v. State*, 86 So. 21 (Ala.) (1920); *Matson & Healy v. State*, 103 S. E. 37 (Ga.) (1920); *United States v. One Buick Roadster Automobile*, 244 Fed. 961 (1917).

⁴ *United States v. Stowell*, 133 U. S. 1 (1889); *United States v. One Saxon Automobile*, 257 Fed. 251 (1919).

⁵ *Skinner v. Thomas*, 171 N. C. 98, 87 S. E. 976 (1916); *United States v. One Cadillac Eight Automobile*, 255 Fed. 173 (1918).

⁶ See U. S. REV. ST., § 3453, *supra*. This is illustrated by the names of the majority of these cases, wherein the chattels to be condemned stand as defendants; e. g., *United States v. Two Barrels of Whisky*, 96 Fed. 479 (1899).

⁷ *The Palmyra*, 12 Wheat. (U. S.) 1 (1827); *Brig Malek Adhel v. United States*, 2 How. (U. S.) 210 (1844).

⁸ *Dobbins Distillery v. United States*, *supra*; *United States v. Two Bay Mules*, 36 Fed. 84 (1888); *United States v. One Buick Roadster Automobile*, *supra*.

that so soon as a "guilty" chattel is found the inquiry need go no further, and one need not consider the rights of innocent owners or mortgagees.⁹ The test of such "guilt" in the case of vehicles is sometimes fixed as the "guilty knowledge of the person in charge,"¹⁰ but this remits us to a consideration of the personal element and brands the whole doctrine as a patent fiction. The logical result of the fiction would be the harsh rule that an innocent owner whose automobile had been stolen without any fault on his part, and used by the thieves for carrying intoxicants, would have no standing to prevent the forfeiture of the car, but it seems that the courts are hesitant about going to this length.¹¹ In some cases, however, there are intimations that if a statute specifically provided for such a forfeiture of stolen property, such a statute would, as a matter of course, be valid.¹² But it seems clear that the question of constitutionality would arise in such a case, for surely the courts would not carry their conception of the "guilty" chattel so far as to hold that the chattel, rather than its owner, is punished by a forfeiture.

The second method of approach is sounder because more in accord with the facts. It recognizes that chattels do not offend,¹³ and that if such forfeitures are justified it is as penalties necessarily inflicted upon the owner.¹⁴ If the legislation has a tendency to enforce obedience to the law and is reasonably necessary for this purpose, and if it gives a chance to all persons interested to defend in court,¹⁵ it is a reasonable exercise of the police power and does not take property without due process of law.¹⁶ The forfeiture is the owner's misfortune, much as if the property had been destroyed, and he is reduced to his remedy against the wrongdoer.¹⁷ As suggested above, if a statute should expressly call for the forfeiture of property which had been stolen, an interesting question of constitutionality would arise.¹⁸ In this case it would obvi-

⁹ This is curiously reminiscent of the noxal liability of Roman law, and the common law deodand. See HOLMES, COMMON LAW, 7-II, 17-25.

¹⁰ *Landers v. Commonwealth*, 101 S. E. 778 (Va.) (1919).

¹¹ *Peisch v. Ware*, 4 Cranch (U. S.), 346 (1808). See *United States v. One Saxon Automobile*, *supra*, 252.

¹² See *White Automobile Company v. Collins*, 136 Ark. 81, 83-84, 206 S. W. 748, 749 (1918).

¹³ *Vaughan, C. J.*, in *Sheppard v. Gosnold*, *Vaugh.* 159, 172 (1672), said: "Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are."

¹⁴ See *Boyd v. United States*, 116 U. S. 616 (1885), holding that in substance such proceedings are "criminal proceedings."

¹⁵ Two cases from New York emphasize the fact that a statute providing for forfeiture without notice is unconstitutional. The first holds a portion of the Liquor Tax Law to be void, on this ground. *Clement v. Rabbach*, 62 Misc. (N. Y.) 27, 115 N. Y. Supp. 162 (1909). The second holds that an amendment to that law, so as to give notice to persons interested and afford a chance to defend, sufficiently protects the rights of an innocent owner. *Farley v. Liquors Seized*, 80 Misc. (N. Y.) 32, 141 N. Y. Supp. 696 (1913).

¹⁶ *Kansas v. Ziebold* (*Mugler v. Kansas*), 123 U. S. 623 (1887); *Robinson Cadillac Motor Car Company v. Ratekin*, 177 N. W. 337 (Neb.) (1920).

¹⁷ See *United States v. Two Bay Mules*, *supra*, 85.

¹⁸ In *Buchholz v. Commonwealth*, 102 S. E. 760 (Va.) (1920), the person in charge of the automobile when it was seized was technically a thief, and the court held that in spite of the owner's freedom from guilt the car was subject to forfeiture; but it distinguished the case from one of out-and-out theft on the ground that the owner had trusted the thief, his chauffeur, with the custody of the car. In such a case it can be

ously be contended that the legislation would be unconstitutional because it would not have a reasonable tendency to accomplish the purpose aimed at.¹⁹ Enforcement of the law would not be materially contributed to by this provision, which would, upon its face, work unmerited hardship. In short, the matter is one for the sound discretion of the legislature, acting within the bounds of reason. It is at any rate clear that an owner of property who has voluntarily given up possession, or otherwise facilitated the illegal use, has no constitutional protection against a forfeiture.

ACCEPTANCE UNDER PROTEST OF RENT ACCRUING AFTER CAUSE FOR FORFEITURE OF A LEASE. — Where cause for forfeiture of a lease has arisen and the tenant subsequently offers rent accruing after the forfeiture, what should the landlord do to preserve his rights to recover the premises? If he accepts the rent as such, with knowledge of the cause for forfeiture, it is well settled that his very acceptance affirms the continuance of the lease and bars his suit upon the breach.¹ Must he therefore refuse the money altogether, or may he take it on a stipulation that he is receiving it not as rent but as compensation for use and occupation in the interim? The authorities on this point are by no means unanimous. The earlier cases originated in a *dictum* of Lord Mansfield's² that the determining factor was the landlord's attitude of mind, and that this was a question of fact for the jury.³ Each case thus goes on its own merits, and the landlord will preserve his right to recover possession if he makes it sufficiently clear that he does not recognize the tenancy as still existing when he accepts the money. This seems to be law to-day in at least four states,⁴ though there is but one case on the exact point.⁵ Later English cases inclined to treat the question not as one of fact, but as independent of the subjective intent of the landlord. Thoroughly

argued that the owner, though guiltless, has voluntarily assumed a risk. The tendency is to draw the line here. For the facts of this case, see RECENT CASES, p. 212, *infra*.

¹⁹ *Minnesota v. Barber*, 136 U. S. 313 (1890).

¹ *Pennant's Case*, 3 Co. 64a (1596); *Conger v. Duryee*, 90 N. Y. 594 (1882); *Ohio Valley Oil Co. v. Irvin Co.*, 184 Ky. 517, 212 S. W. 110 (1919). A suit by the landlord for rent has been held to have the same effect. *Dendy v. Nicholl*, 4 C. B. N. S. 376 (1858). *Nasby Bldg. Co. v. Walbridge*, 6 Oh. App. 104 (1916), *contra*. A mere demand for rent does not bar the landlord's right of re-entry. *Blyth v. Dennett*, 13 C. B. 178 (1853). Cf. *Camp v. Scott*, 47 Conn. 366 (1879).

² See *Doe d. Cheny v. Batten*, 1 Cowp. 243, 245 (1775).

³ *Goodright d. Charter v. Cordwent*, 6 T. R. 219 (1795); *Prindle v. Anderson*, 19 Wend. (N. Y.) 391 (1838); *Blyth v. Dennett*, *supra*.

⁴ *Manice v. Millen*, 26 Barb. (N. Y.) 41 (1857); *Fitzpatrick v. Childs*, 2 Brewst. (Pa.) 365 (1866); *Medinah Temple Co. v. Currey*, 162 Ill. 441, 44 N. E. 839 (1896). See *Doe d. Stedman v. McIntosh*, 5 Ired. L. (N. C.) 571, 574 (1845).

⁵ *Fitzpatrick v. Childs*, *supra*. Certain cases are to be explained on the ground that the money was not for rent that had accrued after the breach, or after the expiration of a notice to quit. *Kimball v. Rowland*, 6 Gray (Mass.) 224 (1856); *Miller v. Prescott*, 163 Mass. 12 (1895); *Lindeke v. Associates Realty Co.*, 146 Fed. 630 (1906). Cf. also *Sixth Avenue Realty Co. v. Zeiler & Co.*, 156 N. Y. Supp. 372 (1916) (express stipulation in lease safeguarding landlord in receiving rent from an assignee); *Fleming v. Fleming Hotel Co.*, 69 N. J. E. 715, 61 Atl. 157 (1905) (receiver in temporary possession).

discussed *dicta* in *Croft v. Lumley*⁶ supported the view that acceptance of rent by the landlord, however much he protested that he did not receive it as rent, operated to bar the landlord's rights under the forfeiture; and in another case⁷ where the landlord accepted rent as rent *eo nomine*, but protested that the tenancy was not thereby recognized, the Privy Council held similarly that the landlord's rights were barred. Finally it has been recently held in *Hartell v. Blackler*⁸ that acceptance of rent accruing after the expiration of a notice to quit (in effect, the same as acceptance after a cause for forfeiture) operates as a withdrawal of the notice to quit, even though the landlord in receiving the money stated that she did not recognize the tenancy as still existing, and said that she retained the money merely "on account of use and occupation of the premises but not as rent." The problem has rarely been before the American courts, but at least one decision and much language in other cases support this view.⁹

The rule of the modern English cases seems to be the more desirable one. The actions of a man are said to speak louder than his words.¹⁰ So in the case of acceptance under protest of a check in payment of a disputed or unliquidated claim, the majority of jurisdictions in this country hold it a good satisfaction in spite of the creditor's statement to the contrary.¹¹ The courts should prefer if possible an objective standard of interpretation to a subjective standard difficult of ascertainment. The rule is not a severe one on the landlord. After the cause for forfeiture or expiration of the notice to quit, he may proceed at once to recover possession; but if on the other hand he receives rent accruing thereafter, the fair and easily applied rule of law will hold him to the consequences of his receipt, whatever his statements denying them. Only where landlord and tenant both agree that the money is not paid

⁶ 6 H. L. C. 672 (1858). Seven out of eight judges in reporting to the House of Lords held this opinion. Their conclusions were purely hypothetical, and the case went off on another ground. In the Queen's Bench, where the question was necessary to a decision of the case, the same view was also taken; but the intermediate court, like the House of Lords, found it unnecessary to pass on the point. 5 E. & B. 648, 5 E. & B. 682 (1855). See also *Griffin v. Tompkins*, 42 L. T. N. S. 359, 361 (1880); *Strong v. Stringer*, 61 L. T. R. N. S. 470, 472 (1889).

⁷ *Davenport v. The Queen*, 3 A. C. 115 (1877); *Rex v. Paulson*, [1920] 3 W. W. R. 372.

⁸ [1920] 2 K. B. 161. See RECENT CASES, p. 217, *infra*.

⁹ *Gulf Railroad Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228 (1891). See *Smith v. Edgewood Casino Club*, 19 R. I. 629, 630, 35 Atl. 884, 885 (1896); *Cochran v. Philadelphia Mortgage Co.*, 70 Neb. 100, 106, 96 N. W. 1051, 1052 (1903); *Kenny v. Lun*, 101 Minn. 253, 257, 112 N. W. 220, 221 (1907). *Contra*, *Prindle v. Anderson*, 19 Wend. (N. Y.) 391, 394 (1838); *Sternburger v. Eiler*, cited 2 Brewst. (Pa.) 365, 369 (1867). See KALES, ESTATES, FUTURE INTERESTS, 2 ed., 290, predicting that Illinois will follow the majority view, — a prediction which seems hardly to be borne out by *Medinah Temple Co. v. Currey*, *supra*. See also 1 TIFFANY, REAL PROPERTY, 2 ed., 302; 2 TAYLOR, LANDLORD AND TENANT, 9 ed., 74 note.

¹⁰ See *Croft v. Lumley*, *supra*, 694, 722, 734.

¹¹ *Beck Electric Co. v. National Contracting Co.*, 143 Minn. 190, 173 N. W. 413 (1919); *Triangle Conduit Co. v. Klorman*, 181 N. Y. Supp. 366 (1920). See Samuel Williston, "Accord and Satisfaction," 17 HARV. L. REV. 459. The rule is otherwise in England. *Day v. McLea*, 22 Q. B. D. 610 (1880). See *Hartell v. Blackler*, *supra*, for a discussion on this apparent inconsistency with the English rule as to landlord and tenant.

as rent but as temporary compensation, may it be conceded that the general principle does not apply.¹²

The right of election in the landlord prevents the rule from operating harshly. The situation is often described by the courts in terms of "waiver";¹³ but "election" is a better term in that it emphasizes the landlord's right to choose between two courses of action.¹⁴ If therefore by some statute he is deprived of his voluntary choice in the matter, and is compelled to receive rent after the cause for forfeiture, his right of action on that forfeiture should not be barred. So in the recent case of *Evans v. Enever*,¹⁵ where a tenant was allowed by statute to stop a suit for possession for failure to pay rent by paying up back rent, it was held that the landlord in thus taking the rent would not be barred from suing on other prior breaches; and the American authority is in accord with this view.¹⁶

In neither case is the rule unfair to the landlord. Where he is free to elect, his acceptance is final; where he is compelled to accept, his rights are not barred.

CAN AN ADMISSION BY SILENCE WHILE UNDER ARREST BE USED AS SUPPORTING EVIDENCE? — It is well settled that if one fails to contradict a damaging statement made in his presence, under such circumstances that, hearing and understanding, he would naturally deny the statement if untrue, he is taken to adopt the statement as his own.¹ This is usually held to apply even if the statement is a charge of crime on suspicion of which the person is then under arrest;² and such adopted statements are admissible at the criminal trial as statements of the de-

¹² *Holman v. Knox*, 25 Ont. L. Rep. 588 (1911).

¹³ See *Kenny v. Lun*, *supra*, 256.

¹⁴ See EWART, WAIVER DISTRIBUTED, 7, for an apt criticism of the loose use of "waiver."

¹⁵ [1920] 2 K. B. 315. See RECENT CASES, p. 217, *infra*. See also *Toleman v. Portbury*, L. R. 6. Q. B. 245 (1871), L. R. 7 Q. B. 344 (1872), a case under the same statute as *Evans v. Enever*, *supra*, where on the landlord's refusal to receive the money at all it was paid into court.

¹⁶ *Palmer v. City Livery Co.*, 98 Wis. 33, 73 N. W. 559 (1897); *Granite Bldg. Corp'n v. Greene*, 25 R. I. 586, 57 Atl. 649 (1904). It is also possible to support these cases on the theory that a suit for possession is an election of such binding nature that acceptance of rent thereafter has no effect upon that election. *Doe d. Cheny v. Batten*, *supra*; *Doe d. Morecraft v. Meux*, 1 C. & P. 346 (1824); *Doe d. Stedman v. McIntosh*, *supra*; *Importers Co. v. Christie*, 5 Robt. (N. Y.) 169 (1867). See *Cleve v. Mazzoni*, 19 Ky. L. Rep. 2001, 2002, 45 S. W. 88, 89 (1898). *Contra*, *Gomber v. Hackett*, 6 Wis. 323 (1857); *Guptill v. Macon Stone Co.*, 140 Ga. 696, 79 S. E. 854 (1913). See 1 TIFFANY, REAL PROPERTY, 2 ed., 302, 303. Cf. *Barber v. Stone*, 104 Mich. 90, 62 N. W. 139 (1895); *Marshall v. Davis*, 28 Ky. L. Rep. 1327, 91 S. W. 714 (1906).

¹ *Rex v. Smithies*, 5 C. & P. 332 (1832); *Donnelly v. State*, 26 N. J. L. 601 (1857). See 1 GREENLEAF, EVIDENCE, 16 ed., §§ 197-198.

² *Kelley v. People*, 55 N. Y. 565 (1874); *State v. Sudduth*, 74 S. C. 498, 54 S. E. 1013 (1906). *Contra*, *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448 (1882); *Commonwealth v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672 (1847); but see *Commonwealth v. Spiropoulos*, 208 Mass. 71, 94 N. E. 451 (1911), where "Me no talk. I want to see my lawyer," was held not silence nor denial and therefore an adoption of the statement.

fendant.³ But it is seldom asked, because it is seldom necessary to decide, why the evidence is admitted and what effect it has.

This question was raised in the recent case of *People v. Cascia*,⁴ where the defendant was convicted of robbery on evidence which, by statute, was not sufficient for conviction unless supported by other evidence. The only other evidence was an admission by silence of the defendant while under arrest. "Supporting evidence," as used in the statute, must be taken to mean positive evidence. Upon what ground could the defendant's adopted statement be used for the purposes of positive proof?

Such failure to deny is generally admitted under the name of an extrajudicial admission.⁵ But an admission, properly so called, cannot be positive or supporting evidence. The reason for admitting extrajudicial admissions is precisely that for admitting prior contradictory statements of a witness, to attempt to impeach the present allegations of the admitter;⁶ the effect of both is purely destructive.⁷ Prior contradictory statements of a witness cannot be introduced for any other purpose than to destroy;⁸ it necessarily follows that the same is true of admissions.⁹ This is the only explanation of the rule that an admitter need have no personal knowledge of the facts he admits;¹⁰ it is inconceivable that evidence with so little guarantee of trustworthiness should be used for purposes of positive proof. It is sometimes said that admissions are positive or corroborative evidence;¹¹ but the word "admissions" is there used, not in the proper sense of a verbal declaration, but as meaning conduct circumstantially evincing guilt.¹²

The second possibility is to consider the adopted statement, not as an admission, but as a confession. If it could be admitted on that ground a conviction could be secured; a confession is both supporting evidence¹³ and itself generally held sufficient to convict when, as in the principal case, the *corpus delicti* has been independently proved.¹⁴ But it is im-

³ But it must be strictly shown that the accused would naturally have denied the statements if they were untrue. *People v. Page*, 162 N. Y. 272, 56 N. E. 750 (1900); *Geiger v. State*, 70 Oh. St. 400, 71 N. E. 721 (1904).

"This evidence is admitted, not because somebody else made the statement, though in the hearing of the person to be charged, but because the latter has expressly or impliedly ratified and adopted it as his own statement." *Merriweather v. Commonwealth*, 118 Ky. 870, 875, 82 S. W. 592, 594 (1904).

⁴ 181 N. Y. Supp. 855 (1920). See RECENT CASES, p. 210, *infra*.

⁵ See *Commonwealth v. Harvey*, 67 Mass. 487, 488 (1854).

⁶ The only qualification necessary to this analogy is that, while a witness offers nothing to impeach except his testimony, a party asserts the truth of all his pleading and evidence, so the admission can be used to attack any point in his case.

⁷ See 2 WIGMORE, EVIDENCE, § 1048 (3).

⁸ *Robinson v. Duvall*, 27 App. D. C. 535 (1906), *aff'd* 207 U. S. 583 (1907).

⁹ *State v. Willis*, 71 Conn. 293, 41 Atl. 820 (1898).

¹⁰ *Reed v. McCord*, 18 App. Div. (N. Y.) 381, 46 N. Y. Supp. 407 (1897).

¹¹ See *State v. Jonas*, 48 Wash. 133, 92 Pac. 899 (1907); *State v. Workman*, 66 Wash. 292, 119 Pac. 751 (1911).

¹² Admissions are sometimes said to be affirmative testimony as exceptions of declarations against interest to the Hearsay rule. See note 18, *infra*. But this cannot be the reason for admitting admissions *qua* admissions, for (1) declarations against penal interest are not within the exception; and (2) admissions are not excluded by the fact that the admitter is available.

¹³ *Schaefer v. State*, 93 Ga. 177, 18 S. E. 552 (1893).

¹⁴ *Gilbert v. Commonwealth*, 111 Ky. 793, 64 S. W. 846 (1901).

possible that the adopted statement could be here introduced as such. While it has been said that there can be a confession by silence,¹⁵ no cases can be found to support the proposition. Probably the courts have considered a confession too serious a matter for the defendant to be deduced from mere silence; or perhaps they have felt that to consider a statement adopted by silence as a confession is a dangerous approach to a violation of the privilege against self-incrimination.¹⁶

The third possibility is to admit the adopted statement as positive evidence under the Hearsay exception of statements against interest. The requirement that the declarant be unavailable is satisfied by the fact that the defendant cannot be compelled to testify,¹⁷ which is the situation in all criminal cases. And the statement is certainly against interest.¹⁸ But the evidence cannot be received on that ground under the existing authorities; the exception is confined to statements against pecuniary and proprietary, and does not extend to penal, interest.¹⁹

One further possibility remains. The silence of the accused may be evidence, and positive evidence, not by way of assent to a third person's statement, but as conduct indicating a consciousness of guilt.²⁰ Such evidence is not obnoxious to the Hearsay rule because it is circumstantial and not testimonial. But because of the double inference necessary to make it incriminatory (from the indication to the consciousness and thence to guilt), it is of doubtful value before a jury; and the cautions with which it would have to be encompassed in order to eliminate all testimonial bearing would practically nullify its effect. Certainly the evidence in the principal case cannot be regarded as admitted from that standpoint as it was received without qualification.

In short, there seems to be no ground upon which the defendant's silence when accused could have been admitted for the purpose of positive proof, and hence no ground upon which the principal case can be supported. The court sustained the conviction merely by citing cases in which adopted statements had been received as admissions; but, as has been seen, such adopted statements, while properly admissible, are of no value where supporting evidence is required.

WHAT SATISFIES THE PUBLIC PURPOSE REQUIRED IN TAXATION. —
The most recent illustration of the wide range of purposes that may be

¹⁵ See 1 GREENLEAF, EVIDENCE, 16 ed., § 215.

¹⁶ See *Bram v. United States*, 168 U. S. 532 (1897).

¹⁷ *Harriman v. Brown*, 8 Leigh (Va.), 697 (1837).

¹⁸ It is this added evidential utility of admissions which explains the proposition, sometimes judicially sanctioned, that an admission is equivalent to affirmative testimony for the party offering it. "There is a wide difference between the declarations of an ordinary witness, a stranger to the suit, and the declarations of a party to the record. The former are admissible only for the purpose of impeaching or contradicting the witness, but the latter . . . may be offered to prove the truth of the matters thus admitted." *Bartlett v. Wilbur*, 53 Md. 485, 497 (1879). See also *Hall v. Banning*, 33 Cal. 522, 524 (1867).

¹⁹ *Donnelly v. United States*, 228 U. S. 243 (1913); *State v. West*, 45 La. Ann. 928, 13 So. 173 (1893); *Sussex Peerage Case*, 11 Cl. & F. 85 (1844).

²⁰ *Moore v. State*, 1 War. (Ohio) 500 (1853); *Holt v. State*, 39 Tex. Cr. Rep. 282, 45 S. W. 1016 (1898).

public is the so-called "Non-Partisan League Legislation" in North Dakota, attacked this year in *Green v. Frazier*.¹ The state is predominantly agricultural, and it was felt that its development was hampered by the lack of internal financial and marketing facilities. Accordingly its constitution was amended, by removing the limit of \$200,000 set on the state debt, and by adding an authorization for the state to engage in business. Then the legislature provided for \$19,000,000 of bonds, and an "Industrial Commission" having under it a state bank, state warehouses, elevators and flour mills, and a state association for building and selling homes. Ten million dollars of the bonds were to provide funds for the bank to loan upon first mortgages on real estate. Taxation for all these purposes was sustained by the state court.² On appeal, the United States Supreme Court followed its usual practice of accepting the judgment of "the local authority, legislative and judicial."³

That a public purpose is necessary in taxation is well established.⁴ In determining whether such a purpose is lacking, the courts are faced by two distinct problems, and much of the undoubted confusion that exists in this field has been caused by a tendency to slur these problems together. The first in importance, practically, though not logically, is the degree of weight to be attached to the legislative determination that the purpose is public. The second is the test to be employed in distinguishing public from private purposes.

As to the first of these, all courts agree in saying that the legislative determination is entitled to great weight. From this uniform premise, however, the most diverse results are obtained. As representative of the liberal extreme we may take Maine. On the question of establishing municipal fuel yards, the court held that the determination of the exigency was for the legislature alone, and that the legislature's decision as to the type of services to be rendered would not be upset if these services were "of public necessity, convenience or welfare,"⁵ a definition broad enough to cover almost the whole field of business enterprise. At the opposite extreme, and illustrative of the more usual stringent examination of the legislature's determination, lies Massachusetts. There a bond issue to furnish funds to be loaned on real estate has been held invalid,⁶ and Opinions of the Justices have been given against fuel yards⁷ and state-built homes.⁸

But whether the court be strict or liberal in its attitude, it will sooner or later be brought face to face with the second problem, the problem as to the test to be employed in distinguishing public from private pur-

¹ U. S. Sup. Ct., October Term, 1919, No. 811. See RECENT CASES, p 212, *infra*.

² *Green v. Frazier*, 176 N. W. 11 (N. D.) (1920).

³ *Green v. Frazier*, note one, *supra*.

⁴ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896); *Green v. Frazier*, note one, *supra*. For a discussion of the fallacies involved in requiring a public purpose, see C. C. Maxey, "Is Government Merchandising Constitutional," 52 AM. L. REV. 215, 216.

⁵ *Laughlin v. City of Portland*, 111 Me. 486, 90 Atl. 318 (1914); *Jones v. City of Portland*, 113 Me. 123, 93 Atl. 41 (1915), affirmed in 245 U. S. 217 (1917).

⁶ *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39 (1873).

⁷ Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142 (1892). Justice Holmes dissented.

⁸ *Ibid.*, 211 Mass. 624, 98 N. E. 611 (1912).

poses. Here the courts have gone at the matter from every conceivable angle. Though logically the more important problem, practically this is of less consequence. Whatever test a court applies on this point, whether legislation will be upheld or overthrown depends primarily upon the court's attitude on the first problem. The opposite results on the question of fuel yards obtained in Maine and Massachusetts, which have substantially the same test upon the second problem, afford an instance of this.

Since the precise test is of secondary importance, a summary classification of the principal tests used will be sufficient. The orthodox test in the nineteenth century, as might be expected, was the historical one; public purpose was determined by the usage of the past.⁹ In the present century the economic test has come into prominence, and stress is laid on the maintenance of private industrial enterprise.¹⁰ A variant of this is the test of virtual monopoly, government ownership being allowed if the field is already closed to competition.¹¹ At all times courts are found which attempt to analyze the essential functions of government, and reject taxation for any purposes which are not embraced in these functions.¹² Another method is by analogy; under this test a municipal ice plant was upheld, because water supply is an admittedly proper purpose, and ice is nothing but congealed water!¹³ A very elastic test is to see whether the purpose falls within the "police power," which test has been held to be satisfied by state warehouses for cotton.¹⁴

A court must be very confident of its position before it can declare that the legislature has overstepped the limits of its discretion. The conflicting nature of the tests attempted upon the second problem should raise serious doubt in the mind of any court as to the entire accuracy of its own particular method. Hence it would seem advisable to give to the legislature's determination that degree of weight accorded by the more liberal among the courts.

RECENT CASES

ABATEMENT AND REVIVAL — ACTION *EX DELICTO* ABATES ON DEATH OF TORTFEASOR. — The defendant in an action for wrongful death died before the termination of the suit. A motion was made for an order to receive the action against defendant's administrator. *Held*, that the motion be denied. *Clough v. Gardiner*, 182 N. Y. Supp. 803.

The authorities are unanimous in supporting the principal case on the proposition that a cause of action for wrongful death will, in the absence of a statute,

⁹ *Loan Association v. Topeka*, 20 Wall. (U. S.) 655 (1874); *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400 (1870).

¹⁰ *Opinion of the Justices*, 211 Mass. 624, *supra*.

¹¹ See Bruce Wyman, "Public Callings and the Trust Problem," 17 HARV. L. REV. 217, 219.

¹² *State v. Osawkee Township*, 14 Kan. 418, 19 Am. Rep. 99 (1875); *Opinion of the Justices*, 182 Mass. 605, 66 N. E. 25 (1903).

¹³ *Holton v. Camilla*, 134 Ga. 560, 68 S. E. 472 (1910).

¹⁴ *State v. Warehouse Commission*, 92 S. C. 81, 75 S. E. 392 (1912). The court expressly held the statute to be a police regulation in general scope, although inoperative because of certain defects.

abate with the death of the wrongdoer. *Clark v. Goodwin*, 170 Cal. 527, 150 Pac. 357; *Bates v. Sylvester*, 205 Mo. 493, 104 S. W. 73. That this rule of the common law reaches an undesirable result is obvious, and it has been generally corrected by statute. It is therefore interesting to note that in as important a jurisdiction as New York the defect in the common law has not yet been remedied by proper legislation.

ADMISSIONS — BY CONDUCT — SILENCE WHEN ACCUSED OF CRIME WHILE UNDER ARREST — ADMISSIBILITY AS SUPPORTING EVIDENCE. — The defendant was convicted of robbery on the testimony of an eleven-year-old boy and proof that while under arrest he had been directly accused of the crime and had said nothing. The only other evidence was independent proof of the robbery. By statute, the boy's testimony could not convict if unsupported by other evidence. *Held*, that proof of the defendant's silence under the circumstances was supporting evidence. *People v. Cascia*, 181 N. Y. Supp. 855.

For a discussion of this case see NOTES, p. 205, *supra*.

BANKRUPTCY — BANKRUPTCY ACT OF 1898 AND AMENDMENTS — §§ 38 (4), 70 E, AND GEN. ORD. XII. — Herbert Weidhorn, having been adjudged bankrupt, his case was referred to a referee. The trustee in bankruptcy thereafter filed with the referee a bill in equity, seeking to set aside alleged fraudulent transfers of chattels by the bankrupt to Leo Weidhorn, the present petitioner. The referee took jurisdiction and gave a decree on the merits in favor of the trustee. *Held*, that the referee had no jurisdiction. *Weidhorn v. Levy*, U. S. Sup. Ct., Oct. Term, 1919, No. 203.

A referee acquires only so much of the District Court's bankruptcy jurisdiction as the order of reference carries. See GENERAL ORDER XII (1), BANKRUPTCY ACT OF 1898, 5 U. S. S. A. 421. Upon unlimited reference, referees have assumed jurisdiction over proceedings in equity originally instituted before them. *In re Murphy*, 3 Am. B. R. 499; *Matter of O'Brien*, 21 Am. B. R. 11. But courts and text-books commonly deny such jurisdiction. *In re Walsh Bros.*, 163 Fed. 352; *In re Overholzer*, 23 Am. B. R. 10; see REMINGTON, BANKRUPTCY, 2 ed.; § 545. And a court has only affirmed a referee's decree in such proceedings, the parties not having disputed the jurisdiction, "with great doubt." *In re Steuer*, 104 Fed. 976. The Bankruptcy Act is not uniformly construed. Under GENERAL ORDER XII (1), "all the proceedings," except those reserved to the judge, "shall be had before the referee." The District Court holds a trustee's suit against a transferee not included in these proceedings. *In re Weidhorn*, 243 Fed. 756. The Circuit Court infers inclusion from no specific exclusion in GENERAL ORDER XII (3) and § 38 (4); and, reading "any court of bankruptcy," in which a trustee is authorized by § 70 e to sue a transferee, in the doubtful light of § 1 (7) — "court of bankruptcy . . . may include the referee" — concludes the referee has jurisdiction. *In re Weidhorn*, 253 Fed. 28. This conclusion inevitably produces the anomaly of an appointed referee, acting not as a master with rather full powers, but as an original court. Surely it is more expedient to accelerate justice by creating more judges than by forming new tribunals.

BANKRUPTCY — DISCHARGE — EFFECT OF FALSE STATEMENTS MADE BY BANKRUPT IN ORDER TO OBTAIN BANK LICENSE. — The bankrupt a few weeks before bankruptcy secured a license to continue business as a banker by a materially false statement in writing to the State Comptroller. The bankrupt thereafter in the course of his business received deposits from his customers. The 1903 amendment of the Bankruptcy Act provides that the bankrupt shall be discharged unless he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the

purpose of obtaining such property on credit." (32 STAT. AT L. 797, 1909 COMP. STAT. SUPP. 1310.) The lower court granted an order refusing to discharge the bankrupt. *Held*, that the order be reversed. *Matter of Oliner*, 262 Fed. 734 (C. C. A.).

The license to continue banking operations was not obtained "on credit" within the meaning of the act. See *In re Tanner*, 192 Fed. 572. Nor does the act apply unless the false statements are made to the persons from whom the property is obtained. *Matter of Napier*, 23 A. B. R. 560; *In re Foster*, 186 Fed. 254. And the same result has been reached under the more liberal language of the 1910 amendment of the Bankruptcy Act. *In re Zoffer*, 211 Fed. 936. See 36 STAT. AT L. 839, 1918 COMP. STAT. § 9598. This last case held that a false statement made by a debtor to a mercantile agency merely to obtain a credit rating and unrequested by the creditor will not bar the bankrupt's discharge. And the creditor who acts on the strength of the credit rating would be more directly relying on the false statement of the bankrupt than would the depositor in the principal case, who may never have known of the bank license. Cases reaching an opposite result, where the bankrupt makes the false statement to the mercantile agency, intending that the creditor shall act thereon, are to be explained on the ground that the mercantile agency is really an agent either of the creditor or of the bankrupt. See *In re Pincus*, 147 Fed. 621; *In re Cloutier Bros.*, 228 Fed. 569. See, also, *In re Dresser*, 146 Fed. 383. But the State Comptroller was obviously an agent of neither party. Whether or not the result of the principal case is on principle altogether desirable, it is submitted that it is right as a matter of statutory construction.

CARRIERS — PASSENGERS — DUTY TO PASSENGER TAKEN SICK *EN ROUTE*. — Deceased boarded the defendant's open trolley car sober and apparently in good health. Soon thereafter he became sick and eventually unconscious. The conductor, thinking deceased drunk, with the advice of a superior official of the company, permitted deceased to remain on the trolley, during its trips, for five hours. Deceased died the next day of cerebral hemorrhage. His administratrix now sues the trolley company for negligence. The trial court instructed that if the conductor honestly believed that deceased was drunk, and, acting on that belief, used ordinary prudence under the circumstances, the defendant should not be liable. *Held*, that this instruction was erroneous. *Middleton v. Third Ave. Ry. Co.*, 192 App. Div. 172, 182 N. Y. Supp. 598.

It has been said the carrier's relation to its passengers is founded on mere courtesy. See *New Orleans, Jackson, & Great Northern Ry. Co. v. Statham*, 42 Miss. 607, 614. This view is unsustainable. See 2 HUTCHINSON, CARRIERS, 3 ed. § 992. A carrier has a genuine duty to give passengers taken sick en route such reasonable care as its functioning as carrier permits. *McCann v. Newark & S. O. Ry. Co.*, 58 N. J. L. 642, 34 Atl. 1052; *Wells v. N. Y. Central & Hudson River R. R. Co.*, 49 N. Y. Supp. 510, 25 App. Div. 365. If it has undertaken an affirmative act with regard to the sick passenger, it has clearly a duty of care. *Paddock v. Atchison, T. & S. F. R. R. Co.*, 37 Fed. 841; *St. Louis, I. M. & S. Ry. Co. v. Woodruff*, 89 Ark. 9, 115 S. W. 953. Beyond this, some abnormal condition of a passenger having come to the carrier's notice, it has an affirmative duty to act with due care under the circumstances as regards this condition. *Middleton v. Whitridge*, 213 N. Y. 499, 108 N. E. 192. Liability cannot attach unless the carrier is actually aware of this condition. *Hollingsworth v. Southern Ry.*, 72 S. C. 114, 51 S. E. 560. Whether due care is then employed is not a question of the conductor's "honest belief" (as the trial court instructed). Nor of holding "a street railway employee responsible for a correct medical diagnosis." *Middleton v. Whitridge*, 156 App. Div. 154, 141 N. Y. Supp. 104. As the principal case declares, it is a question of fact for the jury.

Deceased died in 1910; these parties are now for a sixth time in court. Yet the case calls merely for the application of a universally acknowledged rule. It perfectly exemplifies the need of reorganizing the judiciary with a view to decreasing and disposing of litigation. See A. W. Scott, "Progress of the Law: Civil Procedure," 33 HARV. L. REV. 238. Based on an examination of twenty thousand California cases, a despairing writer intimates it might be socially more desirable if the Federal Court decided each personal injury case as soon as filed by rolling dice, rather than by taking fifteen months to reach an absolutely just decision. See S. B. Warner, "Procedural Delay in California," 8 CAL. L. REV. 369. The principal case outherods Herod.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHTS OF INNOCENT OWNER UNDER STATUTORY FORFEITURE. — A Virginia statute provides that an automobile caught carrying intoxicating liquor shall be forfeited to the state. (1918 ACTS, 612.) A chauffeur in the District of Columbia was instructed to take his master's car to a garage. Instead of doing so, he drove into Virginia, becoming at once a thief by the law of the District of Columbia. He was arrested in Virginia carrying prohibited liquor in the car. It was admitted that the owner was ignorant of the unlawful use, and was in the exercise of due care. *Held*, that the automobile was forfeited, notwithstanding the innocence of the owner. *Buchholz v. Commonwealth*, 102 S. E. 760 (Va.).

For a discussion of the principles involved in this case, see NOTES, p. 200, *supra*.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — WHAT SATISFIES THE PUBLIC PURPOSE REQUIRED IN TAXATION. — The Supreme Court of North Dakota had sustained, as constitutional, taxes for the purpose of a state bank, loans on real estate, state flour mills, and state-built homes. *Held*, that the judgment should be affirmed. *Green v. Frazier*, U. S. Sup. Ct., October Term, 1919, No. 811.

For a discussion of this case, see NOTES, p. 207, *supra*.

CONSTITUTIONAL LAW — *EX POST FACTO* AND RETROACTIVE LAWS — LAW VALIDATING UNAUTHORIZED COLLECTION OF CANAL TOLLS. — The defendant board maintained certain canals, which were used by the plaintiff's boats. The legislature had failed to grant to the board the power to charge tolls. The board nevertheless required the plaintiff to pay tolls for using the canals. The plaintiff paid under protest, and later brought suit to recover the money so paid. Thereafter the legislature passed a statute which retroactively authorized the collection of the tolls. *Held*, that the statute is constitutional. *Board of Commissioners of Everglades Drainage District v. Forbes Pioneer Boat Line*, 86 So. 199 (Fla.).

The federal constitution does not prohibit retrospective legislation as such. *League v. Texas*, 184 U. S. 156. The provision forbidding *ex post facto* laws applies only to criminal statutes. *Calder v. Bull*, 3 Dall. (U. S.) 386. However, a retrospective state law impairing the obligations of contracts is invalid. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122. But this applies only to true contracts, based on the assent of the parties. *Freeland v. Williams*, 131 U. S. 405. The principal case involves only a quasi-contractual right, and hence no question of impairing the obligations of contracts can arise. See *State v. New Orleans*, 38 La. Ann. 119. A further limitation upon the power of the states to pass retrospective laws is found in the provisions of the Fourteenth Amendment. See *White v. Crump*, 19 W. Va. 583, 592. These provisions protect vested property rights. *Grigsby v. Peak*, 57 Tex. 142. A legal right of action is property, and is protected. *Osborn v. Nicholson*, 13 Wall. (U. S.) 654. See *Pritchard v. Norton*, 106 U. S. 124, 132. But even if a claim be regarded as a

vested property right, if it is based on a mere technicality, it may be divested by retrospective legislation. *Utter v. Franklin*, 172 U. S. 416; *Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033. See *Foster v. Essex Bank*, 16 Mass. 245, 273. In the principal case, the plaintiff's only basis for recovery was a mere oversight of the legislature, and hence his right to recovery might constitutionally be taken away. The fact that the plaintiff had brought an action before the curative act was passed does not add to his rights. *State v. Norwood*, 12 Md. 195; *Ferry v. Campbell*, 110 Ia. 290, 81 N. W. 604. A similar result has been reached in a case involving the unauthorized collection of customs duties. *United States v. Heinszen & Co.*, 206 U. S. 370.

DISCOVERY — INTERROGATORIES — USE IN ACTION FOR LIBEL — DISCLOSURE BY NEWSPAPER OF SOURCE OF INFORMATION. — The plaintiff brought an action for libel against the defendant newspaper. The defendant pleaded fair comment. The plaintiff sought to interrogate the defendant as to the source of the alleged libel, stipulating that this information would not be made the basis of an action against the defendant's informant. The defendant refused to answer the interrogatories. *Held*, that he need not do so. *Lyle-Samuels v. Odhams, Ltd.*, [1920] 1 K. B. 135.

The English practice allows the propounding of interrogatories in all civil actions. **RULES OF THE SUPREME COURT**, Order XXXI, Rule 1. Such interrogatories must be relevant to the issues in the case, and must not be oppressive. Order XXXI, Rules 6 and 7. In the principal case, the interrogatories seem to have been relevant, as the character of the defendant's source of information might clearly have been evidence on the issue of malice. Such interrogatories have frequently been allowed. *Elliott v. Garrett*, [1902] 1 K. B. 870; *White & Co. v. Credit Reform Assn.*, [1905] 1 K. B. 653. An exception has been made, however, in cases where the defendant was a newspaper. *Hennessy v. Wright*, 24 Q. B. D. 445 n.; *Plymouth Mutual Coöperative Society v. Traders' Publishing Assn.*, [1906] 1 K. B. 403. The principal case is an example of this exception. The exception seems an anomalous one. A newspaper as such has no special privilege as to the publication of defamatory matter. *Barnes v. Campbell*, 59 N. H. 128. See *Arnold v. The King-Emperor*, L. R. 41 Ind. App. 149, 169. There seems to be no good reason why such privilege should be given as to the answering of interrogatories concerning such defamatory matter. Another reason advanced to support the privilege is that disclosure of the source of the libel would enable the plaintiff to sue the informant. See *Hennessy v. Wright*, 24 Q. B. D. 445 n., 448 n. But the fact that the disclosure sought may reveal a right of action against a third person is not a fatal objection to allowing such disclosure. *Heathcoate v. Fleet*, 2 Vern. 442; *Hurricane Telephone Co. v. Mohler*, 51 W. Va. 1, 41 S. E. 421.

EVIDENCE — RES GESTAE — VIOLATION OF RULES OF RAILWAY COMPANY AS EVIDENCE OF NEGLIGENCE. — In an action for the death of the plaintiff's intestate, plaintiff claimed that the servants of the defendant railroad were negligent in not maintaining a lookout on the tender of a backing engine by which, it was alleged, the intestate was killed. Rules of the corporation requiring such a lookout were admitted in evidence. *Held*, that the admission was error. *Louisville & N. R. Co. v. Stidham's Adm'x*, 218 S. W. 460 (Ky.).

A slight majority of the authorities has sustained the admission of such precautionary rules as evidence of a standard of care admitted or assumed by the corporation. *Lake Shore & M. S. R. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Sullivan v. Richmond Light & R. Co.*, 128 App. Div. 175, 112 N. Y. Supp. 648. But no cases have been found holding a refusal to admit them error. And an important minority objects that the standard of care is fixed by law and may be neither enlarged nor decreased by the corporation. *Fonda v. St. Paul City*

Ry. Co., 71 Minn. 438, 74 N. W. 166; *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167, 83 S. E. 1072. Moreover such penalizing of extra precautionary regulations might discourage their adoption. See *Hoffman v. Cedar Rapids & M. C. Ry. Co.*, 157 Ia. 655, 674, 139 N. W. 165, 172. These rules may, however, be of probative value as a crystallization of operative experience. See *Birmingham Ry. L. & P. Co. v. Morris*, 163 Ala. 190, 50 So. 198; *Deister v. Atchison, T. & S. F. Ry. Co.*, 99 Kan. 525, 539, 162 Pac. 282, 288; 1 WIGMORE, EVIDENCE, § 461. Their admission as such might well lie within the discretion of the trial court. A few cases treat them as circumstances of the defendant's servant's action. *Cincinnati St. Ry. Co. v. Altemeier, Admr.*, 60 Ohio 10, 53 N. E. 300; *St. Louis, S. F. & T. Ry. Co. v. Andrews*, 44 Tex. Civ. App. 426, 99 S. W. 871. This seems sound. As a warning of potential danger and a suggested means of avoiding it, they color the servant's act and are relevant on the question of his negligence. It is otherwise with rules adopted merely to facilitate systematic business operation. *Chabott v. Grand Trunk Ry. Co.*, 77 N. H. 133, 88 Atl. 995; *Bush v. Union Pac. Ry. Co.*, 62 Kan. 709, 713, 64 Pac. 624, 625. The rules in the principal case are clearly precautionary and should have been admitted.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF WIFE AS TO THIRD PARTIES — ALIENATION OF AFFECTIONS — ANNULMENT OF MARRIAGE NO DEFENSE. — Plaintiff brought this action against her husband's parents for alienation of affections. While the action was pending, the parents had their son's marriage annulled because he was under the age of consent, as they had a right to do by statute. The trial court directed a verdict for defendants on the ground that the annulment was a bar to this action. *Held*, that a new trial be granted. *Wolf v. Wolf*, 181 N. Y. Supp. 368.

The right of a wife to sue for alienation of her husband's affections, though denied at common law, has been almost universally recognized since the married women's acts. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027; *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890. The parents of the alienated spouse may be liable in such an action as well as a stranger, though in a suit against parents malice must be shown. *Hutcheson v. Peck*, 5 Johns. 196; *Lannigan v. Lannigan*, 222 Mass. 108, 110 N. E. 285. The marriage of persons under the age of consent is not void, but voidable merely by judicial decree. *State v. Lowell*, 78 Minn. 166, 80 N. W. 877; *People v. Ham*, 206 Ill. App. 543. The effect of a decree of annulment at common law was to make the marriage void from the outset, but in order to protect children born of voidable unions some jurisdictions save their legitimacy by statute. MASS. REV. LAWS (1902), c. 151, § 13; IND. STATS. (1901) Art. 7, § 1037. Others make the marriage void only from the date of the decree. *Harrison v. State*, 22 Md. 468. See 1909 N. Y. CONSOL. LAWS, c. 14, § 7. Until that moment each party has a right to the conjugal society of the other. See *Price v. Price*, 124 N. Y. 589, 599, 27 N. E. 383, 385. It follows that under the New York type of statute a subsequent dissolution of the marriage relationship will not prevent the injured spouse from recovering damages for the violation of her legal rights occurring between the marriage and the annulment. *Luke v. Hill*, 137 Ga. 159, 73 S. E. 345.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — EXECUTION AGAINST HUSBAND'S INTEREST IN ESTATE BY ENTIRETY. — Husband and wife held land as tenants by entirety. Judgment creditors of the husband brought a bill in equity praying that the court apply, to the satisfaction of their judgment, the rents and profits of the land so held. The defendant demurred. *Held*, that the demurrer be sustained. *Ohio Butterine Co. v. Hargrave*, 84 So. 376 (Fla.).

Tenants by entirety have each an indivisible interest in the whole. *Jordan v. Reynolds*, 105 Md. 288, 66 Atl. 37. See 2 BLACKSTONE, COMMENTARIES, 182. At common law because of the husband's absolute control over the wife's property, both interests were, during his life, vested in him and subject to execution against him. *Bennett v. Child*, 19 Wis. 362; *Hall v. Stephens*, 65 Mo. 670. Married Women's Acts have altered the situation. Some courts have considered them as abolishing estates by entirety by destroying that fictitious identity of husband and wife on which they rest. *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553; *Robinson, Appellant*, 88 Me. 17, 33 Atl. 652. Others regard them as rendering the interests of tenants by entirety divisible, alienable, and separately subject to execution. *Buttler v. Rosenblath*, 42 N. J. Eq., 651, 9 Atl. 695; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337. In most jurisdictions, however, the nature of the estate has not been changed, but the liberation of the wife's interest from marital control has made it impossible for the husband to deal independently with the estate. *Beihl v. Martin*, 236 Pa. St. 519, 84 Atl. 953; *Ashbaugh v. Ashbaugh*, 273 Mo. 353, 201 S. E. 72. Nor may execution be levied against his interest since this would prejudice the wife's enjoyment of her identical and entire interest. *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. 40; *Harris v. Carolina Distributing Co.*, 172 N. C. 16, 89 S. E. 789; *Otto F. Stifel's Brewing Co. v. Saxy*, 273 Mo. 159, 172 S. W. 67. The principal case follows this decided trend of authority. But such an interpretation of legislation which aims to abolish economic disabilities once incident to the marriage relation may well be considered too restrictive.

INDEMNITY — JOINT TORT-FEASORS — RECOVERY FROM PARTY PRIMARILY RESPONSIBLE. — On account of the defendant's reckless driving, the plaintiff was forced to turn to the left and drive upon the sidewalk, where he injured one Stock. Stock brought action against both parties and recovered judgment against the plaintiff. The plaintiff seeks to recover indemnity. The defendant moved for judgment on the pleadings. *Held*, that the motion be denied. *Knippenberg v. Lord & Taylor*, 183 N. Y. Supp. 72.

Generally speaking the law does not allow indemnity or contribution between joint tort-feasors. *Central of Georgia R. R. Co. v. Macon R. R. & Light Co.*, 9 Ga. App. 628, 71 S. E. 1076. *Union Stockyards Co. v. Chicago R. R. Co.*, 196 U. S. 217. But there are exceptions which greatly limit this rule. See *Bailey v. Bussing*, 28 Conn. 455. See COOLEY, TORTS, 3 ed. 254. One of these, an extension of the doctrine of the last clear chance, allows the tort-feasor who at the time of the injury could not have prevented it to have indemnity from the tort-feasor who could. *Nashua Iron and Steel Co. v. Worcester and Nashua R. R. Co.*, 62 N. H. 159. See, *contra*, Francis H. Bohlen, "Contributory Negligence," 21 HARV. L. REV. 233, 292. Another exception allows a tort-feasor whose negligence consisted in some mere failure to perform an affirmative duty to have indemnity from one whose negligence was active. *Fulton County Gas & Elec. Co. v. Hudson River Tel. Co.*, 130 App. Div. 644, 114 N. Y. Supp. 642. *Hudson Valley R. R. Co. v. Mechanicville Elec. Light & Gas Co.*, 180 App. Div. 86, 167 N. Y. Supp. 428. The principal case does not, as the court suggests, come within the first exception, because the plaintiff's negligence followed that of the defendant. Nor does it come within the second, because the plaintiff was not merely passively negligent. His intervening act contributed to the injury. But this act was defensive against the dangerous situation created by the defendant. On principle it seems that one who thus acts defensively should be entitled to indemnity, even if his defensive act, with respect to a third person, is negligent.

INSURANCE — INSURABLE INTEREST — NECESSITY OF SUCH INTEREST IN SECOND ASSIGNEE WHEN FIRST ASSIGNEE HAS NO INSURABLE INTEREST. — A

took out a life insurance policy payable to his executor and subsequently assigned it to B for value in New York. B sold it to C Bank in Alabama. Neither B nor C Bank had any insurable interest in A's life. A died, A's executor, B and C Bank, each claimed the proceeds of the policy. The insurance company paid the money into court. *Held*, that C Bank is entitled to the proceeds. *Haase v. First National Bank of Anniston*, 84 So. 761 (Ala.).

The validity of the successive assignments in this case must be determined by the law of the places where they are made. *Miller v. Manhattan Life Insurance Co.*, 110 La. Ann. 652, 34 So. 723; *Lee v. Abdy*, L. R. 17 Q. B. D. 309. The first assignment is governed by the law of New York, which does not require any insurable interest in the assignee. *Olmsted v. Keyes*, 85 N. Y. 593; *Poryciarz v. Prudential Insurance Co.*, 95 Misc. (N. Y.) 306, 158 N. Y. Supp. 834. Therefore B's claim is superior to that of A's executor. The second assignment is governed by Alabama law. And in Alabama an assignment of a life policy by the assured or a beneficiary to one without an insurable interest is void as against public policy. *Helmstad v. Miller*, 76 Ala. 183; *Troy v. London*, 145 Ala. 280, 39 So. 713. The court assumes that the requirement of an insurable interest is intended to reduce the temptation to kill the assured. Since there is no reason to suppose that succeeding assignees are more likely than B to murder A, the court concludes that the policy does not apply here. But the real purpose of the doctrine is to prevent wager contracts. See 2 JOYCE, INSURANCE, 2 ed., § 894 a. The assignment to C Bank is none the less a wager contract because both B and C Bank are without insurable interests. Therefore, the policy does properly apply here to render void the assignment to C Bank, and the proceeds should go to B.

JUDGES — DISQUALIFICATION FOR KINSHIP WITH A PARTY IN INTEREST — ATTORNEY ON A CONTINGENT FEE AS A PARTY IN INTEREST. — The defendant's counsel was a first cousin of the trial judge. By his contract with the defendant he was to receive fifty dollars in any event, and four hundred fifty dollars if the defendant won. A constitutional provision prohibits a judge from presiding at the trial of any cause "where the parties or either of them shall be connected with him by affinity or consanguinity." *Held*, that the judge was not disqualified. *Norwich Union Fire Ins. Co. v. Standard Drug Co.*, 83 So. 676 (Miss.).

An attorney has a pecuniary interest in the result of the suit, since he is entitled to the aid of the court in procuring the payment of his fees out of the proceeds of the judgment recovered. *Read v. Dupper*, 6 T. R. 361; *Rooney v. Second Ave. Ry. Co.*, 18 N. Y. 368. But this alone is not held sufficient to make him a party. *People v. Whitney*, 105 Mich. 622, 63 N. W. 765. See *Casmento v. Barlow Bros. Co.*, 83 Conn. 180, 182, 76 Atl. 361, 362. On the other hand, the attorney has been held to be a party within the meaning of the statute where his fees are to be paid as part of the judgment, or are to be fixed by the court. *Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616; *Brown v. Brown*, 103 Kan. 53, 172 Pac. 1005. In the intermediate case of a contingent fee, most courts hold the attorney to be a party, not distinguishing between contingent fees of a fixed sum, and those which are to be a percentage of the amount recovered. *Johnson v. State*, 87 Ark. 45, 112 S. W. 143; *State v. Pitchford*, 43 Okla. 105, 141 Pac. 433. The principal case, however, and some others, distinguish these forms of fees, and declare the attorney to be a party only when he is to be paid upon a percentage basis. *Young v. Harris*, 146 Ga. 333, 91 S. E. 37. But see *Y. & M. V. Railroad Co. v. Kirk*, 102 Miss. 41, 58 So. 710; *Shuford v. Shuford*, 141 Ga. 407, 81 S. E. 115. However, the distinction between contingent fees generally, and fixed fees, is clearer, and probably a more satisfactory place to draw the line.

LANDLORD AND TENANT — ABANDONMENT OF LEASE — DUTY OF LANDLORD TO ACCEPT NEW TENANT TO MINIMIZE DAMAGES. — A lease stipulated against an assignment or a sublease without the lessor's consent, and allowed him the option of re-entering and reletting the premises in case they were vacated. The lessee vacated during the term, and thereafter offered a new tenant, whom the lessor refused to accept. The lessee claimed that the lessor was bound to accept a proper tenant to minimize damages. *Held*, that the lessor recover the full amount of the rent. *Muller v. Beck*, 110 Atl. 831 (N. J.).

It is a familiar rule in contracts that a plaintiff cannot recover for such damages as he might reasonably have prevented. *Miller v. Mariner's Church*, 7 Me. 51; *Roberts v. Lehl*, 27 Colo. App. 351, 149 Pac. 851; *Moses v. Aduono*, 56 Fla. 499, 47 So. 925. But it is also established that a landlord upon the tenant's abandonment is under no duty to relet to minimize the amount of his recovery. *Bowen v. Clarke*, 22 Ore. 566, 30 Pac. 430; *Becar v. Flues*, 64 N. Y. 518; *Patterson v. Emerick*, 21 Ind. App. 614, 52 N. E. 1012. But see *contra*, *West Side Auction House Co. v. Conn. Mutual Life Ins. Co.*, 186 Ill. 156, 57 N. E. 839; *Sears v. Curtis*, 189 Ill. App. 420. Though it is true that the landlord's recovery is for rent rather than for damages, the two principles are hardly reconcilable. After the breach of a personal service contract, the plaintiff must make reasonable effort to find new employment. *King & Graham v. Steiren*, 44 Pa. St. 99; *Howard v. Daly*, 61 N. Y. 362. So it would seem just to impose on the landlord a similar duty to relet. Nor would the duty be inconsistent with the continuance of the lease, for the landlord in most jurisdictions may rerent for the tenant's benefit without thereby effecting a surrender. *Auer v. Penn*, 99 Pa. St. 370; *Oldewurtel v. Wiesenfeld*, 97 Md. 165, 54 Atl. 969; *Brown v. Cairns*, 107 Ia. 727, 77 N. W. 478. *Contra*, *Gray v. Kaufman Dairy, etc. Co.*, 162 N. Y. 388, 56 N. E. 903. Of course the principal case may be distinguished on the particular terms of the lease. But in so far as the case implicitly stands for the denial generally of any duty to relet, it asserts a principle that may well be challenged.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — WAIVER OF FORFEITURE — ACCEPTANCE OF RENT UNDER PROTEST. — A landlord gave a weekly tenant notice to quit. The tenant remained in possession and tendered rent accruing after expiration of the notice. The landlord accepted the money but stipulated that it was for "use and occupation" and that the tenancy was not thereby recognized. In a suit by the landlord to recover possession, the tenant set up the defense that the plaintiff by this acceptance had waived the notice to quit. *Held*, that the defense is valid. *Hartell v. Blackler*, [1920] 2 K. B. 161.

A landlord brought action against a tenant for years to recover possession, on the tenant's breach of covenant to pay rent. The tenant took advantage of a statute and stopped the proceedings by paying to the landlord the rent in arrear (15 and 16 VICT., c. 76, § 212). The landlord then brought a second action on a cause of forfeiture which had existed before the previous action. The tenant set up the defense that the cause for forfeiture had been waived by the acceptance of rent accruing thereafter in the first suit. *Held*, that the defense is invalid. *Evans v. Enever*, [1920] 2 K. B. 315.

For a discussion of these cases, see NOTES, p. 203, *supra*.

LANDLORD AND TENANT — HOLDING OVER — ODD TERM LESS THAN A YEAR RENEWED BY ACCEPTANCE OF RENT FROM TENANT HOLDING OVER. — Premises were let to defendant for a term of seven months for the "seven months' rent" of \$420, payable in equal monthly instalments. Defendant held over for some time, the landlord accepting the monthly rent. In an action of ejectment by plaintiff the matter turned on the length of the term

created by the acceptance of rent. *Held*, that it was another tenancy for seven months. *Farbman v. Meyers*, 77 Leg. Intel. 642.

Where a tenant holds over and the landlord assents, the length of the new term is fixed by implication of law. *Robinson v. Holt*, 90 Ala. 115, 7 So. 441; *Souhami v. Brownstone*, 177 N. Y. Supp. 726. Most cases hold that where the original tenancy was for a year or more the new tenancy is from year to year or for a year. *Smith v. Bell*, 44 Minn. 524, 47 N. W. 263; *Condon v. Brockway*, 157 Ill. 90, 41 N. E. 634. The view has also been taken that the length of the period for which rent is computed delimits the new term. *Kaufman v. Mastin*, 66 W. Va. 99, 66 S. E. 92. Where the expired lease was for a period less than a year it has been held that the new term was of the same duration as the old one. *Waterman v. Le Sage*, 142 Wis. 97, 124 N. W. 1041; *Wood v. Gordon*, 18 N. Y. Supp. 109; *Ballenbacker v. Fritts*, 98 Ind. 50. But the implied term has also been decided to be from month to month. *Eastman v. Richard & Co.*, 29 Can. Sup. Ct. Rep. 438. In the case of odd termed leases, as in the principal case, it would seem that the parties rarely contemplate the duplication of the original period. In the absence of needed legislation it would therefore be better to imply a tenancy from month to month.

MARRIAGE — NULLIFICATION — FRAUD WHERE MARRIAGE IS UNCONSUMMATED. — Immediately after her marriage and before its consummation the petitioner discovered that her husband was a repulsively immoral man and left him. She now asks for nullification of the marriage on the ground of fraud. *Held*, that a decree will issue. *Ysern v. Horter*, 110 Atl. 31 (N. J.).

Fraud as to material facts which induce consent to marriage is a well recognized ground for annulment. See Franklin G. Fessenden, "Nullity of Marriage," 13 HARV. L. REV. 110, 113. English courts refuse a decree except where the fact of impotency or the identity of a party has been concealed by fraud. *Napier v. Napier*, [1915] P. 184; *Moss v. Moss*, [1897] P. 263. But in America courts have widened the doctrine to include cases of antenuptial pregnancy, incurable contagious disease at the time of the marriage, and intention never to consummate the marriage. *Reynolds v. Reynolds*, 3 Allen (Mass.), 605; *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120; *Bolmer v. Edsall*, 90 N. J. Eq. 299, 106 Atl. 646. See 24 HARV. L. REV. 157. Courts have refused steadily to decree annulment for misrepresentation as to disposition, habits, or moral character and have seemed to consider consummation of the marriage immaterial. *Wier v. Still*, 31 Iowa, 107; *Williamson v. Williamson*, 34 App. D. C. 536. *Contra*, *King v. Brewer*, 8 Misc. 587, 29 N. Y. Supp. 1114; *Weill v. Weill*, 104 Misc. 561, 172 N. Y. Supp. 589. The New Jersey court follows the tendency of the New York cases by holding that fraudulent concealment of immoral character is a ground for annulment if the marriage is unconsummated. The prevailing view is that consummation is not an essential of a valid marriage. *Franklin v. Franklin*, 154 Mass. 515, 28 N. E. 681. See 32 HARV. L. REV. 848, 849. Since the court probably would have refused annulment had there been consummation, it seems that the principal case goes too far by its destruction of the marriage status.

NEW TRIAL — GROUNDS FOR GRANTING NEW TRIAL — NECESSITY FOR PREJUDICIAL ERROR. — Plaintiff, upon the evidence, was entitled to a verdict against the defendant for either \$153.90 or \$169.12 or nothing. The jury returned verdict for \$153. *Held*, that the defendant is entitled to a new trial. *De Corte v. Trichinsky*, 102 N. Y. Supp. 749.

The case is wrong and absurd. It is clear that a compromise verdict is not involved. Nor was the defendant prejudiced — quite the opposite. If the court did not care to correct the error summarily of its own motion, surely "de minimis" applies. Incidentally the costs of the motion were \$30.

PARTNERSHIP — RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS *INTER SE* — RIGHT TO CONTRIBUTION FOR COSTS OF SUCCESSFUL DEFENSE OF UNWARRANTED SUIT. — A partnership, consisting of plaintiff and defendant, acted as broker in effecting a sale of realty. Subsequent to the dissolution of the partnership, the purchaser of the realty brought an action against the plaintiff individually for alleged fraudulent misrepresentations connected with the sale of the land, an action which the present plaintiff successfully defended. The plaintiff seeks to recover from the defendant a proportionate share of the costs of his defense. To a complaint containing substantially the above facts, defendant demurred. *Held*, that the demurrer be sustained. *Hadley v. Coffin*, 176 N. W. 885 (Iowa).

Although treatises on the law of Partnership do not adequately deal with the problem here presented, the case can be satisfactorily reasoned out on principles of agency. The plaintiff was undoubtedly not only a partner, but also an agent of the partnership. See *Midland Nat. Bank v. Schoen*, 123 Mo. 650, 27 S. W. 547; STORY, PARTNERSHIP, 3 ed., § 1. As such agent he had an undisputed right to be indemnified by his principal — the firm — for such losses as proximately resulted from the relationship. *Adamson v. Jarvis*, 4 Bing. 66; *Guirney v. St. Paul R. R. Co.*, 43 Minn. 496, 46 N. W. 78. And the fact that the relation has terminated when the loss is suffered should not derogate from this principle of reimbursement. *D'Arcy v. Lyle*, 5 Binn. (Pa.) 441. Accordingly if the plaintiff could have established the causal connection between his agency and the loss to which he was subjected, his right to reimbursement by the firm, and therefore of contribution against his partner, would have been clear. Of course, the difficulty largely lies in establishing that the plaintiff's loss was a proximate consequence of the execution of the agency. See *First Nat. Bank v. Tenney*, 43 Ill. App. 544; 1 MECHEM, AGENCY, 2 ed., §§ 1603 *et seq.* In the principal case, it would seem that the factor of proximate causation was much too arguable to lay the complaint open to a demurrer. Cf. *D'Arcy v. Lyle*, *supra*; *First Nat. Bank v. Tenney*, *supra*.

PUBLIC OFFICERS — JUDGES — LIABILITY OF JUSTICES OF PEACE FOR MINISTERIAL ACTS. — The defendants, justices of the peace, were required by statute to forward the record of cases they had tried to the upper court on notice of appeal. The plaintiff in this action gave such notice to the defendants who failed to forward the papers. Not having the record, the upper court dismissed the appeal. The plaintiff now sues the defendant for the loss which resulted. *Held*, that the defendants are liable. *Kowalenko v. Lewis and Lepine*, (1920) 3 W. W. R. 119.

By the common law public officers are liable for misfeasance and nonfeasance to persons injured thereby. *Wright v. Shanahan*, 149 N. Y. 495, 44 N. E. 74. This rule is subject to the qualification that judicial officers, acting within their jurisdiction, enjoy absolute immunity for acts of a judicial nature. *Henke v. McCord*, 55 Ia. 378, 7 N. W. 623. Statements in the books that justices of the peace enjoy a lesser degree of immunity than judges of superior courts are largely founded on *dicta*. 2 SHEARMAN & REDFIELD, NEGLIGENCE, 6 ed., § 303. The modern tendency, at any event, is to afford all judges the same broad protection. *Broom v. Douglass*, 175 Ala. 268, 57 So. 860. All judicial officers, however, are liable for ministerial acts. See *People v. Bush*, 40 Cal. 344, 346. The question in every case of this type is, therefore, whether the act is ministerial or judicial. An act which on a given set of facts must be performed in a prescribed manner, according to legal mandate, is ministerial. *Hamm v. People*, 42 Col. 401, 94 Pac. 326. Though the principles applicable are simple, it is often difficult to apply them to the particular facts. Cf. *Wertheimer v. Howard*, 30 Mo. 420, and *Briggs v. Wardell*, 10 Mass. 356. As the act in the principal case is clearly ministerial, the defendants are liable on ordinary tort principles.

SUBSCRIPTIONS — SUBSCRIPTIONS FOR CHARITABLE OBJECTS — ENFORCEABILITY OF PLEDGE TO COMMUNITY WAR CHEST. — Plaintiff, a local organization for the efficient collection and distribution of war charities, sues to enforce defendant's pledge to it. *Held*, that the verdict be directed for plaintiff. *Mechanicville War Chest v. Ryan*, 181 N. Y. Supp. 576.

Charitable subscriptions are enforced at law by the great weight of authority but on various analytically unsound grounds. See 1 WILLISTON, CONTRACTS, §§ 116, 377; 15 HARV. L. REV. 312. The most common device is to hold the subscription an offer, accepted by incurring liability in reliance thereon. *Young Men's Christian Ass'n v. Estill*, 140 Ga. 291, 78 S. E. 1075. Other cases find consideration for the subscriber's promise in promises of other subscribers, in an implied promise to apply funds properly, in efforts to obtain additional subscriptions, or in inducing of other subscriptions thereby. *Petty v. Trustees of Church*, 95 Ind. 278; *Troy Academy v. Nelson*, 24 Vt. 189; *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325; *Irwin v. Lombard University*, 56 Ohio St. 9, 46 N. E. 63. Some, agreeing with the English view, deny recovery altogether. *In re Hudson*, 54 L. J. Ch. 811; *Montpelier Seminary v. Smith's Estate*, 69 Vt. 382, 38 Atl. 66. A charitable subscription is clearly a promise to make a gift, without legal consideration. Nevertheless it seems unfair to allow the subscriber to avoid his solemn promise, in reasonable reliance on which liabilities have been incurred. And courts confronted with this dilemma will continue to hold the subscription legally enforceable. Promissory estoppel generally operates only to support a waiver. *Schroeder v. Young*, 161 U. S. 334. See 1 WILLISTON, CONTRACTS, § 139. But two cases have made it the basis of liability to an individual. *Ricketts v. Scothorn*, 57 Neb. 51, 77 N. W. 365; *Switzer v. Gertenbach*, 122 Ill. App. 26. And some have held it the foundation of liability for charitable subscriptions. *Beatty v. Western College*, 177 Ill. 280, 52 N. E. 432. Its uniform recognition in this field would harmonize the decisions and substitute truth for fiction in the opinions.

TAXATION — INCOME TAX LAW OF 1913 — DEDUCTION FOR LOSSES "INCURRED IN TRADE." — Plaintiff, a member of a firm of cotton bag manufacturers, conducted a series of transactions on his own account on the cotton exchange, extending over more than three years, and resulting in a large financial loss. On his income tax returns for 1913 and 1914 he deducted these losses, under the provision permitting deduction for "losses actually sustained during the year; incurred in trade. . . ." (38 STAT. AT L. 167.) Defendant, as internal revenue collector, assessed an additional tax upon these deductions, relying upon a Treasury Department ruling to the effect that the term "in trade" was to be held to apply only to the trade or trades in which the person was engaged, investing money and devoting at least a part of his time and attention, and not to isolated transactions. (TREASURY DECISION 2090, Oct. 14, 1914.) Plaintiff paid the tax under protest, and brought this action to recover the money paid. *Held*, that the plaintiff could not recover. *Mente v. Eisner*, 266 Fed. 161 (C. C. A.).

It seems on its face inconsistent to hold profits from speculation in stocks or commodities taxable as part of a man's gross income, and to allow no deduction for losses. But such profits are clearly taxable under the statute. See 38 STAT. AT L. 167. The deductions to be made therefrom are, under the Sixteenth Amendment, entirely within the discretion of Congress. The courts can therefore do no more than construe the words, "incurred in trade." In the present case, "trade" was taken to mean the business by which a man earns his livelihood, which is a definition sometimes employed. See *Woodfield v. Colzey*, 47 Ga. 121, 124; *People v. Warden of City Prison*, 144 N. Y. 529, 538, 39 N. E. 686, 689. But this is using the word in the sense of a trade, as synonymous with calling or occupation. See *Topeka v. Jones*, 74 Kan. 164, 166, 86

Pac. 162, 163. "Trade" has usually, however, been more broadly defined as buying and selling, or any dealing by way of sale or exchange. See *May v. Sloan*, 101 U. S. 231, 237; *Doe v. Bird*, 2 A. & E. 161, 166. See also 3 BOUV. L. DICT. 3290. This definition has been held to apply to a single transaction. *United States v. Douglas*, 190 Fed. 482. There seems to be nothing in the act to show that Congress intended the narrower interpretation, especially in view of the fact that by a later statute, such losses may be deducted under a provision permitting deduction for all losses incurred in "any transaction entered into for profit." See 40 STAT. AT L. 1067.

TAXATION — PARTICULAR FORMS OF TAXATION — TRANSFER TAX: TRANSFER TO CHILDREN UNDER ANTENUPTIAL AGREEMENT. — A and B made an antenuptial agreement whereby, on the death of either, leaving issue, said issue were to take one third of the community property. A died. His children claim that the transfer to them under the agreement is not taxable under the New York Taxable Transfers Act. (1909 NEW YORK LAWS, c. 62; CONSOL. LAWS, c. 60, Art. 10.) Held, that the transfer is not taxable. *Matter of Schmoll*, 191 App. Div. 435, 181 N. Y. Supp. 542.

For a discussion of the principles involved in this case, see NOTES, p. 198, *supra*.

BOOK REVIEWS

PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY. By Various Authors. Continental Legal History Series, Vol. XI. Boston: Little, Brown, and Company. 1918.

For American purposes this is the most useful volume in a useful series. In the first two chapters (by Alvarez) the philosophical ideas which underlay our American Bills of Rights, as well as the French legislation of 1804, and the later modes of thought which characterized the maturity of law in the nineteenth century both in Europe and in America, are set forth clearly in convenient form. The thoughtful reader who can apply to the text his own knowledge of nineteenth-century American law will find much to aid him in understanding our law as it was a generation ago. Also he will find much material for reflection in such phenomena as the text of the French Civil Code of 1804 making liability a corollary of fault and the rise of liability without fault in recent years (pp. 58-61).

Chapter 3, "Changes of Principle in the Field of Liberty, Contract, Liability and Property," translated from Duguit's *Transformations du droit privé depuis le code Napoléon*, is a book in itself and deserves the most careful reading by American lawyers. The belief of lawyers in the first half of the last century "that law was an exact system, commanding adherence with the same rigor and unassailable logic as a system of geometry" (67), the breakdown of the word "right" as a legal conception (70), the functional idea of duty (73), the rise of legal limitations upon individual activity imposed in the interest of the individual (80), — all these things are as manifest and as significant in our law as in French law. In the last century there was a persistent attempt to force the common law of contracts into a Romanist mold, to state common-law relational doctrines in terms of "implied contract," to make tort liability depend upon culpability, in short to make the individual will the central point in our legal theory. Partly this resulted from a natural turning to the civilians for systematic ideas in view of the poverty of our law in this respect. Even more

it grew out of the modes of thought which governed everywhere in nineteenth-century science of law. Duguit's argument that the will-conception of a legal transaction "no longer agrees in the least with the facts" (89), his discussion of the duties of a public service company (120 ff.), and his exposition of the "new conception of liability for an injurious act" (125 ff.), are of great value for us. For he shows that this interpretation of everything in terms of the individual will, which our law has resisted and our courts have had to abandon, is breaking down at home. Again, the legal questions of which he treats under the head of "property as a social function" (129 ff.) are quite as important with us as in twentieth-century France. The distinction between socialization of property, which is becoming a fact, and collective ownership, which is but a creed (129), the legal theory of property in terms of economic need (130), the demonstration that "the individualistic system of property law is disappearing" (132), and the point that this does not mean disappearance of private ownership as an economic institution, but "that the legal notion upon which protection of property is founded is being modified" (134), may be verified out of our law by the same methods which he applies to French law. This chapter, written in the best style of a great thinker, is a notable contribution to the science of law and could properly have found a place in the series on Philosophy of Law.

Charmont's chapter on "Changes of Principle in the Field of Family, Inheritance and Persons" (chap. 4) deals with a subject in which we have been more conscious of change and has less interest for us. French attempts to adopt American homestead legislation (162 ff.) suggest how futile these borrowings of exotic institutions are likely to prove. Also the movement for "restoration of paternal testamentary power" (184 ff.) should give pause to those who would introduce the "reserve" or some equivalent institution with us. Another matter of interest is the effect of stock companies upon the French family (169 ff.).

Five succeeding chapters (5-9) treat of the method and influence of the modern codes historically and comparatively. They contain little or nothing that is not well known, but chap. 9 (by Rocco) on the commercial codes gives the first good account in English of the work of Thöl and Goldschmidt in the system and history of commercial law. The remaining chapters treat of the "Movement for the International Assimilation of Law," which excited much interest among scholars in the past twenty-five years. As things are, the subject is somewhat academic. But the thoughtful and eloquent address of Dean Wigmore with which the volume closes deserves to be pondered in connection with inevitable movements for unification of law in the United States, if not for the promotion or restoration of unity of law among English-speaking peoples.

A few doubtful translations, *e. g.*, "gross failure of consideration" for *lésion* (p. 14), do not seriously detract from the value of the book.

R. P.

JURISPRUDENCE. By Sir John [William] Salmond. Sixth Edition. London: Sweet and Maxwell, Limited. 1920. pp. xv, 512.

The practice of issuing reprints of a standard work with minor changes under the guise of new editions leads inevitably to a point where it becomes obvious that the book speaks from the date of the original publication and not from the date of the *imprimatur*. With the sixth edition Salmond's book on *Jurisprudence* has reached that point. When the first edition appeared in 1902 it was easily the best general introduction to the subject in the English language. Even then what was original in it was not new, as the author was rather restating in rounded form what he had worked out in his *Essays in Jurisprudence*

and *Legal History* (1891), his *First Principles in Jurisprudence* (1893), and his essays in the last decade of the nineteenth century in the *Law Quarterly Review*. It is from that decade that the book speaks. That it is still the best work of its kind to put into the hands of the student proves rather that there is a gap in our literature, than that nothing has happened in the last quarter of a century in the world of jurisprudence. On the contrary, so much has happened that our author is painfully conscious that neither his engagements nor his opportunities have been such as to enable him to maintain the bibliography, an especially good feature of the first edition, "as an adequate guide to the literature of the subject." Accordingly he now omits this bibliography altogether. But, one wonders, can a book really be more modern than its bibliography?

An examination of the text of the book before us shows that it has taken practically no advantage of the translations made available by the Association of American Law Schools through its Modern Legal Philosophy Series or its Continental Legal History Series. The discussion of fundamental legal conceptions (Chapters X and XI) has not been benefited by Dean Pound's elucidation of rights and interests in the *International Journal of Ethics* or the late Professor Hohfeld's painstaking analysis in the *Yale Law Journal*. Its philosophy of law — the book has a distinct philosophical tinge (see e. g., Chapter III) — is equally oblivious of Kohler's Neo-Hegelian *Universalrechtsgeschichte* and of Stammler's Neo-Kantian categories. Its treatment of the "law of nature" is kindly, though firm, and yet there is nothing in it about the law-of-nature-with-a-changing-content that the recent French writers have taken from Stammler and developed into a system of their own. The movement for the socialization of the law was just beginning to make itself felt in Anglo-American law when Salmond was formulating his ideas, and writing from that laboratory of social experiments, New Zealand, he naturally touched on some phases of the movement (cf. his discussion of the purposes of punishment in Chapter IV); but it is difficult to see how one can ignore the challenge of Dean Pound's chapters on *The Scope and Purpose of Sociological Jurisprudence* in the *HARVARD LAW REVIEW* (vol. 24, p. 591; vol. 25, p. 140, p. 489) in this connection.

There is one phase of current opinion bearing on juristic problems that seems to have impressed the author with the necessity of elaborating his discussion in an Appendix. It is the vexed problem of sovereignty. It is not, however, the discussion of the recent French jurists who would make of the state a kind of public service corporation, that has troubled the author. These might lead to the modification of Appendix II instead of the addition of Appendix V. It is rather the unfortunate circumstance that we insist on calling by an eighteenth-century name the twentieth-century facts that cannot be comfortably summarized in a single word, at least not in the word "sovereignty." In the various parts of the British Empire these facts are, of course, particularly complicated. For this reason though a successful summary of them in traditional terms is a feat requiring much cleverness, it is not likely to interest the American reader, except as cumulative evidence of the necessity of abandoning the old nomenclature eventually.

Sir John Salmond's service to the science of jurisprudence is great beyond measure; but a part of this service, it must not be forgotten, has been the stimulation of thought which has made not only his bibliography but great parts of his book obsolete. It is to be hoped that he may long be spared to the science and that he may find occasion and opportunity to revise the book in the light of the developments which, as he has demonstrated elsewhere (e. g., in his introduction to *The Science of Legal Method*, 1917), have not passed by him unnoticed.

NATHAN ISAACS.

MARITIME LAW. By Albert Saunders. Second Edition, enlarged, with a Supplement by Sanford D. Cole on the law of shipping during war. London: Effingham Wilson. 1920. pp. xxxii, 470 + 31.

Fantastic as the life of Lucius Titius, gathered from the ancient Roman references in the Digest, and pieced together by Stammler in his "Aufgaben,"¹ is the checkered career of the good ship *Malabar*, as told by Mr. Albert Saunders in his *Maritime Law*, an enlarged edition of which has recently appeared. Mr. Saunders' purpose, as he tells us in his preface, is not so much to give a profound exposition of the law of admiralty, as to set forth in a readable way the practical operation of maritime law as he has observed it during his long practice in the English Admiralty Courts. To do so he has adopted the unique method of a narrative form; he follows the legal fortunes of his imaginary ship from the time the contract for her construction is entered into with the shipbuilder until she is finally sunk off Ushant, drowning two of her passengers and four of her crew, and the affairs of the Malabar Steamship Company are consequently wound up and a liquidator appointed. The author, following the fortunes of the ship through nine successive voyages, runs pretty completely through the gamut of possible maritime eventualities; and each event lends occasion for a discussion of resulting legal liabilities and a consideration of leading cases in point.

One cannot avoid questioning whether the narrative is the happiest form for an exposition of law. Such a book could never be devoured as summer fiction; at best it seems doubtful whether any one would be lured to read merely because of a desire to follow the fortunes of the *Malabar*. On the other hand, for the practitioner seeking a general treatise on maritime law, or desiring to find the law on some specific point, the narrative method successfully prevents the arrangement of the material in such concise form as to be immediately and easily accessible, — a defect which might be cured, but unfortunately is not, by a full and careful index. Considered, however, as an elementary exposition of English maritime law largely for the benefit of ship owners and shippers, the book has distinct merits. The law is set forth in fairly general outlines without presupposing an expert's knowledge; and for this reason the book has fulfilled, and will doubtless continue to do so, a very useful function in the commercial world.

Maritime law is a subject of great and growing importance because of the ever-increasing size and costliness of modern ships and cargoes, and will always be of peculiar interest as the outgrowth of a world-wide system of law, cosmopolitan in its nature and international in its scope, and therefore largely free from the provincialities of English common law. In view of the importance of the subject it is remarkable how few good textbooks and adequate treatises on maritime law exist. One therefore welcomes the more the appearance of this new and enlarged edition of Saunders' *Maritime Law*. F. B. S.

THE LAW OF DAMAGES AND COMPENSATION. By F. O. Arnold. Second Edition. London: Butterworth & Co. 1919. pp. lxxxvi, 354, 54.

Since the first edition, in 1913, Arnold on Damages has become the standard English work on the subject. The English courts have never worked out the law of damages as our own courts have done. The twenty-five hundred English cases here cited (many of them not concerned with damages) are an inconsiderable fraction of the cases cited in the latest editions of Sedgwick and Sutherland. Many subjects of importance in the American law are here not even mentioned — avoidable consequences, for instance — or are dismissed

¹ Stammler: *Aufgaben aus dem Römischen Recht*, p. 183.

with a few lines, as is the case with exemplary damages. The treatment of the subject is concise and encyclopædic, and the author seldom reconciles contradictory passages in the decisions or criticizes the language of a court. Of the rather meager text, a considerable proportion is taken up with considerations of cause of action. Nor does the author contribute a clear arrangement, an enlightening analysis, or a development of general principles. These things the author modestly disclaims. The book is what it purports to be: an industrious and valuable compendium of the English decisions on the subject.

J. H. B.

THE LAW OF MORTGAGES OF REAL ESTATE. By John Delatre Falconbridge, M.A., LL.B. Toronto: Canada Law Book Company, Limited. 1919. pp. lxxiii, 797.

This treatise is intended for the use of students as well as practitioners. It is probable that it will be found more useful for the latter class of readers than for the former. The author does not make a very serious attempt to discuss the theoretical foundations upon which the law is based; the presentation is somewhat dogmatic. A student would have difficulty in grasping the law of mortgages from a study of this book alone. By the practitioner it will doubtless be found a very convenient statement of the common law and statutory law of mortgages as it is administered to-day in Canada (except Quebec), and particularly in the province of Ontario. The practitioner in Ontario will find especially useful the matter relating to the registry system in that province.

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- FRESH LIGHT ON ROMAN BUREAUCRACY. By H. Stuart Jones. New York: Oxford University Press.
- THE AMERICAN SUPREME COURT AS AN INTERNATIONAL TRIBUNAL. By Herbert A. Smith. New York: Oxford University Press.
- A MEMOIR OF THE RIGHT HONOURABLE SIR WILLIAM ANSON. Edited by Sir William Anson. New York: Oxford University Press.
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FOREWORD TO "THE VALUATION OF PROPERTY IN THE ROMAN LAW"

BY ROSCOE POUND

COMPARATIVE law took an important part in the constructive period of American law. In the hands of Kent and Story and their contemporaries and immediate successors study of the Roman law and of the law of Continental Europe bore fruit in liberal development of common-law doctrines, in intelligent filling of gaps in the common-law system and in the reception and adaptation of a law merchant based to no small extent on the Continental commercial law. Later, when the building of an American common law had been achieved, the energies of jurists turned for a season to analytical and historical investigation of the common law, as received and adapted, in order to reach its fundamental ideas, develop them logically, and give the system form and internal coherence. The critical exposition of civil-law doctrines and institutions, in comparison with our own law, which had characterized the books of an earlier generation decayed into a brief prefatory statement or a few perfunctory historical references by way of introduction.

There is nothing peculiar to us in this phenomenon. In legal history periods of growth and expansion call for and rely upon philosophy and comparative law. Periods of stability, striving for perfection of the form of the law rather than for development of its substance, rely upon analysis and history. The scientific treatment of law begins in the taking of distinctions between cases which are superficially analogous and establishment of categories and "differences." This simple form of analysis is appropriate to the stage of the strict law. Later the attempt to put principles behind distinctions and to generalize this comparison

of rules within the legal system leads to comparison with like rules or rules on like subjects in other systems. This step is suggested by Cicero in the transition to a stage of growth in Roman law and by Fortescue near the end of the stage of the strict law in England. In the period of growth and expansion marked by the development of equity and reception of the law merchant it is marked. With the rise of the analytical method in the nineteenth century it largely disappears. We may be confident, therefore, that the revival of serious use of comparative law in our legal literature is a significant sign of the times.

It is significant also that a critical study of Roman law for purposes of a modern legal problem comes from a practical practising lawyer who has found it worth while in the pursuit of a specialized branch of the practice. It will be perceived at once that this study has utility beyond its immediate subject wherever valuation of property must be had in some form. But its chief interest to the observer of legal progress is in its testifying to a new spirit in our treatment of the law. The need for comparative study of law in this country did not come to an end with Kent and Story.

THE VALUATION OF PROPERTY IN THE ROMAN LAW¹

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I INTRODUCTORY

THE arrangement of this article in subdivisions treating severally of definitions, general rules, and evidence is not to be regarded as an attempt at a rigidly logical division of the subject itself, but rather as a practical way of handling the material, suggested by experience in the preparation of briefs and arguments in valuation cases tried under the common law. In the law of valuation as worked out by the Roman jurists, as well as by the English and American courts, it is often impossible to draw exact distinc-

¹ The substance of this monograph was prepared some years ago as a chapter in a treatise on the law of valuation which the writer has never found time to complete. It has recently been revised by him with special reference to its publication in the HARVARD LAW REVIEW. The writer desires to acknowledge his indebtedness to Mr. Carl H. Bassler, Harvard Law School, 1919, for assistance in the preparation of the article.

tions between rules of valuation and evidence of value; between the elements or factors of value, and the proof itself. The arrangement adopted in this paper has been found helpful in practice. It makes no pretension to mutually exclusive accuracy.

No attempt has been made to compare the opinions of the Roman jurists in particular cases with the decisions on similar questions to be found in the English and American law reports. The paper is intended merely as an outline, and, so far as a comparison with modern law goes, has intentionally been restricted to general principles.

Certain aspects of the subject should be referred to before entering upon a discussion of the law itself.

a. THE IMPORTANCE OF THE SUBJECT AT THE PRESENT DAY

In view of the multiplicity of decisions on the methods of valuing property to be found in the American and English law reports of the last half century, and of the less extensive but careful treatment of some branches of the subject in the jurisprudence of France, Germany and other countries in Continental Europe, it may be thought that an investigation of the original sources of the Roman law of valuation would be a work of historical curiosity rather than one of present utility.

The law of valuation, as applied by the American and English courts, is, however, almost entirely of recent growth; it has no roots in the ancient principles of the common law; and, as will be seen from the following account, the questions which a modern court of law must answer in determining the value of property are often exactly the same questions that were illumined by the legal instinct and practical sense of Paulus, Ulpian, and the other great lawyers who erected the most enduring monument to the genius of the Roman people — the perfected civil Roman law. There is, moreover, probably more valuation law in the Digest than in all the English law books prior to the nineteenth century. It would seem, therefore, that the manner in which valuation problems were worked out by the Roman jurists might in many cases be considered with profit in our own courts at the present day.

The subject also presents a practically new, if somewhat narrow, field of investigation. As pointed out below, the valuation of property in the Roman law has not, so far as the present writer has

been able to discover, been made the subject of systematic treatment by any mediaeval or modern writer;² and in England during the formative period of the common law no attention was apparently ever paid to the precepts or decisions in the Digest on this subject. In some departments of law an extensive use was made by our professional ancestors of the jurisprudence of Rome; but the very practical decisions of the Roman lawyers on the valuation of property seem to have been entirely unknown. This is doubtless to be accounted for by the unmethodical arrangement of the Digest, and by the absence there, as well as in the Institutes, of any separate treatment of this particular subject. Even when all legal writings in England were in Latin, and also after the compilations of Justinian were available in print, no use was made of the opinions of the Roman jurists on the subject of value. The very words used by these writers to designate property values were either unknown or soon forgotten; and from an early period new words of mediaeval origin, such as "valor" and "valentia," were in common use in writs, statutes, charters and other legal documents.

Nor, in modern times, has any accurate use been made by English or American courts and writers of the Roman law of valuation.³

Although the main purpose of the present investigation is historical and although the results are necessarily fragmentary and,

² The subject is sometimes apparently covered by the title of a book or article, but not in reality. Thus Erwin Grueber's *ROMAN LAW OF DAMAGE TO PROPERTY* relates to the estimation of damages in actions under the *lex Aquilia*, but contains less than a page or so on the specific subject of property values.

³ An instance of the consequences of this unfamiliarity with the subject is furnished by the opinion or *dictum* of the Superior Court for the city of New York in one of the earliest American cases in which the sentimental value of property is considered, and by the repetition of this *dictum* by textbook writers (SUTHERLAND ON DAMAGES, for instance) and by other courts. This case, *Suydam v. Jenkins*, 3 Sandf. 614, was an action of replevin and involved the value of 500 barrels of flour. It had nothing to do with sentimental values; but in the course of a long opinion the court went out of its way to say that in some cases the "pretium affectionis" of the property was to be considered. No authorities are cited, but the court must have thought that this was the law in that system of jurisprudence in which the words quoted originated. Now the Roman law was exactly the opposite; *pretium affectionis* being, as shown below, seldom mentioned in the Digest except as an illustration of the kind of value which was *not* to be considered in a legal appraisal of property or damages. The assumption of the New York Superior Court respecting the legal aspect of a *pretium affectionis* was a complete inversion of one of the commonplaces of the Roman law; but this assumption or *dictum* has been the cause of considerable inconsistency in the American decisions on sentimental value. See *infra*, II, d.

in some cases, not free from doubt, the writer trusts that a sufficient body of Roman precedents has been collected to justify the labor involved, and to be useful, whether by way of confirmation, contrast or suggestion, in the consideration of the increasingly important subject of the valuation of property in modern law.

The author also ventures to express the hope that the results of this inquiry into a single branch of ancient jurisprudence may stimulate the *cupida legum juvenitus* assembled at the Harvard Law School to the prosecution of historical studies in the law.

b. THE DIFFICULTIES OF THE SUBJECT

At the outset of the inquiry we are confronted by many difficulties, some of them quite serious. In fact no entirely satisfactory account of the methods by which property was valued by the Romans can now be written. The subject is not treated in the *Corpus Juris* as a separate branch or department of either administration or law; and the passages referring to methods of valuation are relatively few. Those two chief sources of modern valuation law, the decisions in proceedings of eminent domain and the judicial interpretations of tax statutes, are almost entirely lacking; and we are practically confined to decisions in actions of tort, sales and partition, and to the rules for the appraisal of estates under the *lex Falcidia*.

The language of the Digest, moreover, is often difficult of accurate application. We meet, in the first place, the same inconsistent use of words which is one of the chief difficulties encountered in the study of modern valuation law. There is no single word in Latin corresponding to our "value." The nearest is *pretium*; but that may mean either price, cost, or value; and when used in the sense of value, may, with or without the addition of *verum*, *justum*, etc., indicate something analogous to our market value, or a concept of a somewhat different nature. *Aestimatio* meant sometimes value, sometimes valuation. *Utilitas*, *id quod interest*, *quantum ea res est*, *quantum alicujus interest*, and similar expressions are often used to indicate what we call value to the owner or the plaintiff; but they are also employed to designate the value of a partial interest in property, or the damage done by an injury to property, or the damages recoverable by the plaintiff in certain cases *dehors* the

property itself, or the amount of compensation generally to which the plaintiff is entitled in the particular action under consideration.

Most modern writers see in this confusion of language little more than the inconsistency of usage apt to exist in a branch of law which has not been subjected to separate or formal treatment. Others profess to discover, at least in so far as the terminology of the subject in compensation cases ⁴ is concerned, a development of the law from the narrow *verum pretium* of the early period to the *utilitas actoris* of the classic law.

The English and American decisions on the valuation of property are certainly not free from the vice of loose and inconsistent language; but the reported cases are so numerous and the facts in each are so fully set out that we can generally in the end discover exactly what the courts mean. In the Roman law, however, we have, so far as this subject goes, merely a relatively small number of opinions or decisions by the jurists, accompanied, in some cases only, by illustrations; and the use of an inconsistent terminology is peculiarly embarrassing.

Another cause of confusion and uncertainty is the fact that many of the phrases and passages in the Digest, which must now be read according to the apparent or ordinary meaning of the words used, had by the time of Justinian acquired strict technical meanings, which would be readily understood if the writings of the jurists themselves had been preserved. But of the nearly two thousand law books ⁵ which Tribonian and his colleagues used in the compilation of the Justinian jurisprudence less than half a dozen have survived in their entirety.⁶

Still more embarrassing is the fact that the decisions of the jurists which were incorporated in the Digest were frequently separated from the examples or applications used in the originals by way of illustration. The Roman lawyers, like those of our own race, preferred the concrete to the abstract as a mode of legal expression. The enunciation of a legal principle was generally ac-

⁴ The reader will understand, of course, that in this article the word "compensation" is used in its English sense, not as the equivalent of the *compensatio* or *debiti et crediti inter se contributio* (= set-off) of the Roman law; and that by "compensation cases" are meant actions under the *lex Aquilia* and other forms of procedure the object of which was the recovery of damages for the loss of property.

⁵ *Duo paene millia librorum*; COD. I. 17. 2. 1.

⁶ The INSTITUTES OF GAIUS, which contain four *libri*, practically complete.

accompanied by a specific application to a given state of facts; and it was in this shape that the statement became a binding precedent. These illustrations, of vital importance to an understanding of the condensed statements of principle, were generally carried over into the Digest; but in many cases this unfortunately was not done, and the original treatises have been lost.

A further difficulty of interpretation is caused by the undoubted corruptions, consisting largely of omissions and displacements⁷ which crept into the text of the Digest at the time of its compilation. The same writer sometimes figures in different parts of the Digest as expressing diametrically opposite views upon the same subject.

It goes without saying that the real meaning of any but the most explicit passages can only be arrived at by a close consideration of the context, by a comparison with other passages and titles, and by paying careful attention to the form of action and to the nature of the final judgment therein.

Still another difficulty for the student of the Roman law is the brevity of the style adopted, and the over-condensed and elliptical opinions in which it results. While there can be no doubt that the language of the Digest conforms far more closely to the Latin tongue as actually used by the Roman people, than does the style of the classic authors, over-condensation of expression was a characteristic of both styles, and is particularly annoying in a law book. Much of it, as found in the Digest, is, of course, due to the use of short technical terms, the full meaning of which the Roman reader was supposed to understand; but elliptical sentences and other partial forms of expression which are not to be explained as technical phrases, are to be found on almost every page of the Digest. Sometimes the subject of the sentence is left out, sometimes the predicate, sometimes the verb; and the insertion of four or five words is often necessary to complete the sentence if full expression is to be given to the thought. Modern libraries are filled with the discussions and controversies which this defect of the ancient law (in the form in which it appears in the Corpus Juris) has created; and

⁷ An instance of displacement which affects the subject of this article is furnished by the presence in DIG. 9.2. (*ad legem Aquiliam*) 33. pr. of an opinion by Pedius on the special value of property to individuals, which opinion, according to modern criticism, really belongs in DIG. 35.2 (*ad legem Falcidiam*) where it also appears in *lex* 63. pr.

unfortunately some of them relate to the valuation of property. Sometimes, as in the definitions of market and rental value referred to below,⁸ the result of the devotion of the Romans to brevity of language is a condensed lucidity of expression which can with difficulty be imitated in any modern tongue. More frequently the meaning is more or less obscured by the effort to substitute brevity for clarity.

Finally, there is a mixed difficulty of style and grammar which confronts us at the outset, and as some of those who read this article may wish to fill up its outlines by independent studies of their own, a short explanation of the expressions commonly used to designate the value of property to a given person, generally the owner or the plaintiff in the case, may be helpful. Besides the word *utilitas* we have such phrases as *quanti mea interest*, *quanti res est*, *quanti* (or *id quod*) *alicujus interest*, etc., etc. The full thought is sometimes expressed, as in DIG. 19.1.1.pr., where value to the buyer is described as *id quod interest, hoc est quod rem habere interest emptoris*; and in DIG. 43.17.3.11, where the phrase *quanti res est* is defined as *quanti uniuscujusque interest possessionem retinere*.⁹ More commonly, however, the phrases used to designate the special value to the owner or plaintiff in the suit of the property in question are the elliptical expressions *id quod interest*, *quanti mea interest*, etc., which the student readily recognizes as purely technical phrases in the law of damages; but he must always study the context, particularly the examples, if any, which are given, and take into account such other passages as bear upon the subject under discussion, before he can safely conclude that the phrase has any reference to the value of property. It may also, and more frequently does, refer to the total compensation or damages involved in the suit, or to the basis of estimating the same; in which case the *utilitas* of the property itself is buried under other considerations. The words

⁸ Chapter II, a. See also the statement of the rule of "value as a whole" in Chapter III.

⁹ See also: *omne quod interest emptoris servum non evinci* (DIG. 19.1.43); *quantum ejus interest possessionem habere* (DIG. 43.4.1.5); *interest legatarii fundum . . . habere* (DIG. 31.54); *ejus rei . . . tanti aestimata est quanti in litem juraverit* (DIG. 6.1.46); *fructuarius aget de fructibus vel quanti interfuit ejus, furtum factum non esse . . . proprietarius vero aget quod interfuit ejus, proprietatem non esse subtractam* (DIG. 47.2.46.1).

Most of these passages refer to the interest or *utilitas* of the plaintiff, buyer, etc., in the lawsuit generally, rather than to the value of the property involved.

"damage" and "damages" are also used in our law not only to indicate the value of property when that is the sole object of the suit, but also to designate the amount of money to which the plaintiff is entitled in cases where the value of the property is a part only of the legal measure of recovery, and in cases where no property at all is involved; but in the Roman law, as well as in modern French and German jurisprudence, the distinctions are not so sharp, and the identification of the particular kind of damage intended is not so easy, as with us.

C. SOURCES OF THE LAW

The only complete law book which survived the compilations of Justinian and the destructive period which ensued is the Institutes of Gaius, written in the second century A.D. and discovered in 1816. Parts of the works of Ulpian and other jurists have also survived and, together with certain other fragments, are to be found in various modern compilations. The main sources of our knowledge are, of course, the Digest, Codex and Institutes of Justinian, published A.D. 529-534, which, with the Novellae, are collectively known to the modern world as the Corpus Juris Civilis.

Very little assistance in the elucidation of the Roman law of property values is to be obtained from the "Gloss" of the twelfth and thirteenth centuries, or from the writings of the post-mediaeval "Commentators." These writers were not interested in this particular subject.

In modern times we find a vast literature of Roman law, covering investigation, discussion and legislation; the most helpful being, naturally, the law books written in Germany since the adoption of the Roman law. The "Reception" carried over nearly the whole of the Roman law of damages; and the opinions or decisions in the Digest relating to value have not only been the subject of learned and voluminous discussion during the past five hundred years, but constitute the common law of the German states. The chief kinds of value discussed by the Roman jurists have also, since the Prussian code of 1794, been incorporated in German statute law.¹⁰ So far as the writer knows, however, neither the German law books, nor those published in France and other countries

¹⁰ See *infra*, II, b.

which make use of the Roman law to a greater or less extent, contain any systematic or comprehensive treatment of the legal methods of valuing property. Hundreds of books and monographs have been written on *id quod interest*, the *Interesse* of the modern German law;¹¹ but no separate consideration of the detailed methods of law applicable to the valuation of property appears to have been undertaken. So far as compensation value is concerned the subject is still treated as part of the law of "obligations"; which results in a merely incidental discussion of property valuation, and, as in the Digest, in the use of the same phrase to denote both the value of the thing destroyed or taken and the general measure of damages in any kind of an action of contract or tort. The value of property, the collateral losses due to the deprivation of it, the damages resulting from the breach of any kind of a contract, the injury to person or property due to any kind of a tortious act, are all treated by the civilians, ancient and modern, as a single branch of law; and a terminology is used which makes it difficult to see when a property value is intended, and when some other measure of damage or basis of recovery.

The works of French and German writers on the Roman law, particularly the learned law books published in Germany before the adoption in 1900 of the *Bürgerliches Gesetzbuch*, are, nevertheless, indispensable to a full understanding of the subject, and free use of them has been made in the preparation of this article.

II

THE DIFFERENT KINDS AND DEFINITIONS OF VALUE

Confining our attention to the passages in which it appears to the writer that the jurist is considering, not the question generally of damages or the value of partial or limited interests, but the appraisal of some particular article of property as such and in its entirety, we find two chief kinds of value referred to.

On the one hand we have what may best be translated as the

¹¹ The best is probably the well-known treatise of Friederich Mommsen on the *Lehre von dem Interesse* in his *BEITRÄGE ZUM OBLIGATIONRECHT* (1855), vol. 2. This learned and illuminating discussion of the subject is, however, in parts obscured by the fact that, as in other German law books, whole pages of general argument will be found without a single practical application or illustration. In fact the Digest itself is often easier to understand than a German commentary on the doubtful passage.

general or ordinary value of the property, *verum pretium*; and, on the other hand, the special value of the property to some particular person, usually the owner or the plaintiff in the case, *utilitas actoris*. The latter is a concept corresponding almost exactly to our value to the owner. The former is more or less identical with market value in the modern sense. The basic concepts of value in the Roman law are not, however, as with us, market value and value to the owner; but general value and value to the owner.

Other kinds of value are referred to in the Digest, generally by way of contrast and exclusion; the principal one being the special value of property which is based on the purely sentimental interest or affection of a particular individual, *pretium ex affectu*.

a. QUANTI VENIRE POTEST — MARKET VALUE

The market value of property, meaning the cash sum for which it could probably be sold on or about the day of valuation, does not figure prominently in the Roman law as an independent concept or kind of value. It is, however, referred to, directly or indirectly, in several places in the Digest; sometimes merely as the sale value of the property in question without any comparison with other kinds of value;¹² sometimes by way of contrast to actual cost;¹³ sometimes to indicate the present (discounted) value of future or conditional payments;¹⁴ more often for the purpose of distinguishing value for sale from other kinds of value, such as *verum pretium*.

The phrase used in the Digest to indicate market value is *quanti venire potest*, what the article can be sold for; or *quanti vendere potest*, what the owner can sell it for.

As shown below¹⁵ the basic value of the Roman law is the ordinary value of property, its value under all circumstances to any person, *quanti omnibus valet*; and in most of the passages in the Digest which refer to market value the object is to distinguish that concept or kind of value from *verum pretium*.

Thus, in proceedings for the determination of the quarter part of a decedent's estate which his heirs (and in certain cases the state) were entitled to under the *lex Falcidia* to receive free from the

¹² DIG. 10.3.10.1.

¹³ DIG. 14.2.2.4; DIG. 15.3.5.pr.

¹⁴ DIG. 35.2.45.1; DIG. 35.2.55; DIG. 35.2.73.1.

¹⁵ *Infra*, II, b.

burden of legacies, it was well settled that the property was to be valued at its common, ordinary or general value to all the world, *verum pretium*; and in the title of the Digest devoted to this law¹⁶ we find it specifically stated that the market value of the property is not to be considered when it differs from *verum pretium*. A slave is not to be estimated at more than his ordinary value, although he could be sold to his own father for more,¹⁷ nor is the fact that he has been given a legacy to be taken into account, although this fact might under the Roman law greatly enhance his market value.¹⁸ And, generally speaking, in proceedings under the *lex Falcidia* the special value of the property to individuals, *utilitas singulorum*, is not to be considered,¹⁹ although this special value must necessarily be included in the *utilitas* which, in actions under the *lex Aquilia*, is the general measure of recovery.²⁰

A sharp distinction is drawn between *aestimatio*, meaning ordinary value, and market value in the title of the Digest devoted to the maritime law, *de lege Rhodia de jactu*. The goods jettisoned are to be valued by their *aestimatio* or ordinary value; those subject to contribution at their market value, *quanti venire possunt*.²¹

It was held that in the action *de damno infecto* for the damage due to the destruction of a party wall the defendant was not liable for the value of such *immoderata cujusque luxuria* as expensive mural paintings.²² Yet such decorations would nearly always affect the market value of the plaintiff's house and wall.

An instructive decision is that contained in DIG. 35.2.63.2, where it is held that although oil may not be worth as much in Spain as in Rome, or in good years as in bad ones, still its value is not to be determined by temporary fluctuations in price caused by accident or abnormal scarcity. *Non ex momentis temporum, nex ex ea, quae raro accidat, caritate, pretia constituentur*. Value, thus defined, may be compared with the "normal value" of the economists, or the "market value under ordinary conditions" of modern German law. It certainly is not market value as understood in English and American law; nor is it the *quanti venire potest* of the Roman law.

¹⁶ DIG. 35.2. *ad legem Falcidiam*.

¹⁸ DIG. *ib.*

²⁰ DIG. 9.2.51.2.

²² DIG. 39.2.40.pr. See Chapter III.

¹⁷ DIG. 35.2.63.pr.

¹⁹ DIG. *ib.*

²¹ DIG. 14.2.2.4.

These authorities seem to the writer to make it fairly clear that market value, both as we understand it and as it figures in the Digest, was, in some cases at least, not the same thing as what the Romans called *verum pretium* or ordinary value.

That kind of market value which is known as "current price," meaning the sum at which articles of ordinary merchandise are bought and sold in the open market, is referred to in an edict of the Emperor Anastasius, A.D. 491, which refers to the price at which foodstuffs *in foris venire solent* (κατὰ τὰ ἐπ' ἀγορὰς ὄντα).²³

Before passing from the subject of market value, attention may be directed to the singularly appropriate expression for this kind of value used by the Roman jurists. *Quanti venire potest*, what the thing can be sold for, expresses in three words the basic idea of market value. If some such definition as this had been kept constantly in mind by English and American judges there would not be found in our law books the innumerable amplifications and ambiguous definitions which encumber the decisions on market value; and we should be spared the frequent and unprofitable reference to the supposititious buyer who is assumed not only to be willing to purchase, but also to be willing to pay the full value of the property in question to its owner. To effect a sale there must, of course, be some one ready to buy; but there may be no one willing to pay a price measured by actual cost, reproduction cost, value in use, or any other test of the real value of the property to the owner. The introduction of the willing purchaser at a fair price does not help us much in the determination of market values; and it has led to the creation of another useless fiction that unless the property can be sold for approximately its full value to the owner it has no market value at all. The problem of market value is much simplified if we fix our attention, as the definition in the Roman law forces us to do, on the essential object of the inquiry, which is simply to ascertain what in the actual circumstances of the case the property could probably have been sold for on or about the day of valuation.

A similarly apt phrase is used to designate the annual or rental value of property, *quanti locari potest*, what the thing could be leased for;²⁴ or *quanti locare potes*, what you could let it for.

²³ Cod. 10. 27. 3.

²⁴ Dig. 12. 6. 65. 7; where it is said that if I have given you a house towards the

b. VERUM PRETIUM; QUANTI OMNIBUS VALET — ORDINARY OR
GENERAL VALUE

The primary value of the Roman law is the value of the property in question to people generally, *quanti res omnibus valet*, as distinguished from its special value to particular persons, and from its market value where that is enhanced by special or personal circumstances.

The words most commonly used to indicate this kind of value are *verum pretium*, or *verum rei pretium*.²⁵ Other words or phrases of similar import are *justum pretium*,²⁶ *pretium rei*;²⁷ often *pretium* alone;²⁸ *vera aestimatio*,²⁹ *vera rei aestimatio*,³⁰ *justa aestimatio*,³¹ *pretii aestimatio*,³² *rei aestimatio*,³³ *aestimatio corporis*,³⁴ or *ad corpus*,³⁵ *aestimatio ex veritate*,³⁶ or simply *aestimatio*.³⁷ Sometimes we find *veritas*,³⁸ *rei veritas*,³⁹ *res vera*,⁴⁰ *ipsa res*,⁴¹ *quantitas*,⁴² used in the same sense.

Many of the phrases cited are, however, used occasionally in other senses; either to indicate the *utilitas* or special value to the plaintiff, or in a yet broader sense to signify the total measure of recovery in the form of action under consideration, that is the entire *litis aestimatio*. Even such an apparently definite expression

payment of a debt its annual value is to be accounted for, not at the market rental value of the house, *quanti locare potui*, but *quanti tu conducturus fuisses*, that is, at the rent you would have paid for it. See also DIG. 10. 3. 10. 1 and *infra*, *b*.

²⁵ DIG. 5. 3. 20. 21; DIG. 10. 3. 7. 12; DIG. 30. 81. 4; DIG. 40. 5. 32. 1; DIG. 47. 2. 50. pr.; DIG. 47. 8. 2. 13; DIG. 47. 8. 4. 11.

²⁶ DIG. 10. 3. 10. 2; DIG. 20. 1. 16. 9; DIG. 24. 1. 36. pr.; DIG. 40. 5. 31. 4; DIG. 49. 14. 3. 5; COD. 3. 37. 3.

²⁷ DIG. 27. 3. 1. 20; DIG. 43. 17. 3. 11.

²⁸ GAL. 3. 212.

²⁹ DIG. 35. 2. 61.

³⁰ DIG. 50. 16. 179.

³¹ DIG. 23. 3. 12. 1; DIG. 31. 1. 54; DIG. 32. 14. 2; COD. 3. 37. 3.

³² DIG. 9. 2. 23. 1.

³³ DIG. 27. 3. 1. 20; DIG. 50. 16. 193.

³⁴ INST. 4. 3. 10; DIG. 9. 2. 22. 1; DIG. 47. 2. 80. 1.

³⁵ DIG. 9. 2. 37. 1.

³⁶ DIG. 35. 2. 42.

³⁷ GAL. 3. 212.

³⁸ DIG. 35. 2. 42.

³⁹ DIG. 35. 2. 62. 1.

⁴⁰ DIG. 35. 2. 60. 1.

⁴¹ DIG. 43. 17. 3. 11.

⁴² DIG. 39. 2. 4. 7; DIG. 45. 1. 38. 17.

as *rei ipsius aestimatio* is used in the sense of *utilitas* in DIG. 43. 17.3.11.

In addition to the foregoing words and phrases, the expression *quanti res est* is frequently used in the sense of *verum pretium*.⁴³ More often, however, especially in the writings of the later jurists, this phrase refers to the value of the property to the owner or to the amount recoverable in the action, and is to be identified with *utilitas* or *id quod interest* rather than with *verum pretium*.

Aestimatio is also used in the general sense of valuation;⁴⁴ or as meaning a judicial valuation in distinction to a valuation by the plaintiff's oath.⁴⁵

Iustum was also apparently sometimes used, in connection with *pretium* or *aestimatio*, in the modern sense of just or adequate. See chapter IV, *a*.

It is generally easy to understand from the context, particularly by the aid of the examples given, whether the words in question are used in the strict sense of *verum pretium* or in some other sense. Care has been taken not to include in the foregoing citations any of the doubtful cases.

Although *verum pretium* is the basic concept of value in the Roman law, it is unfortunately nowhere fully defined. The nearest approach to a definition more exact than is implied by the words themselves and the paraphrases cited above is to be found in DIG. 35.2.63.pr. where valuations under the *lex Falcidia* are stated to be based not on the special utility of the property to one of the parties in interest, but on the elements of value *quae communiter funguntur*, and in DIG. 9.2.33.pr. where the general value of a slave is described as *quanti omnibus valeret*.

The closest approximation in modern law to the *verum pretium* of the Romans is probably the *gemeiner Werth* of the Prussian Code of 1794 (the *Allgemeines Landrecht*) and subsequent German statutes. In fact the concepts represented by *verum pretium* and *gemeiner Werth* are considered by the German writers to be identical. This was undoubtedly the understanding of the authors of the *Allgemeines Landrecht*, for the code recognizes three kinds of value; *gemeiner Werth*, *ausserordentlicher Werth* and *Affec-*

⁴³ DIG. 50.16.179 and 193.

⁴⁴ DIG. 9.2.23.6.

⁴⁵ DIG. 24.1.36.pr.

tionswerth, which correspond, as defined in the code itself, to the concepts of *verum pretium*, *utilitas* and *pretium ex affectu* inherited from the Roman law. The Prussian inheritance tax act of 1873 and its amendments, the Prussian municipal tax act of 1893, and many other tax laws in the various German states prescribe *gemeiner Werth* as the basis of valuation. The most important of these laws are the *Ergänzungssteuergesetze* which, in addition to the ordinary taxes on property based on income or rental value, levy a small tax on its capital value. These laws, beginning with the Prussian act of 1893, generally provide that the property shall be appraised at its *gemeiner Werth*; but the application of this rule to certain kinds of real estate was found to be extremely uncertain, and in 1909 a more definite mode of valuation based on the capitalization of income was adopted for agricultural and forest property.⁴⁶ In other tax acts of recent date *gemeiner Werth* has been replaced by market value, or "market value under normal circumstances." The latter would seem to be almost the same thing as the *verum pretium* of the ancient law.

Verum pretium may be less than market value, in the ordinary sense, as in the case where a particular buyer might for special reasons give more for the property than its value in use to the ordinary person. On the other hand *verum pretium* may exceed market value, as where in *communi dividundo* the property to be divided consists of a right of user which *neque venire neque locari potest*.⁴⁷

It would appear that *verum pretium* was a kind of value much less easy to determine than either market value or value to the owner; and that, except when identical with market value, it corresponded to no price or amount actually paid in the acquisition or development of property. In the simple civilization of early Rome it may have been much the same thing as actual value; but long before the law developed into the form in which it has come down to us, this concept of value must have become excessively difficult of application. Its survival to and perpetuation in the

⁴⁶ The "supplemental tax" acts have given rise to numerous discussions, judicial, parliamentary and economic, of the difference between *gemeiner Werth* and other kinds of value. These discussions, especially the decisions of the Prussian *Oberverwaltungsgericht* on the valuation of property under the act of 1893, are particularly instructive.

⁴⁷ DIG. 10.3. 10. 1.

Justinian jurisprudence is probably to be explained by the desire of the jurists to keep down the extravagant judgments which resulted from the penal damages allowed in actions of tort and from the kind of testimony known as *juramentum in litem*.⁴⁸

c. *UTILITAS; ID QUOD INTEREST* — VALUE TO THE OWNER

As already explained, the value of property which by reason of its peculiar qualities or the circumstances of some particular individual, usually the owner or the plaintiff in the case, is worth more to him than to the world at large is often designated by the phrases *id quod interest*, *quanti ea res est*, *quanti mea est*, *quanti alicujus interest*, and the like. As also noted, however, these phrases were commonly used by the Roman lawyers to designate damages or compensation generally, including the loss to partial interests, as well as to the general owner, by the theft or conversion of property, the amount of damage done by a partial injury as well as by a total destruction of it, and injuries to persons and business as well as to property.

Less ambiguous phrases for the value of property to the owner or its value in use, as distinguished from its ordinary or its market value, are *utilitas*; *utilitas circa ipsam rem*; *pretium ex utilitate*; *utilitas actoris*, *emptoris*, *creditoris*, etc. *Utilitas* is often, however, synonymous with *id quod interest* in the sense of damages generally, whether more or less than the value of the property taken. In fact the primary meaning in the developed law of both *utilitas* and *id quod interest* may be said to be the entire damage sustained by the plaintiff in the suit, whether it be a diminution in the value of some particular article of property or not; and it frequently requires much consideration before we can be sure that in a given passage only a property value is referred to.⁴⁹

Care must also be taken not to confuse the *utilitas* of the plaintiff in the property which is the subject of the lawsuit with the penal damages, in some cases twice the value, in others three or four times, which he was allowed to recover in certain forms of action. The *poena dupli*, *tripli* or *quadrupli* of the Roman law was a substitute for the criminal law of modern times, and, like the punitive damages sometimes allowed in modern law, is not to be

⁴⁸ See *infra*, V.

⁴⁹ See *supra*, I, b.

confounded with the value of the property itself or with the basis of appraisal.

The same caution applies to the passages in which *utilitas* or *id quod interest* is used to designate a penalty created by contract.

Confining our attention to opinions or decisions which seem to relate to the valuation of specific property we are obliged in the first place to note that here, as in the case of *verum pretium*, there is an unfortunate lack of definition; but so many examples are given that we can easily discern the practical identity of *utilitas* with our value to the plaintiff, which phrase it would be difficult to improve upon, as a literal translation of *id quod interest* (or *utilitas*) *actoris*. By this is meant the special value which a given article of property has to its owner by reason of its adaptability to his requirements or desires; a value which may far exceed the general value of the property to all the world, or its value for sale to others.

This concept of value is frequently contrasted with *verum pretium*, and with the actual cost of the property. It is on the other hand distinguished from *pretium ex affectu*, and from market value.

The best illustrations of the kind of value here under discussion are to be found in the title of the Digest relating to the *lex Aquilia*, the damages in which were always based on *utilitas*.

Thus in DIG. 9. 2. 22. 1 it is said that all the *causae corpori cohaerentes* are to be taken into account, such as the special value of one of a pair of mules, the peculiar utility of a horse that made one of a four-horse chariot team, the special value of a slave because he was one of a pair of comedians or musicians. Similar illustrations are found in GAL. 3. 212; INST. 4. 3. 10.⁵⁰

In DIG. 19. 1. 21. 2 the measure of damages in the *actio empti* for a failure by the vendor to deliver the property bought is stated as *omnis utilitas quae modo circa ipsam rem consistit*. As a definition this phrase has given rise to an enormous amount of discussion and speculation, beginning with the mediaeval Gloss and continuing to the present day; and it cannot be said to be established that the sentence refers to property values only. The illustrations which follow seem, however, to relate to property, and to indicate that what the jurist means by *utilitas emptoris* in this passage is the

⁵⁰ For further discussion of these passages see *infra*, III.

value to the buyer of the property itself, including every quality inhering in it, and no more. A similar thought is probably indicated by the phrase *damnum quod re vera inducitur* in Justinian's statutory attempt to keep down the judgments in damage cases.⁵¹

As already pointed out⁵² such general phrases as *quod rem habere interest emptoris*, *interest emptoris servum non evinci*, *utilitas creditoris quantum ejus interest possessionem habere*, *quanti uniuscujusque interest possessionem retinere*, *quanti interfuit nostra servum non esse occisi*, point, as a general thing, not so much to property values as to the total damage sustained, whether inhering in the property or not; and many instances are given of elements of damage *dehors* the property which are nevertheless embraced in the *id quod interest* of the plaintiff. Thus the damage caused by the theft of a will,⁵³ may be recovered as part of the plaintiff's *utilitas*. A sickening glimpse at the chief blot upon the civil law of Rome is afforded by the application of this rule to the case where the defendant had killed a slave who had with others been guilty of defrauding his owner, the plaintiff in the suit. Here the loss of the opportunity to discover his accomplices by torture was to be included in the damages recoverable in an action under the *lex Aquilia*, that is, *quanti mea interest fraudes servi per eum commissas detegi*.⁵⁴

The peculiar value of a slave to his owner because he has been given a legacy which when collected will become the property of his master may be recovered by the latter from a third party who has killed the slave before the collection of the legacy.⁵⁵ At first thought this would appear to be a case of *utilitas* in its broader sense; but the Roman lawyers evidently regarded the master's right to receive the legacy when paid to the slave as an ordinary incident of his property in the latter, and the writer thinks that this would perhaps be the view taken by a modern court if the question could come before it.

Sufficient has been said, we think, to show that the *utilitas* or *id quod interest* of the Roman law, when confined to property values,

⁵¹ Cod. 7.47. See *infra*, VI.

⁵² See *supra*, I, b.

⁵³ Dig. 47.2.27.pr.; Dig. 47.2.32.pr.

⁵⁴ Dig. 9.2.23.4.

⁵⁵ Gai. 3.212; Inst. 4.3.10; Dig. 9.2.23.pr.; Dig. 47.2.52.28.

corresponds almost exactly to the concept of value in use to the owner or to the plaintiff in the case, which (when it exceeds market value) is the basis of appraisals for compensation in modern jurisprudence throughout the world.

d. *PRETIUM EX AFFECTU* — SENTIMENTAL VALUES

A kind or element of value only mentioned by the Roman jurists to be rejected, because incapable of representation in money and therefore not to be included in either *verum pretium* or *utilitas*, is that due to purely sentimental considerations, *affectionis aestimatio*,⁵⁶ *pretium ex affectu*;⁵⁸ or to any quality or attribute which may be described as *affectio*,⁵⁹ or which *ad affectionem pertinet*.⁶⁰

The standard illustration of this kind of value is the love which a man feels for the slave who happens also to be his natural son. This special value of the slave to his owner is not to be included in a valuation under the *lex Falcidia*,⁶¹ which depends on *verum pretium*; nor⁶² can it be recovered in an action under the *lex Aquilia* in which the measure of damages for the death of a slave is the full *utilitas* of the owner. So in an action to recover the value of the services of a slave, *voluptatis vel affectionis aestimatio non habebitur, veluti si dilexerit eum dominus, aut in deliciis habuerit*.⁶³ So if A and B have agreed with each other each to free a slave who happens to be the other's natural son, and A performs while B does not, the measure of damages in an action by A against B for breach of contract is the ordinary value of the plaintiff's slave, not the enhanced value to the plaintiff of the defendant's slave due to the relationship between him and the plaintiff.⁶⁴

Where a freedman has died after alienating his master's real estate, the sale cannot be rescinded by the former owner merely *quod illic educatus sit, vel parentes sepulti*; because he had been brought up on it, or because his ancestors were buried there. If the full general value of the property itself had been obtained, there was no *damnum pecuniarum*.⁶⁵

The tie of affection may in some cases be a sufficient foun-

⁵⁶ Dig. 7.7.7.2.

⁵⁹ Dig. 9.2.33.pr.

⁶¹ Dig. 35.2.63.pr.

⁶³ Dig. 7.7.6.2.

⁶⁵ Dig. 38.5.1.15.

⁵⁸ Dig. 35.2.63.pr.

⁶⁰ Dig. 20.1.6.

⁶² Dig. 9.3.33.pr.

⁶⁴ Dig. 19.5.5.pr.; Dig. 19.5.5.5.

dation for an action; ⁶⁶ but it is never to be included in the damages.⁶⁷

Modern jurisprudence is generally in accord with the Roman law upon this subject. The attempt made in the Prussian Code of 1794 to allow the recovery of the *Affectionswerth* of property in certain aggravated cases did not reflect the German-Roman common law, and is not now to be found in German statute law.

The French *Code Civil*, enacted in 1804 and still in force, contains no recognition of *pretium affectionis*.

The decisions of the French and German courts are also against allowing sentimental or other non-pecuniary considerations to affect the valuation of property.

In England and the United States market value, the price for which the property can probably be sold, may, apparently, in rare cases be based on the sentimental value to a given individual buyer, that is, to some one other than the owner or plaintiff in the case; as where a man owns a portrait of the common ancestor of himself and half a dozen other persons of means, all of whom would, because of family pride, pay for it more than its value as a painting. The question of sentimental value generally arises, however, in cases of value to the owner; and in such cases the weight of authority is in favor of excluding from the valuation all considerations based on the sentiment or affections of the owner. Such considerations, being personal to the owner, are not reflected in the sale value of the property; they rest entirely in the plaintiff's mind; and they are incapable of translation into money. Sentiment may be the reason why the property has a special value to its owner; it may in fact be the basis of the suit, as where a bill in equity is brought to compel the return of heirlooms, slaves, or other property of a peculiar nature. Sentiment may even be regarded as a fundamental cause of value, for that, as Epictetus said, is in the last analysis nothing but the opinion of people about things. It cannot, however, be the legal measure of value to the owner; for there is no way by which his mere opinion, desires or sentiments

⁶⁶ See, for instance, DIG. 17.1.54.pr.; DIG. 18.7.6.pr.

⁶⁷ Of course in cases where the plaintiff's oath as to the damage sustained was, as in the earlier law, to be taken as final, any kind of a *pretium ex affectu* could be included. The peculiar procedure known as the *juramentum in litem* was one of the causes for the preposterous judgments in damage cases which so troubled the Roman jurists. See Chapters V and VI, *infra*.

can be translated by a court of law into money. Value to the owner, whatever its mental basis, can only be measured by such tests as original cost, or reproduction cost less depreciation. This is in accord with the Roman law; although, as pointed out above,⁶⁸ there are a few American decisions, based on an unaccountable mistake in an early New York case, as to what the Roman law on this subject really was, which look the other way.

III

THE GENERAL RULES OF VALUATION

The general rules or methods of valuation were much the same as with us.

We have first the rule of value in money. In tax appraisals and other valuations which are not for purposes of compensation no one would be likely to suggest any other rule. In compensation cases also, as shown by the decisions cited in Chapter II, the value of the property is to be expressed, and must be capable of expression, in money. This is in conformity to the general principle of the Roman law that only such damages as are capable of reduction to money can be recovered in an action for compensation. *Ea enim in obligatione consistere, quae pecunia lui praestarique possunt.*⁶⁹ The compensation might, however, be fixed by contract or statute as payable in property rather than in money. See, for instance, the cases of compensation in kind prescribed in edicts of eminent domain, referred to *infra* in IV, *a*.

Then comes the rule of present value. All appraisals, whether in compensation or other cases, are to be made *secundum praesens pretium*⁷⁰ *in praesentia*,⁷¹ *praesentis temporis*;⁷² that is as of the day of valuation, regardless of actual cost, or of the value of the property in the past,⁷³ or of the possible proceeds of a future sale.⁷⁴

⁶⁸ *Supra*, I, *a*.

⁶⁹ DIG. 40.7.9.2. Modern opinion is divided as to whether this rule applied to all actions for damages. Express contracts were apparently held to be valid, although the subject matter was not always of a pecuniary character. As to strict property values there seems to be no reason to believe that any exception to the general rule was recognized.

⁷⁰ DIG. 35.2.62.1.

⁷¹ DIG. 35.2.63.pr.

⁷² DIG. 47.8.4.II.

⁷³ DIG. 49.14.3.5.

⁷⁴ DIG. 35.2.63.pr.

In like manner property accruing in the future, such as an annuity, or a promise to pay money without interest at some future date, is to be taken at its present value, in view of the probabilities of the situation. If Titius is given a legacy payable so much a year it is to be valued in proceedings under the *lex Falcidia* at *quanti venire id legatum potest in incerto posito quamdiu victurus sit Titius*; that is, at what it could be sold for in view of the uncertainty as to how long the legatee will live.⁷⁵ So a debt payable *in futuro* is to be valued, *quanti ea spes obligationis venire possit*, that is at its present or discounted market value.⁷⁶

In the next place we have, expressed in singularly apt language, the principle that the appraisal must represent the value of the property as a whole, not the aggregate value of its component parts or units, estimated separately: *universae res aestimari debent, non singularum rerum partes*.⁷⁷ This is the modern rule of "value as a whole."

The necessity for taking into account the capacity or availability of the property for any and all uses which have pecuniary value is laid down in the decisions cited above in the discussion of *utilitas*: *causae corpori cohaerentes aestimantur*;⁷⁸ and *omnia commoda quae . . . pretiosiorum servum facerent, haec accedere ad aestimationem ejus dicendum est*.⁷⁹ This is the modern rule of "capacity (or adaptability) for use." The passage first cited is followed by the statement that the appraisal is to include not only the *perempti corporis aestimatio* . . . *sed et ejus ratio haberi debet, quo cetera corpora depretiata sunt*. This may be regarded as an alternative method of valuation, comparable with the double process of our law of eminent domain as applied to partial takings of land. The compensation can be based either on a direct valuation of the part taken estimated with reference to its utility in connection with the part not taken, or on the difference between the value of the whole tract before the taking and the value after the taking of the part not taken. The result should be the same whichever process is followed. As applied to articles of personal property as in DIG. 9.2.22.1, the first process indicated by the jurist, that of a direct valuation of the property, taking into account all *causae corpori*

⁷⁵ DIG. 35.2.55.

⁷⁷ DIG. 10.2.52.3.

⁷⁹ DIG. 9.2.23.6.

⁷⁶ DIG. 35.2.73.1.

⁷⁸ DIG. 9.2.22.1.

cohaerentes, would appear to be the more logical and also the more simple method. The opinion in DIG. 9.2.23.6 refers to extra property damages as well as to property values. An excellent paraphrase of the rule here under discussion is given by the glossator Azo: *non tantum ipsius corporis . . . fit aestimatio, sed etiam computantur utilitates corpori cohaerences*.⁸⁰

The Roman law was that the plaintiff's case must be founded upon *honesta causa*; and although no application of this rule to the valuation of property has been noted, it cannot be doubted that in the jurisprudence of Rome, as in that of modern countries, a value based upon an illegal use was not to be taken into account.

The decision referred to in the chapter on market value that the cost of expensive mural paintings is not to be included in the value of a party wall which the defendant has destroyed was cited for the purpose of noting the difference between market value and *verum pretium*. According to the general opinion of modern critics, it is probably not to be taken as a denial of the right to recover the so-called "luxury value" of property. The passage in question is thought rather to indicate an independent proposition of the law of party walls that the co-owners have each a right against the other only to the maintenance of a reasonable wall from a structural standpoint.⁸¹ If the case means that luxury values, as such, are to be excluded from a property valuation, it is not in accord with the law of any modern state.

There is a passage in the Digest in which the words *formale pretium* are used to indicate a kind of value or a mode of valuation which is not to be considered: *nec quidquam eorum formali pretio aestimandum*.⁸² The phrase occurs nowhere else, and its meaning is uncertain. Some modern writers regard it as a paraphrase of *utilitas singulorum* or *ex affectu*, or as meaning an imaginary value; others think that it refers to assessments for taxation. Inasmuch as the passage occurs in a discussion of the proper mode of valuing property under the *lex Falcidia*, which was essentially a revenue law, the writer inclines to the view that what Ulpian meant was that in estimating the Falcidian quarter or in applying the *lex Julia et Papia Poppaea*,⁸³ the actual present value

⁸⁰ *Summa*, fol. 52.

⁸¹ See DIG. 39.2.39.4 and DIG. 8.2.13.1.

⁸² DIG. 35.2.62.1.

⁸³ See *infra*, IV, b.

of the property was to be taken, rather than the figure that might appear on the official tax rolls.⁸⁴ If so, the rule accords with modern law.

IV

APPLICATION TO PARTICULAR PROCEEDINGS

a. IN COMPENSATION CASES

As in modern law, a person suing in any of the ordinary forms of action for the loss of his property was, as a general rule, entitled to recover its value to him; that is, the full *utilitas circa ipsam rem* (sometimes doubled, trebled or quadrupled as a penalty) was the basis of the valuation.

This was certainly the case in actions of contract, such as the *actio empti* for the non-delivery of property bought of the defendant,⁸⁵ and in actions of tort under the *lex Aquilia*;⁸⁶ and it was probably the rule in most compensation suits. There is, however, much apparent inconsistency in the statements of the jurists on this subject, and there is a corresponding conflict of opinion among modern critics. Some of the inconsistencies in the Digest seem to be due to the constant effort of the jurists to mitigate the severity of the extravagant judgments which resulted from the *juramentum in litem* and the right to penal damages. Others are perhaps to be explained by the fact that *utilitas* is used in cases where the plaintiff has only a partial interest in the property, as well as in cases where he owns it outright.

The extent to which the principle of public law now known as eminent domain was invoked for the acquisition of private property has been the subject of much discussion.

An early instance of something quite similar to eminent domain is furnished by the *lex Icilia* (circa B.C. 454). The Aventine was supposed to be public property, but had been invaded and improved by private persons without authority. Lucius Icilius, a tribune and a leader of the plebeians, forced the Senate to pass a law providing for the division among the people of the lands wrong-

⁸⁴ In DIG. 50.15 (*de censibus*) 4. pr. we have *Forma censuali cavetur ut*, etc., i. e., it is provided in the tax regulations that, etc.

⁸⁵ DIG. 19.1.1. pr.

⁸⁶ GAL. 3.212; DIG. 9.2.22. pr.; DIG. 9.2.23. pr.; INST. 4.3.10.

fully held by the present occupants upon paying the cost of the buildings as estimated by appraisers.⁸⁷

Frontinus says that materials taken out of private land for public works were paid for at a price *virī boni arbitratu aestimata*.⁸⁸

Private buildings required for the embellishment of the schools at Constantinople could be acquired for a *competens pretium*.⁸⁹ Sometimes when land was acquired for public buildings compensation was made to the landowner in the form of a grant of the right *superaedificandi*; that is, of the right to build upon and over the new building.⁹⁰ Where land was taken for the construction of a tower in Constantinople the landowner was compensated by a right to live in the tower when built.⁹¹ Sometimes the compensation took the form of a remission of taxes.⁹²

Reference is made by Ulpian in a passage preserved in the Digest,⁹³ to a decision of the Emperor Antoninus that one who desired access through another's land to his own ancestral burying place could procure a right of way by paying the landowner its *justum pretium*. Nothing is said as to how this value was to be estimated; and the case is regarded by some modern writers as not a true instance of expropriation, because the object was not a public one.

An edict of Justinian, A.D. 535, provided that church lands could be taken for such other purposes as the authorities might deem to be in the public interest upon condition that the religious bodies should receive other property of equal or greater value.⁹⁴ The lands taken were themselves public property, and the statute is therefore not strictly one of eminent domain.

Notwithstanding the paucity of surviving precedents for the expropriation of real estate, the general opinion seems to be that this function of government must have been freely exercised, par-

⁸⁷ LIVY, HISTORY OF ROME, Book 3, § 30; DIONYSIUS, ROMAN ANTIQUITIES, book 10, §§ 31-32. A few years later Icilius was one of the heroes of the tragedy of Virginia which brought about the fall of the Decemvirate. Dionysius describes him as an active man, and "for a Roman not uneloquent."

⁸⁸ De aquaeductibus No. 125.

⁸⁹ COD. TH. 15.1.53.

⁹⁰ COD. TH. 15.1.50.

⁹¹ COD. TH. 15.51.

⁹² COD. 10.27.2.pr.

⁹³ DIG. 11.7.12.pr.

⁹⁴ Nov. 7. (*Ne res ecclesiasticae alienentur*) 2.1.

ticularly under the later emperors, in aid of highways, municipal buildings and other public improvements; and it is singular that so little has survived relating to the basis of compensation. The precedents cited above show that in such cases a *pretium competens* or a *justum pretium* was to be paid. In one particular the Roman practice was at variance with modern ideas; compensation in other property or rights of property, compensation in kind, having evidently been regarded as *competens* or just. Where the compensation was payable in money we do not know whether the landowner was entitled only to the *verum pretium* of the property, or to its market value, or (as in modern law) to its full value to him.⁹⁵

A procedure somewhat analogous to eminent domain was provided for the acquisition of foodstuffs required in times of famine, compensation being made on the basis of *justum pretium* or of current price.⁹⁶

Another instance of the exercise of a power analogous to that of eminent domain is furnished by the compulsory sale or manumission of slaves for various reasons. Masters who maltreated their slaves could be forced to set them free, *bonis conditionibus ut pretium dominis daretur*;⁹⁷ in criminal cases a slave could be put to the torture if his master was paid his value;⁹⁸ in two cases the Emperor Tiberius exercised this right in aid of the state treasury,⁹⁹ as also Augustus before him;¹⁰⁰ in some cases the compulsory sale of a slave could be brought about in return for public services, the owner receiving the *pretium* of the slave from the treasury;¹⁰¹ and where one of the co-owners of a slave wanted to free him and the other did not, manumission could, under the later emperors, be forced on the dissenting owner by paying him the value of his interest in the slave.¹⁰² Except in the case where the price was fixed

⁹⁵ The last-named alternative is supported in Georg Meyer's *RECHT DER EXPROPRIATION*, 1868, pp. 271-272.

⁹⁶ *COD.* 10.27.2 and 3. See *supra*, II a.

⁹⁷ *INST.* 1.8.2.

⁹⁸ *DIG.* 48.5.27.pr.

⁹⁹ *TACITUS ANN.* 2 ch. 30; 3 ch. 67.

¹⁰⁰ *DIO CASS.* 55.5. This practice was put a stop to by the later emperors. *DIG.* 48.18.1.18.

¹⁰¹ *COD.* 7.13.2.

¹⁰² *INST.* 2.7.4; *DIG.* 40.12.30. In A.D. 530 Justinian established a fixed scale of prices, dependent on age and other conditions, for application to this situation. *COD.* 7.7.1.

by statute, no indication of the basis of compensation, whether market value, *verum pretium* or *utilitas*, has been discovered.

b. IN OTHER THAN COMPENSATION CASES

Except where the object of the litigation was to furnish compensation for the loss of property, the basis of appraisal was not its value to the owner, or its market value; but its ordinary value, *verum pretium*.

This was the case in the action known as *communi dividundo* for the partition of specific property owned in common,¹⁰³ and the same is undoubtedly true of *familiae erciscundae*, an action for the partition of inheritances. Also in litigation over *caduca* or failing legacies, in suits for the distribution of property in payment of debts, and in proceedings under the *lex Falcidia* for the determination of the quarter interest of the heir in inheritances. In the last-named case the authorities are clear that the appraisal is to be based on the ordinary value of the property,¹⁰⁴ and there can be little doubt that the same rule applied to other proceedings named.

Generally speaking, in all kinds of what we should call probate proceedings the basis of valuation was *verum pretium*; as where the heir is to account for a legacy of property which the testator did not own.¹⁰⁵ And this was the rule for determining the Falcidian quarter even if the heir had paid more for the property than its *verum pretium*.¹⁰⁶

Some of the paragraphs in the title of the Digest *ad legem Falcidiam*¹⁰⁷ relate evidently to valuations for the *vicesima hereditatum* or tax on legacies in aid of which this law was enacted, as well as to the Falcidian quarter.¹⁰⁸ Other paragraphs of this chapter relate as well to valuations of *caduca* under the *lex Julia et Papia Pop-paea*.¹⁰⁹ The inference is that appraisals for all these purposes were to be made on the same basis, that of the *verum pretium*.

Except for the foregoing rules, which are definite enough as far as they go, the directions, either judicial or administrative, which

¹⁰³ DIG. 10.3.10.2.

¹⁰⁴ DIG. 35.2.42; DIG. 35.2.62.1; DIG. 35.2.63.pr.; DIG. 30.81.4.

¹⁰⁵ DIG. 30.71.3; DIG. 32.14.2.

¹⁰⁶ DIG. 35.2.61.

¹⁰⁷ LIB. 35.2.

¹⁰⁸ DIG. 35.2.68.

¹⁰⁹ DIG. 35.2.63.pr.; DIG. 35.2.62.

have survived concerning the method or basis of the appraisal of property for taxation are extremely few; and we are thus, for the Roman law, deprived of what in modern systems is a fruitful field of information for the subject in hand — statutory definitions, administrative instructions and judicial opinions on the elements of value to be considered in the assessment of property for taxation.

As to the ordinary taxes on real estate we know that from the *tributum ex censu* of the early period down to the latest times taxes of various kinds were assessed on the capital value of land. The mode of estimating the *tributum ex censu*, which lasted till the conquest of Macedon, is not known; but some slight information has come down to us concerning the basis of the *tributum*, *vectigal* and other land taxes of the imperial period. These taxes sometimes took the form of a percentage in kind of the annual produce, but in some cases seem to have been based on the net income or annual earning capacity of the property, or on the capitalized value thereof.¹¹⁰ About the only evidence we have as to the basis for estimating these land taxes is the statement by Hyginus that the land was valued *ad modum ubertatis*, or *pro aestimio ubertatis*,¹¹¹ and an imperial rescript that the income of land for purposes of taxation is not the actual yield but the proper net income under sound methods of agriculture.¹¹²

V

EVIDENCE AND PROOF

Comparatively little has survived respecting evidence of value as distinguished from the basis or rules of valuation.

The decisions cited in the foregoing pages indicate that actual cost, current price, utility for various purposes, rental value, earning capacity, future prospects, were, as in modern law, admissible in evidence; and that fertile field of modern testimonial endeavor known as "reproduction cost" may have been in the mind of Paulus when he says that in actions under the *lex Aquilia* the recovery is *quod aut consequi potuimus, aut erogare cogimur*.¹¹³

A few words may be added about the employment of experts,

¹¹⁰ Like the Massachusetts tax laws under the Province Charter.

¹¹¹ *De limitibus constituendis*. See 5 MARQUARDT-MOMMSEN, *RÖMISCHER ALTERTHÜMER*, p. 216. *Aestimium* is late Latin for *aestimatio*.

¹¹² DIG. 49. 14. 3. 5.

¹¹³ DIG. 9. 2. 33. pr.

and concerning that peculiar judicial procedure known as the *juramentum in litem*.

Opinion or expert evidence of value was apparently not received. This is contrary to the view taken by some modern writers, and it is difficult to see how the Roman courts could have got along without such aid; but the writer has yet to discover a single passage in the sources which points to the use of expert witnesses on the value of property. Much of the litigation in Rome was conducted before *arbitri* or *boni viri* (indifferent third parties) selected by the parties or appointed by the court; but they were not witnesses, nor (necessarily) experts. Surveyors,¹¹⁴ midwives,¹¹⁵ physicians, and other *artis periti* were used as *arbitri* or referees, and also as expert witnesses to facts; but no reference to the employment of experts to give opinions on value has been discovered.

The *juramentum in litem* is not to be considered as testimony in the modern sense. It was a mode of proof imposed upon the defendant in certain forms of action as a penalty for *dolus* or *contumacia*; and consisted in permitting the plaintiff to fix the value of the property in question by his own oath. *Actori permittetur in litem jurare, quanti sua interest . . . tanti condemnetur reus*.¹¹⁶ In the earlier period this oath was conclusive; but in the developed law the court could in some cases fix a maximum, or disregard the sum sworn to by the plaintiff, or deny the privilege altogether.¹¹⁷ This practice, especially in cases where the plaintiff was allowed to recover two to four times the value of the property involved, led inevitably to the *immensa* or *infinita pretia* which both jurists and legislators endeavored to discourage, but apparently without success; for the *juramentum in litem* continued to the end.

VI

CONCLUSION

The foregoing account of the valuation of property in the Roman law is admittedly inadequate; but the writer thinks that it goes as far as the authorities clearly warrant.

Frequent reference has been made to the fact that in the civil

¹¹⁴ DIG. 10.1.8; DIG. 11.6.3.4; COD. 3.39.3.

¹¹⁶ DIG. 12.3.10; DIG. 5.1.64.pr.

¹¹⁷ DIG. 12.3.4.2; DIG. 12.3.5.1 and 2.

¹¹⁵ DIG. 25.4.1.pr.

law the valuation of property for compensation purposes is treated under "obligations" generally; the *utilitas* of the plaintiff in the broader sense of the word, that is, the total damage sustained by him, being the direct object of the inquiry. In this mode of treatment the value of any property which happens to be involved in the case is absorbed in the ultimate measure of recovery, and is not necessarily made the subject of separate appraisal. The thoroughgoing civilian may object to any treatment of the subject of value in the Roman law which departs from this method of theoretical discussion; but a departure is necessary if we are seeking to group the decisions on property values in compensation cases with those in cases which do not involve the question of compensation. A departure from the obligation theory of the civil law is also necessary if any comparison or contrast is to be drawn between the methods of valuing property in the Roman law and those which obtain in a legal system which, like ours, proceeds upon the theory that in a case where the value of property is involved, the property itself is first to be valued, and then if there are any other elements or factors to be included in the judgment, these are to be established separately.

The subject of property valuations can be treated in either way; but if the object, or one of the objects, of the study is a comparison between the general principles of valuation as found in the Roman law and those of the Anglo-American common law, the same method must be adopted for both systems. Owing to the fact that the obligation theory as developed by the civilians has not been adopted in our system, the basis of comparison used by the writer — that furnished by the decisions in the Digest which seem to relate to property values as such — would appear to be the only practicable one.

The English and American system is also, in the writer's opinion, better than that of the civil law for two reasons: it is more direct and simple, and it covers value throughout the law. Moreover, it has always seemed to the writer that while the germs of the obligation theory can be found in the Institutes of Gaius and Justinian, the actual opinions or decisions of the Roman jurists, as compiled in the Digest, are based, in many cases at least, upon a process of reasoning which is more like the direct methods of property valuation used in our common law.

The question, therefore, is whether the comparison has been made properly. This depends — at least in so far as compensation cases go — on whether the passages selected refer to the property itself, or merely to the plaintiff's "interest" in the case, that is, on whether, to use the language of the Commentators, the *utilitas* in question is *circa rem* or *extra rem*. The writer has done the work as carefully as he can, and submits it in the belief that while some of his interpretations may not be free from doubt, no substantial error has been committed.

So far as the results of this investigation go, the reader will note the general identity with modern law of the rules laid down by the Roman jurists; and he cannot fail, we think, to appreciate the applicability to present circumstances of many of the decisions cited. He will also note the special efforts to limit the appraisal of property to its normal value for sale or use; but he will suspect that notwithstanding these efforts the effect of doubling and quadrupling the value of the property in actions of tort, and of allowing the plaintiff in cases where the defendant was in the wrong to fix the damages himself, must have resulted in excessive valuations and preposterous judgments. This was the fact, and was the cause of constant complaints, which culminated in the much-discussed edict issued by Justinian in A.D. 531, *De sententiis quae pro eo quod interest proferuntur*, on judgments in damage cases. This statute¹¹⁸ provided that the recovery in cases where the value was fixed, as in sales, leases and contracts, should never exceed twice the value of the property in question; and that in other cases, where the value was uncertain, the court should determine for itself and by its own devices what the property was really worth. The object of the law, as therein stated, was to put an end to those *machinationes et immodicae perversiones*, to that *infinita computatio*, which had led to *circuitus inextricabiles* and to the frequent total failure of the litigation by reason of the impossibility of collecting the judgment. This part of this edict might with profit be used by modern courts when confronted by the extravagances of testimonial experts on value.

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¹¹⁸ COD. 7.47.

DAMAGES FOR FRIGHT

IN February, 1888, the Judicial Committee of the Privy Council, in the case of *Victorian Railways Commissioners v. Coultas*,¹ decided that the plaintiff was not entitled to recover damages for nervous shock caused by the defendant's negligence, in the absence of proof of actual impact, even though serious physical injuries resulted from the shock.

Sir Richard Couch, in delivering the judgment of the court, said:

"The learned counsel for the respondents was unable to produce any decision of the English Courts in which, upon such facts as were proved in this case, damages were recovered. . . . It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent."

In the same month of same year the Supreme Court of New York, in *Lehman v. Brooklyn City R. Co.*,² an action for physical injuries due to nervous shock caused by the plaintiff's being frightened at a runaway horse, likewise denied a recovery. Here also it was said by the court, speaking through Dykman, J.: "We have been unable to find either principle or authority for the maintenance of this action and we have been referred to none by the counsel."

Such was the origin, simultaneous in England and America, of the doctrine denying recovery for physical injuries due to fright without impact. In the New York case no reason was given for the rule save the want of a precedent allowing recovery. In the English case other reasons were given, though not regarded as necessary. Both courts rested their decisions upon a doctrine which, if given universal application, would put an end to the growth of law by judicial decisions. If applied at an earlier period so as to deny new remedies for new wrongs, English law would have remained in its primitive state instead of attaining its present splendid development and expansion.

¹ 13 A. C. 222, 226 (1888).

² 47 Hun (N. Y.), 355, 356 (1888).

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City W. U. Talbot v. Spang
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The Privy Council and the Supreme Court of New York had spoken.

Acquiescence in their decisions would make an end to suits for physical injuries due to nervous shock without impact. But so far from the cases cited making an end of such suits, they constitute only the beginning. And the frequency with which they have continued to be brought is the best evidence of the profound dissatisfaction of the bar with the doctrine of these pioneer cases.

In the multitude of actions for nervous shock that have been brought within the last thirty years, many of the courts have elected to stand on what they term "the ancient ways."³ Neither in Great Britain nor in America, however, have there been wanting judges of broader vision and more liberal spirit, with the result that in a number of jurisdictions their jurisprudence has been enriched and expanded by the allowance of damages for physical injuries, even though such injuries have been produced by the wrongful act of the defendant operating upon the nervous system of the plaintiff without actual impact.

The doctrine of the Coultas case was repudiated in Ireland within two years after that decision was announced. This was in the case of *Bell v. Great Northern Ry. of Ireland*,⁴ in the Exchequer Division, in which Palles, C. B., in an able opinion, criticized the Coultas case and refused to follow it. In taking this action the court relied on the earlier unreported Irish case of *Byrne v. Great Southern and Western R. Co.* of Ireland, decided in the Common Pleas Division in 1882 and affirmed on appeal, and also on the intrinsic reason of the rule allowing a recovery.

In England, the doctrine of the Coultas case was first questioned in *Pugh v. London, etc. Ry. Co.*,⁵ in which there was said of it by Lord Esher, M. R.: "That case is different, and I should not like to express an opinion as to whether we ought to follow it until I am forced to do so." The next year, in the case of *Wilkinson v. Downton*,⁶ an action for injury resulting from nervous shock and injury to plaintiff caused by the intentional act of defendant in frightening the plaintiff, the Coultas case was referred to as having

³ *Huston v. Freemansburg*, 212 Pa. 548, 61 Atl. 1022 (1905), per Mitchell, C. J.

⁴ 26 L. R. Ir. 428 (1890).

⁵ [1896] 2 Q. B. 248, 250.

⁶ [1897] 2 Q. B. 57.

been questioned in *Pugh v. London, etc. Ry. Co.*,⁷ and as having been repudiated in Ireland, and on these grounds and also because not in point upon a case of fright resulting from a wilful act, the Queen's Bench Division refused to apply its doctrine to the facts of the case before it. In *Dulieu v. White & Sons*⁸ the identical principle was involved upon which the Coultas case was decided. The plaintiff, a woman, while standing behind the bar of her husband's public house, was frightened by a pair of horses and van being driven into the house, through the negligence of the defendant's servant, with the result that she sustained severe nervous shock, which in turn caused a miscarriage. In elaborate opinions by Kennedy, J., and Phillimore, J., the Coultas case was repudiated. In adopting this attitude the judges of the King's Bench Division were influenced partly by the previous English and Irish cases referred to above, and partly by reason of the fact that the judgment in that case had been "unfavourably reviewed by legal authors of recognized weight such as Mr. Sedgwick, Sir Frederick Pollock, and Mr. Beven;"⁹ but the two judges writing opinions also examined at length the principle involved and stated fully the reasons upon which they justified a recovery. Later cases in the Admiralty Division of the High Court of Justice¹⁰ and in the House of Lords¹¹ treat *Dulieu v. White*¹² as settling the law in England; and it may, therefore, be said that the Coultas case has been overruled and the doctrine established in England that there may be recovery for physical injuries resulting from nervous shock without proof of actual impact.

In Scotland the doctrine of the Coultas case was repudiated by the Court of Session in 1910 in the case of *Gilligan v. Robb*,¹³ in which a woman was allowed to recover for illness due to nervous shock, without impact, caused by a cow bolting from the street into the house in which the plaintiff was. And in *Coyle v. Watson*¹⁴ the House of Lords, on an appeal from the Court of Session treated

⁷ [1896] 2 Q. B. 248.

⁸ [1901] 2 K. B. 669.

⁹ *Dulieu v. White & Sons*, [1901] 2 K. B. 669, 677, per Kennedy, J.

¹⁰ *The Rigel*, [1912] P. 99.

¹¹ *Coyle v. Watson*, [1915] A. C. 1.

¹² [1901] 2 K. B. 669.

¹³ [1910] S. C. 856.

¹⁴ [1915] A. C. 1.

the case of *Gilligan v. Robb*¹⁵ as establishing the rule in Scotland in favor of recovery for nervous shock without impact.

The present state of the law in Great Britain and Ireland as to the recovery of damages for nervous shock without impact is said by Lord Shaw of Dunfermline in *Coyle v. Watson*¹⁶ to be as follows:

"But in England, in Scotland, and in Ireland alike, the authority of *Victorian Railways Commissioners v. Coultas* has been questioned, and, to speak quite frankly, has been denied. I am humbly of opinion that the case can no longer be treated as a decision of guiding authority. . . . I should add that other cases were cited showing it to be fully established by authority — recent and strong authority — that physical impact or lesion is not a necessary element in the case of recovery of damage in ordinary cases of tort."

Thus the law in England, Scotland, and Ireland is settled in favor of a recovery for physical injuries resulting from nervous shock caused by the wrongful act of the defendant, without actual impact.

Unfortunately this cannot be said also of America. The next case arising here after that of *Lehman v. Brooklyn City R. Co.*¹⁷ was *Hill v. Kimball*,¹⁸ in which the Supreme Court of Texas in 1890 treating the case as one of first impression, and without the doubtful light of the *Coultas*¹⁹ and *Lehman*²⁰ cases, held that the plaintiff was entitled to recover for nervous shock resulting in a miscarriage even though there was no physical impact. Notwithstanding, however, the extensive circulation of this opinion in the official reports and in the Southwestern and the Lawyers Reports Annotated, it seems not to have been brought to the attention of the court in *Ewing v. Pittsburgh, etc. R. Co.*,²¹ nor in *Haile's Curator v. Texas & Pacific R. Co.*,²² nor in *Mitchell v. Rochester Ry. Co.*,²³

¹⁵ [1910] S. C. 856.

¹⁶ A. C. 1, 13, 14 (1915). And see also, to the same effect, 21 HALSBURY'S LAWS OF ENGLAND, 488.

¹⁷ 47 Hun, 355 (1888).

¹⁸ 76 Tex. 210, 13 S. W. 59 (1890).

¹⁹ 13 A. C. 222 (1888).

²⁰ 47 Hun (N. Y.), 355 (1888).

²¹ 147 Pa. St. 40, 23 Atl. 340 (1892).

²² 60 Fed. 557, 9 C. C. A. 134 (1894).

²³ 151 N. Y. 107, 45 N. E. 354 (1896) (reversing 77 Hun, 607, 28 N. Y. Supp. 1136 (1894)).

and in these cases the Supreme Court of Pennsylvania, the United States Circuit Court of Appeals for the Fifth Circuit, and the Court of Appeals of New York threw the weight of their authority in favor of the rule denying recovery. In another year these courts were joined by the Supreme Court of Massachusetts in *Spade v. Lynn & Boston R. Co.*,²⁴ and it could safely be said that the rule thus supported by the courts of last resort in Massachusetts, New York, and Pennsylvania had become the weight of American authority. In fact the Ewing, Mitchell, and Spade cases have been the leading cases on this subject in America, and due to their influence and that of the Coultas case now overruled in the jurisdiction of its origin, the rule has been established in a number of the American jurisdictions²⁵ denying a recovery for nervous shock without actual impact.

This doctrine, however, was not destined to meet with unanimous acceptance in America. It was repudiated by the Supreme Court of Minnesota in 1892 in the case of *Purcell v. St. Paul, etc. Ry. Co.*,²⁶ in which the court ignored the Lehman and Coultas cases cited by counsel, and seems not to have had the Mitchell case or those from Pennsylvania and Massachusetts brought to its attention. Again, the Supreme Court of South Carolina in 1897, in the case of *Mack v. South Bound R. Co.*,²⁷ after an elaborate review of the decided cases and of the views of the text-writers on the subject, adopted the rule of liability. Following these two leading

²⁴ 168 Mass. 285, 47 N. E. 88 (1897).

²⁵ The following is a list of jurisdictions in which recovery is denied, with a recent or leading case in each:

U. S. Haile's Curator v. Texas & Pacific R. Co. (U. S. Cir. Ct. of App., Fifth Cir.), 60 Fed. 557 (1894).

Ark. St. Louis, etc. R. Co. v. Bragg, 69 Ark. 402, 64 S. W. 226 (1901).

Ill. Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898).

Ind. Terre Haute Electric R. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703 (1899).

Ky. McGee v. Vanover, 148 Ky. 737, 147 S. W. 742 (1912).

Mass. Spade v. Lynn, etc. R. Co., 168 Mass. 285, 47 N. E. 88 (1897).

Mich. Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899).

N. J. Ward v. West Jersey, etc. R. Co., 65 N. J. L. 383, 47 Atl. 561 (1900).

N. Y. Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354 (1896).

O. Miller v. Baltimore, etc. R. Co., 78 Oh. St. 309, 85 N. E. 499 (1908).

Pa. Ewing v. Pittsburgh, etc. R. Co., 147 Pa. St. 40, 23 Atl. 340 (1892).

²⁶ 48 Minn. 134, 50 N. W. 1034 (1892).

²⁷ 52 S. C. 323, 29 S. E. 905 (1897).

cases, the courts of an increasing number of jurisdictions have been adopting the rule allowing a recovery.²⁸

This discordant state of the American authorities challenges attention to the reasons upon which the variant decisions are based. In the end, the rule of justice may be expected to prevail. If, therefore, justice is on the side of the cases denying recovery for injury due to fright without impact, the cases so holding may be viewed with complacency, and the courts of those jurisdictions allowing a recovery may be regarded as having been misled by sympathy or desire for popular favor. If, however, the rule against recovery is not based on reason, it may be expected to yield to that which is more in conformity with the maxim of the law that for every wrong there is a remedy.

The principal reasons assigned by the courts for denying recovery in the class of cases in question are:

First, that since fright caused by negligence is not itself a cause of action, none of its consequences can give a cause of action;

Second, that the damages resulting from fright are too remote;

Third, that it is contrary to public policy to allow recovery for damages for personal injuries resulting from fright.

These reasons will be discussed in the order stated:

First, since there can be no recovery for mere fright there can

²⁸ The following is a list of jurisdictions in which the rule of recovery prevails, with a recent or leading case in each:

- Ala.* Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916).
- Cal.* Lindley v. Knowlton, 179 Cal. 298, 176 Pac. 440 (1918).
- Ga.* Goddard v. Watters, 14 Ga. App. 722, 82 S. E. 304 (1914).
- Ia.* Watson v. Dilts, 116 Iowa, 249, 89 N. W. 1068 (1902).
- Kan.* Whitsell v. Watts, 98 Kan. 508, 159 Pac. 401 (1916).
- La.* Stewart v. Arkansas Southern R. Co., 112 La. 764, 36 So. 676 (1904).
- Md.* Green v. Shoemaker, 111 Md. 69, 73 Atl. 688 (1909).
- Minn.* Purcell v. St. Paul City R. Co., 48 Minn. 34, 50 N. W. 1034 (1892).
- N. C.* Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778 (1906).
- Ore.* Salmi v. Columbia, etc. R. Co., 75 Ore. 200, 146 Pac. 819 (1915).
- R. I.* Simone v. Rhode Island Co., 28 R. I. 186, 66 Atl. 202 (1907).
- S. C.* Mack v. South-Bound R. Co., 52 S. C. 323, 29 S. E. 905 (1897).
- S. D.* Sternhagen v. Kozel, 40 S. D. 396, 167 N. W. 398 (1918).
- Tenn.* Memphis St. R. Co. v. Bernstein, 137 Tenn. 637, 194 S. W. 902 (1917).
- Tex.* Gulf, etc. R. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944 (1900).
- Wash.* O'Meara v. Russell, 90 Wash. 557, 156 Pac. 550 (1916).
- Wis.* Pankopf v. Hinkley, 141 Wis. 146, 123 N. W. 625 (1909).

be none for its consequences.²⁹ The doctrine is thus stated in *Mitchell v. Rochester R. Co.*,³⁰ per Martin, J.:

"Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical³¹ result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it."

Of this reasoning it is to be said that the premise is admitted,³² but not the conclusion. The reason that negligence causing mere fright is not actionable is for want of damage. *De minimis non curat lex*. The mere temporary emotion of fright not resulting in physical injury is, in contemplation of law, no injury at all, and hence no foundation of an action.³³ In like manner negligence *per se* is not actionable, but negligence causing injury is. In each case the gist of the action is the injury flowing from defendant's wrongful act. Physical injury, therefore, caused by defendant's wrongful act is actionable, whether the wrongful act operates through the medium of impact or of nervous shock.³⁴

The fallacy of denying recovery on this ground has been clearly

²⁹ *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896); *St. Louis, etc. R. Co. v. Bragg*, 69 Ark. 402, 64 S. W. 226 (1901).

³⁰ 151 N. Y. 107, 109, 45 N. E. 354 (1896).

³¹ As an illustration of the conflict of opinion among the authorities denying recovery as to the reasons upon which the rule is based, see *Smith v. Postal Telegraph Cable Co.*, 174 Mass. 576, 55 N. E. 380 (1899), where it is said, per Holmes, C. J.: "The point decided in *Spade v. Lynn & Boston Railroad*, 168 Mass. 285, and *White v. Sander*, 168 Mass. 296, is not put as a logical deduction from the general principles of liability in tort, but as a limitation of these principles upon purely practical grounds."

³² *Memphis St. R. Co. v. Bernstein*, 137 Tenn. 637, 194 S. W. 902 (1917); *Williamson v. Central of Georgia R. Co.*, 127 Ga. 125, 56 S. E. 119 (1906).

³³ *Gulf, etc. R. Co. v. Trott*, 86 Tex. 412, 25 S. W. 419 (1894); *Atchison, etc. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453 (1891).

³⁴ *O'Meara v. Russell*, 90 Wash. 557, 156 Pac. 550 (1916).

exposed by Evans, J., in the following passage from his opinion in *Alabama Fuel & Iron Co. v. Baladoni*:³⁵

"Damages, when confined to fright alone, is dealing with a metaphysical, as contradistinguished from a physical, condition, with something subjective instead of objective, and entirely within the realm of speculation. So the damages suffered where the only manifestation is fright are too subtle and speculative to be capable of admeasurement by any standard known to the law; but when the damages are physical and objective as consequent upon the physical pain and incapacity manifested by and ensuing upon a miscarriage, the damages are quite as capable of being measured by a jury as if they had ensued from an impact or blow."³⁶

The error in this respect is largely due to a misconception of the nature of nervous shock and to a confusion between nervous shock and mental anguish. Thus, it is said, in one case,³⁷ that "'Nervous prostration' is largely a mental, and not a physical, condition."

So *Wyman v. Leavitt*³⁸ is often cited³⁹ as authority for the doctrine that there can be no recovery for nervous shock without impact, but that was an action for mental suffering caused by fear of the plaintiff that she would be injured by blasting conducted near her residence by the defendant. No shock nor physical injury of any kind was proved, and the court, speaking through Virgin, J., expressly said: "Whether a fright of sufficient severity to cause a physical disease would support an action, we need not now inquire."⁴⁰ A shock to the nerves is not an affection of the mind, but of the body.⁴¹ The nerves are as truly a part of the human body as the bones or the muscles,⁴² and an injury to the

³⁵ 15 Ala. App. 316, 320, 73 So. 205 (1916).

³⁶ And see to the same effect *O'Meara v. Russell*, 90 Wash. 557, 156 Pac. 550 (1916).

³⁷ *Cleveland, etc. R. Co. v. Stewart*, 24 Ind. App. 374, 381, 56 N. E. 917 (1900).

³⁸ 71 Me. 227 (1880).

³⁹ *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 109, 45 N. E. 354 (1896); *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 289, 47 N. E. 88 (1897).

⁴⁰ Other cases sometimes cited as denying recovery for nervous shock, but in reality denying recovery for mental anguish, are: *Jones v. Western Union Tel. Co.*, 233 Fed. 301 (1916); *Trigg v. St. Louis, etc. R. Co.*, 74 Mo. 147 (1881); *Crutcher v. The Big Four, etc. R. Co.*, 132 Mo. App. 311, 111 S. W. 891 (1908).

⁴¹ *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 680, 44 Pac. 320 (1896); *Mack v. South-Bound R. Co.*, 52 S. C. 323, 334, 29 S. E. 905 (1897); *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068 (1902).

⁴² *Watson v. Dilts*, 116 Iowa, 249, 252, 89 N. W. 1068 (1902); *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892).

nerves is therefore just as truly a physical injury as a broken bone or a strained muscle.⁴³

The first reason assigned for denying recovery for nervous shock resulting from fright may therefore be dismissed with the statement that while it is true no recovery may be had for mere fright for want of a physical injury, yet physical injury resulting from a wrongful act is actionable whether the injury be to the nerves or to some other part of the body, and regardless of whether the link in the chain of causation between the wrongful act and the injury to the nerves is physical impact or fright. The essential thing is the existence of the link in the chain of causation, not the character of that link.

A second reason for denying recovery for damages for fright causing nervous shock is that such damages are too remote.⁴⁴ Thus, in pronouncing judgment in *Victorian Railways Commissioners v. Coultas*,⁴⁵ it is said by Sir Richard Couch: "Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper." And, again, in *Ward v. West Jersey, etc. R. Co.*,⁴⁶ this reason is stated as follows, per Gummere, J.:

"The doctrine of non-liability affirmed in the several opinions referred to, rests upon the principle that a person is legally responsible only for the *natural* and proximate results of his negligent act. Physical suffering is not the probable or natural consequences of fright, in the case of a person of ordinary physical and mental vigor; and in the general conduct of business, and the ordinary affairs of life, although we are bound to anticipate and guard against consequences, which may be injurious to persons who are liable to be effected thereby, we have a

⁴³ See *Yates v. South Kirby, etc. Collieries*, [1910] 2 K. B. 538, 542, where it is said, per Farwell, L. J.: "In my opinion nervous shock due to accident which causes personal incapacity to work is as much 'personal injury by accident' as a broken leg."

⁴⁴ *Victorian Railways Com'rs v. Coultas*, L. R. 13 A. C. 222 (1888); *Ewing v. Pittsburgh, etc. R. Co.*, 147 Pa. St. 40, 23 Atl. 340 (1892); *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657 (1898); *Ward v. West Jersey, etc. R. Co.*, 65 N. J. L. 383, 47 Atl. 561 (1900); *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1912); *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 73 Atl. 4 (1909); *Miller v. Baltimore, etc. R. Co.*, 78 Oh. St. 309, 85 N. E. 499 (1908).

⁴⁵ L. R. 13 A. C. 222, 225 (1888).

⁴⁶ 65 N. J. L. 383, 385, 47 Atl. 561 (1900).

right, in doing so, to assume, in the absence of knowledge to the contrary, that such persons are of average strength both of body and mind."

The fallacy here is in assuming that any damages may be too remote which flow in an unbroken chain of causation from the defendant's wrongful act, or that fright may not be a link in the chain between the wrongful act and the damage. "Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural causal sequence — the inability to trace in regard to the damage the *propter hoc* in a necessary or natural descent from the wrongful act."⁴⁷ Thus, if the firing of a pistol frightens a woman, and the fright so operates on her nervous or physical system as to cause a miscarriage or other physical injury, the fright is but a link in the chain of causation connecting the firing of the pistol with the physical injury.⁴⁸ So, if an explosion causes fright, and the fright a faint, which in turn causes a fall resulting in bodily injury.⁴⁹

In such cases, it must be admitted that the fright is a cause "without which" the injury would not have happened. It is not, however, an intervening, efficient cause,⁵⁰ nor an independent concurring cause. It can, therefore, be only a link in the chain of causation connecting the defendant's wrongful act with the injury and damages.⁵¹ Thus, to use the illustration of Evans, J.:⁵²

"Where one is placed in sudden peril, and but for his fright consequent thereon the injury would not have occurred, the injured person under the stress of emergency is not chargeable with contributory negligence if he fail to act as under ordinary circumstances he might, but the injury is referable solely to the primary, negligent act that set in motion the dangerous agency."⁵³

⁴⁷ *Dulieu v. White & Sons*, [1901] 2 K. B. 669, 677, 678, per Kennedy, J.

⁴⁸ *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916).

⁴⁹ *Salmi v. Columbia, etc. R. Co.*, 75 Ore. 200, 146 Pac. 819 (1915).

⁵⁰ Herein lies the error in *Morris v. Lackawanna, etc. R. Co.*, 228 Pa. 198, 77 Atl. 445 (1910), in which the physical injury is treated as due to fright as an independent, intervening cause rather than to the defendant's wrongful act, although it was clearly shown that the wrongful act had caused the fright.

⁵¹ *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892).

⁵² *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 321, 73 So. 205 (1916).

⁵³ And see to the same effect *Purcell v. St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892); *Pankopf v. Hinkley*, 141 Wis. 146, 123 N. W. 625 (1909); *Green v. Shoemaker*, 111 Md. 69, 73 Atl. 688 (1909).

No better evidence of the absurdity of the rule denying recovery for personal injuries resulting from fright on the ground that the damage is too remote could be desired than the circumstance that many of the cases denying a recovery for injury resulting from fright alone authorize a recovery for physical injuries resulting from fright where the fright was also accompanied by trifling impact in itself causing little or no injury.⁵⁴

If, for example, the defendant negligently frightens the plaintiff, and the fright causes the plaintiff to experience a nervous shock and also to fall, and the fall results in bodily bruises, the plaintiff, it is conceded, may recover, not only for the bruises but also for the nervous shock.⁵⁵ Yet in this case the nervous shock for which recovery is allowed is no less remote from the fright which caused it than it would have been if unaccompanied by the fall and bruises. The argument of remoteness, therefore, fails.

The argument in the Ward case⁵⁶ against liability for nervous shock resulting from fright because nervous shock is not the natural or probable result of fright is based on the old fallacy of "foreseeability" as the test of liability in tort. The circumstances as they appear to the defendant at the time of injury — the likelihood of his act or failure to act to cause harm — are important in determining whether the defendant has violated a duty imposed upon him by the law. Running a railroad train at sixty miles per hour in the country, for example, may not be negligent, because the rate of speed alone, under the circumstances, will not naturally or probably cause harm or injury to persons at crossings, but the same rate of speed maintained through a village or city with numerous highway crossings not protected by gates and the obstruction of view incident to the existence of buildings near the crossings is negligence, because highly probable to result in harm. But once admit the existence of negligence in the operation of the train, and the railroad is liable for all the damages resulting therefrom in an

⁵⁴ *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1912).

⁵⁵ *Conley v. United Drug Co.*, 218 Mass. 238, 105 N. E. 975 (1914), in which it was agreed that plaintiff's damages should be assessed at \$600, of which the greater part was obviously for the nervous shock rather than for the fall and trifling bruises.

⁵⁶ *Ward v. West Jersey, etc. R. Co.*, 65 N. J. L. 383, 47 Atl. 561 (1900). And see also *Chittick v. Philadelphia Rapid Transit Co.*, 224 Pa. 13, 73 Atl. 4 (1909); *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657 (1898); *Mitchell v. Rochester Ry. Co.* 151 N. Y. 107, 45 N. E. 354 (1896).

unbroken chain of causation, even though the particular damages could not be foreseen.

In truth, the test of the measure of damages in tort is not "fore-sight," but "hindsight." Once establish the tort — the defendant's wrongful act or neglect — and he is liable, not merely for such damages as he could have foreseen, but for all damages that have actually resulted.⁵⁷ Otherwise the defendant's foresight, rather than the plaintiff's injury, would be the measure of recovery.

The fallacy of the foresight test of the measure of damages as applied to torts has repeatedly been exposed.⁵⁸ Yet patently unsound as it is, it continues to be applied in some jurisdictions,⁵⁹ partly no doubt out of deference to early precedents, but in large measure because of a confusion of ideas and of the thoughtless repetition of a familiar phrase without the intellectual exertion required to ascertain its meaning and the limits of its application.

A typical illustration of the erroneous application of the "foreseeability test" is furnished by the case of *Braun v. Craven*.⁶⁰ Here the defendant, a landlord, entered upon leased premises stealthily, and in an angry and violent manner forbade the plaintiff, the tenant's sister, to move from the premises, thus frightening the plaintiff and causing her such nervous shock as to bring on St. Vitus's dance. The court admitted that the conduct of the defendant was negligent, saying, "appellee might have reasonably anticipated that his acts would cause excitement or even fright";

⁵⁷ *Ehrgott v. New York*, 96 N. Y. 264, 281 (1884), where it is said, per Earl, J.: "The true rule, broadly stated, is that a wrong-doer is liable for the damages which he causes by his misconduct."

⁵⁸ *Mack v. South-Bound R. Co.*, 52 S. C. 323, 29 S. E. 905 (1898) [quoting Wardlaw, J., in *Harrison v. Berkeley*, 1 Strob. (S. C.) 525 (1847), as follows: "It is, therefore, required that the consequences to be answered for, should be natural as well as proximate. . . . By this I understand not that they should be such as upon a calculation of chances would be found likely to occur nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued, one from another, without the concurrence of any such extraordinary conjuncture of circumstances or the intervention of any such extraordinary result as that the usual course of nature should seem to have been departed from"]. And see *Ehrgott v. New York*, *supra*; *Green-Wheeler Shoe Co. v. Chicago, etc. R. Co.*, 130 Iowa, 123, 106 N. W. 498 (1906); *Coy v. The Indianapolis Gas. Co.*, 146 Ind. 655, 46 N. E. 17 (1897).

⁵⁹ *Smith v. Postal Telegraph Cable Co.*, 174 Mass. 576, 578, 55 N. E. 380 (1899), where it is said, per Holmes, C. J.: "Negligence with reference to a given consequence means that the consequence ought to have been foreseen."

⁶⁰ 175 Ill. 401, 51 N. E. 657 (1898).

but denied liability on the ground that "fright and excitement so seldom result in a practically incurable disease that, from the ordinary experience of mankind, such a result could not have been expected." The true rule, of course, is that if the defendant could have foreseen that his wrongful act was likely to frighten the plaintiff, he is liable for all the consequences resulting in a regular chain of causation from the fright, regardless of whether he should have foreseen the particular consequences.

This rule is understood and, not without the traditional confusion in the use of the words "natural and probable," is correctly applied, in *Pankopf v. Hinkley*,⁶¹ in which recovery was allowed for a miscarriage due to nervous shock, without physical impact, produced by defendant's negligence in permitting the automobile he was driving to collide with the carriage in which the plaintiff was riding. Thus it is said by the court, per Winslow, C. J.:

"Now, if the shock can legally operate as the connecting link between the defendant's negligent act and the plaintiff's miscarriage, so that the negligence was truly the cause which operated first and set in motion the train of events which ended in the miscarriage as the natural and probable result, then it does not become necessary to decide whether 'shock' as here used is a physical or mental disturbance, or whether, as seems more reasonable, it partakes of both."

The third reason assigned for denying recovery for nervous shock, without impact, is that it is contrary to public policy to open the courts to actions of this character as tending to stir up litigation, and to promote fraud and the presentation of claims for injuries beyond the capacity of juries properly to assess.⁶² Thus, it is said in *Mitchell v. Rochester Ry. Co.*,⁶³ per Martin, J.:

"If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining

⁶¹ 141 Wis. 146, 123 N. W. 625 (1909).

⁶² *Victorian Railways Com'rs v. Coultas*, L. R. 13 A. C. 222 (1888); *Ewing v. Pittsburgh, etc. R. Co.*, 147 Pa. St. 40, 23 Atl. 340 (1892); *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896); *Spade v. Lynn & Boston R. R.* 168 Mass. 285, 47 N. E. 88 (1897); *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657 (1898); *Ward v. West Jersey, etc. R. Co.*, 65 N. J. L. 383, 47 Atl. 561 (1900).

⁶³ 151 N. Y. 107, 110, 45 N. E. 354 (1896).

whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy."

Or, as this doctrine of expediency is more baldly stated by the Supreme Court of Pennsylvania:⁶⁴

"All the cases [allowing a recovery] are of recent and unhealthy growth, and none of them stands squarely on the ancient ways. In the last half century the ingenuity of counsel, stimulated by the cupidity of clients and encouraged by the prejudices of juries, has expanded the action for negligence until it overtops all others in frequency and importance, but it is only in the very end of that period that it has been stretched to the effort to cover so intangible, so untrustworthy, so illusory and so speculative a cause of action as mere mental disturbance. It requires but a brief judicial experience to be convinced of the large proportion of exaggeration and even of actual fraud in the ordinary action for physical injuries from negligence, and if we opened the door to this new invention the result would be great danger, if not disaster, to the cause of practical justice."

So also Holmes, C. J., in *Smith v. Postal Telegraph Cable Co.*,⁶⁵ says: "The point decided in *Spade v. Lynn & Boston Railroad*, 168 Mass. 285, and *White v. Sander*, 168 Mass. 296, is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds." Or, as expressed by the same judge on another occasion,⁶⁶ the exemption from damages of this kind "is an arbitrary exception, based upon a notion of what is practicable."

An analysis of the opinions denying recovery in such cases on the ground of public policy discloses that the alleged public policy is based on one or more of the following reasons:

First, there is no precedent for such a recovery prior to the latter part of the nineteenth century;

Second, allowance of recovery would increase litigation;

Third, allowance of recovery would lead to the bringing of actions on fraudulent claims;

⁶⁴ Per Mitchell, C. J., in *Huston v. Freemansburg*, 212 Pa. 548, 61 Atl. 1022 (1905).

⁶⁵ 174 Mass. 576, 577, 578, 55 N. E. 380 (1899).

⁶⁶ *Homans v. Boston Elevated R. Co.*, 180 Mass. 456, 457, 62 N. E. 737 (1902).

Fourth, damages from nervous shock are difficult to prove and measure.

In any discussion of the denial of a right of action on the ground of public policy, it must be borne in mind that the general theory upon which the common law is based is that there is a remedy for every wrong, and in any case in which A is shown to have committed a wrongful act as a proximate result of which B has suffered damage, there is a very strong presumption in favor of a right of action by B against A. If B's right to maintain such an action is denied on the ground of public policy, such policy must be made very clearly to appear and must be strongly grounded on considerations of the public welfare. As very properly said by Evans, J., in *Alabama Fuel & Iron Co. v. Baladoni*:⁶⁷

"The doctrine of expediency or public policy . . . is a doctrine that should be very sparingly and cautiously employed, for if a person's rights have been unlawfully invaded, it would ill become a court of justice to withhold its remedy on the ground of expediency."

The first reason alleged for the existence of the alleged public policy is no reason at all. If it were, every case of first instance would be decided against the party invoking the new rule of law or the new application of an old rule. It would put an end to all growth or progress of the law through judicial decision. If applied a hundred years ago, it would have denied recovery for physical injury suffered by contact with an electric wire, and five hundred years ago recovery for injury inflicted by the negligent handling of gunpowder. The Anglo-American is a living — not a dead — system of law, is a growing and expanding body of rules, so recognized by all the courts engaged in its administration. To say that an action may not be brought for a personal injury because no action for that particular injury or for an injury inflicted in that particular manner was ever brought before 1888 is not only absurd, but is contrary to principles of law long established, and in the abstract, at least, nowhere now denied.

The twofold answer to the second reason assigned for the alleged public policy is that the allowance of a recovery of damages for physical injuries caused by fright has not increased litigation to any marked extent; and that even if it had,

⁶⁷ 15 Ala. App. 316, 321, 322, 73 So. 205 (1916).

public policy does not forbid increased litigation for the redress of wrongs.

Upon the first point we have the testimony of Gaines, C. J., in *Gulf, etc. Ry. Co. v. Hayter*,⁶⁸ as follows: "The reported cases would indicate that the litigations arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable increase of litigation." Furthermore, a denial of recovery for such injuries has wholly failed to put a stop to actions brought for this purpose, as witness the reported cases in Massachusetts,⁶⁹ New York,⁷⁰ and Pennsylvania.⁷¹ The doctrine as originally declared in Massachusetts and New York has not been strictly adhered to in all subsequent cases in these jurisdictions,⁷² the early English case denying recovery has been overruled,⁷³ the current of judicial opinion has set clearly in favor of a recovery, and it is not unreasonable to expect that actions for the recovery of damages for such injuries will continue to be brought even in those jurisdictions where recovery has heretofore been denied in the not altogether unfounded hope of a modification or even abolition of the existing doctrine denying recovery.

Nor is it desirable to prevent an increase of actions for the recovery of damages for personal injuries resulting from fright so long as such actions are necessary to obtain redress for injuries of this character. While public policy is concerned with the discouragement of merely vexatious litigation, it is equally concerned with providing a means of legal redress for every wrong. It is true, as stated by Chief Justice Mitchell,⁷⁴ that actions for negligence have greatly increased in the last half century, but the action for negligence has not on that account been abolished. To deny a recovery of damages for personal injuries caused by negligence without providing another remedy, as has been done in some cases by the workmen's compensation acts, would be a gross injustice,

⁶⁸ 93 Tex. 239, 242, 54 S. W. 944 (1900).

⁶⁹ See cases cited 17 C. J. 839, note 94.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² See for Massachusetts, *Conley v. United Drug Co.*, 218 Mass. 238, 105 N. E. 975 (1914), and for New York, *Cohn v. Ansonia Realty Co.*, 162 App. Div. 791, 148 N. Y. Supp. 39 (1914).

⁷³ See *ante*, p. 216.

⁷⁴ In *Huston v. Freemansburg*, 212 Pa. 548, 61 Atl. 1022 (1905).

and the frequency with which such suits are brought, after making liberal allowance for groundless claims, is the strongest evidence of the amount of injury inflicted and of the justice of the rule allowing a recovery. Every argument in favor of the maintenance of actions for negligence in general is also an argument in favor of that particular class of actions for negligence which are brought to recover damages for personal injuries due to fright caused by defendant's negligence.

But it is said that the award of damages for nervous shock caused by fright will make possible recovery for fraudulent claims. Yet this reason in itself has never been held sufficient to deny recovery for real injuries the existence of which have been proved under the rules of procedure established for the purpose of ascertaining facts. The Supreme Court of Pennsylvania, in *Huston v. Freemansburg*,⁷⁵ complains of "the large proportion of exaggeration and even of actual fraud in the ordinary action for physical injuries from negligence," but it does not go so far as to say that on this account no recovery should ever be allowed for physical injuries resulting from negligence. Why, then, deny the right of recovery for actual physical injuries inflicted in a particular manner — through nervous shock caused by fright — simply because fraudulent claims of this character may be preferred?

In the language of Evans, J., in *Alabama Fuel & Iron Co. v. Baladoni*:⁷⁶

"It may be that physical injuries springing out of fright are easily simulated and relief granted in such instances would open the door to fraud and imposture; but this is a matter involving the proof of the case and is addressed rather to the good sense and honesty of purpose of our juries than to the courts."

To the same effect, also, it is said, per Gaines, J., in *Hill v. Kimball*,⁷⁷

"That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing

⁷⁵ 212 Pa. 548, 61 Atl. 1022 (1905).

⁷⁶ 15 Ala. App. 316, 321 73 So. 205 (1916).

⁷⁷ 76 Tex. 210, 215, 13 S. W. 59 (1890). And see to the effect *Dulieu v. White & Sons*, [1901] 2 K. B. 669, per Kennedy, J.

compensation in an action at law when the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had."

The fourth reason is closely akin to the third, but is based not so much on the idea of forbidding the presentation of claims as upon the incapacity of the jury to discriminate between meritorious and fraudulent claims and upon its further incapacity to determine the proper amount of recovery for injuries of this character. But the very function of the jury is to sift evidence and to determine whether an injury has been proved, the extent of the injury, and the proper measure of compensation in money. The problem of determining liability in actions for physical injuries due to nervous shock caused by fright is largely one of tracing the chain of causation from the fright to the ultimate physical injury. Damages are allowed for nervous shock when accompanied by impact. The absence of impact, however, makes such damages no more difficult to trace. In like manner the proper measure of recovery for physical injuries generally is difficult to determine. But the law does not, on that account, deny all recovery. Nervous shock resulting from fright is just one species of physical injury, and the rules of law, governing the right of recovery therefor, and the measure of recovery, are, or should be, the same as in all other cases of physical injury.⁷⁸ The refusal to apply these general rules to actions for this particular kind of physical injury is nothing short of a denial of justice.⁷⁹ "Such a course," it is said, per Kennedy, J., in *Dulieu v. White & Sons*,⁸⁰

"involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous

⁷⁸ *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916). And see the recent case of *Janvier v. Sweeney and Barker*, [1919] 2 K. B. 316, allowing a recovery for illness caused by fright, produced by false statements and threats.

⁷⁹ *Simone v. Rhode Island Co.*, 28 R. I. 186, 195, 66 Atl. 202 (1907), where the denial of recovery on the ground of expediency is characterized, per Parkhurst, J., as "a pitiful confession of incompetence on the part of courts of justice."

⁸⁰ [1901] 2 K. B. 669, 681.

shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time."

If A, by his negligence, brushes slightly against B, a pregnant woman, and while doing her no injury by the impact, yet frightens her so badly that a nervous shock results from the fright — not from the impact — and the nervous shock causes B to have a miscarriage, it is admitted that she may recover from A for the physical pain and suffering endured by her in the shock and miscarriage. But, it is said, if A is driving negligently on the street, and stops his horse within a few inches of impact with B, but frightens her just as badly as in the former case, with the resultant nervous shock and miscarriage, B may not recover from A,⁸¹ albeit her physical injury is just as great as before and just as much due to A's fault. A rule of liability so highly technical, so completely without foundation in reason, is not out of place in a primitive system of jurisprudence, but is unworthy of any system based on the theory of granting redress for every substantial wrong.

The fallacies of the arguments by which the rule denying recovery has been supported, the essential reason of the rule, and the grave injustice of its application have been so often exposed that it is high time our courts — many of them operating under constitutions solemnly guaranteeing remedies for every injury⁸² — shall no longer deny redress for that particular personal injury which is due to nervous shock caused by fright. No vested rights have been acquired under decisions denying such a recovery, and no inconvenience or injustice, but rather a tardy justice, would result from the courageous action of the courts in these jurisdictions overruling their former decisions, as was done in England, and establishing the rule of reason and justice, to this extent making good the boast of the law that it provides a remedy for every wrong.⁸³

⁸¹ *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 45 N. E. 354 (1896).

⁸² Witness, for example, the Ohio Constitution, Art. I, sec. 16: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay." Yet, the Supreme Court of the State, in *Miller v. Baltimore, etc. R. Co.*, 78 Oh. St. 309, 85 N. E. 499 (1908), has denied justice and refused any remedy for that particular injury done to one's person which results from nervous shock caused by fright.

⁸³ See *Stewart v. Arkansas Southern R. Co.*, 112 La. 764, 36 So. 676 (1904); *Green v. Shoemaker*, 111 Md. 69, 73 Atl. 688 (1909).

In those jurisdictions in which recovery for nervous shock caused by fright is denied, consistency requires that where physical impact and fright are coincident in point of time and are followed by shock resulting in physical injuries, no recovery shall be allowed for the physical injuries and shock if they are caused by the fright alone. In other words, the physical impact must not only accompany the fright, but must in part, at least, cause the shock in order to enable the plaintiff to recover for the shock and its effects. And this is the position taken in the New York case of *Hack v. Dady*.⁸⁴

As a general rule, however, even in the jurisdictions denying recovery for nervous shock caused by fright without impact, if it is shown that fright and impact were coincident in point of time, recovery is allowed for the resulting shock and physical injuries without inquiry as to whether the shock was caused by the concurrence of fright and impact or by fright alone.⁸⁵ The cases which thus allow a recovery for injuries resulting from fright when accompanied by impact impliedly admit the justice of recovery for the physical consequences of fright, and in undertaking to deny such recovery where the fright is not accompanied by impact are thrown back upon untenable arguments based largely upon the difficulty of proving the tort and damages in the absence of impact. With the demonstration of the insufficiency of these arguments, the only obstacle remaining in these jurisdictions to the allowance of a recovery for nervous shock resulting wholly from fright is the existence of precedents denying such a recovery. As stated before, however, these precedents do not establish a rule of property. They merely constitute a limitation on the administration of justice in a particular class of cases — a limitation indefensible in logic and unjust in operation, which should therefore be abolished as a step forward in the development of an enlightened system of jurisprudence.

Both in the jurisdictions in which recovery for nervous shock caused by fright without impact is denied,⁸⁶ and also in those in

⁸⁴ 142 App. Div. 510, 127 N. Y. Supp. 22, 25 (1911).

⁸⁵ *Samarra v. Allegheny Valley St. Ry.*, 238 Pa. 469, 86 Atl. 287 (1913); *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1912); *Buchanan v. West Jersey R. Co.*, 52 N. J. L. 265, 19 Atl. 254 (1890); *Homans v. Boston Elevated R. Co.*, 180 Mass. 456, 62 N. E. 737 (1902); *Jones v. Brooklyn Heights Ry. Co.*, 23 App. Div. 141, 48 N. Y. Supp. 914 (1897); *Denver, etc. R. Co. v. Roller*, 100 Fed. 738 (1900).

⁸⁶ *Fleming v. Lobel*, 59 Atl. (N. J. L.), 28 (1904).

which as a general rule it is allowed,⁸⁷ such recovery is denied if the plaintiff's fright proceeds not from fear of personal injury to himself but from fear of injury to his property, or to the person of another. Thus, it is said, per Kennedy, J., in *Dulieu v. White & Sons*:⁸⁸ "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C." And the rule has been applied to deny a recovery to a plaintiff who has been frightened by an attack made upon her husband in her presence,⁸⁹ or has sustained a severe nervous shock and permanent impairment of health from seeing her daughter dragged along a railway platform because of the negligence of the railway company's employees in starting the train.⁹⁰

In a few jurisdictions, however, the validity of this exception has been denied, at least under certain circumstances. Thus, a married woman has been allowed to recover for nervous shock caused by fright at injury or threatened injury to her husband,⁹¹ her child,⁹² her property,⁹³ or to third persons in no wise related to her.⁹⁴ In some of these cases recovery is allowed on the ground that the plaintiff was pregnant at the time of her fright, and the defendant knew, or should have known, of her condition.⁹⁵ But in

⁸⁷ *Dulieu v. White & Sons*, [1901] 2 K. B. 669; *Sanderson v. Northern Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542 (1902); *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134 (1899).

⁸⁸ [1901] 2 K. B. 669, 675.

⁸⁹ *McGee v. Vanover*, 148 Ky. 737, 147 S. W. 742 (1913); *Bucknam v. Great Northern R. Co.*, 76 Minn. 373, 79 N. W. 98 (1899).

⁹⁰ *Cleveland, etc. R. Co. v. Stewart*, 24 Ind. App. 374, 381, 56 N. E. 917 (1900). And see also *Southern R. Co. v. Jackson*, 146 Ga. 243, 91 S. E. 28 (1916), holding defendant not liable for injury to plaintiff caused by fright at the seeing her child mangled.

⁹¹ *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068 (1902); *Jeppsen v. Jensen*, 47 Utah, 536, 155 Pac. 429 (1916).

⁹² *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916).

⁹³ *Engle v. Simmons*, 148 Ala. 92, 41 So. 1023 (1906); *Lesch v. Great Northern R. Co.* 97 Minn. 503, 106 N. W. 955 (1906).

⁹⁴ *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59 (1890), fright to white woman by assault on two negroes.

⁹⁵ *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916); *Engle v. Simmons*, 148 Ala. 92, 41 So. 1023 (1906). And see 1 COOLEY, TORTS, 3 ed., 98.

*Hill v. Kimball*⁹⁶ there was no evidence to charge the defendant with knowledge of the plaintiff's condition, and in other cases none to show the plaintiff was in fact pregnant or in other than normal physical condition.⁹⁷ Certainly the right of recovery in such cases cannot, upon principle, be made to turn upon the sex or condition of the plaintiff, and the logical tendency of these cases is towards the adoption and application of the broad rule of liability in all cases in which the defendant while in the commission of a wrongful act causes fright to the plaintiff, resulting in nervous shock and physical injury.

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⁹⁶ 76 Tex. 210, 13 S. W. 59 (1890).

⁹⁷ *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068 (1902); *Lesch v. Great Northern R. Co.*, 97 Minn. 503, 106 N. W. 955 (1906).

THE PROGRESS OF THE LAW: CORPORATIONS

A summary statement of some 1919 or 1920 decisions on the law of corporations, with occasional comment, follows:

DISTINCTION BETWEEN A CORPORATION AND AN UNINCORPORATED BUSINESS UNIT

Crocker v. Malley.¹ By the terms of the federal income tax law of 1913 trustees were not liable to pay a certain tax upon dividends received from a corporation that was itself liable to a tax on its income, but such tax was payable by "every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships." The plaintiffs were trustees, and had received dividends from a corporation that was itself liable to a tax on its income. They were trustees of what would popularly be known as a business trust, and the terms of the trust were such that the persons entitled to the benefits of the trust were *cestui que trusts* and not partners. *Williams v. Milton*.² The taxes in question were assessed to the plaintiffs as a joint-stock association. The court held that they were entitled to recover the taxes so assessed, which had been paid under protest.

As the plaintiffs were trustees, and as trustees were not expressly made liable for such a tax,

"if they are to be subjected to a double liability the language of the statute must make the intention clear. . . . The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not. . . . It would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees [in the income tax law] is to be made meaningless. We perceive no ground for

¹ 249 U. S. 223 (1919).

² 215 Mass. 1, 102 N. E. 355 (1913).

grouping the two — beneficiaries and trustees — together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law.”³

The court also remarked that it presumed the double taxation was for the purpose of discouraging combinations by which one corporation holds controlling interests in other corporations which in their turn may control others, and that the facts showed that there was no such combination in this case.

The legal conception of a corporation is distinct from that of human beings who, as trustees, carry on a business; but the federal legislature might expose a corporation and business trustees to similar taxes, and it may well be that such legislation is desirable. The only question before the court was one of legislative intent. Tax laws must be strictly construed, and the law should not therefore be construed to tax the same business income twice, unless the intent to do so was clearly expressed.

*Home Lumber Co. v. Hopkins.*⁴ A business unit was a trust, as distinguished from a partnership. *Williams v. Milton.*⁵ The constitution of Kansas provided that the term “corporations” “shall include all associations and joint-stock companies having powers and privileges not possessed by individuals or partnerships,” and the court held that the trust fell within this definition.

FORMATION OF CORPORATIONS

*Schmitt v. Kulamer.*⁶ It is not illegal for an attorney employed to form a corporation to procure persons to sign the certificate of incorporation who are not intended to have any interest in the corporate venture. After the formation of the corporation such persons remain liable on their subscriptions contained in the paper signed by them until, but only until, they have transferred their stock with the consent of the corporation. Consent of the corporation is not necessarily shown by an entry upon its books.

*Hess Warming & Ventilating Co. v. Burlington Grain Co.*⁷ This decision should be contrasted with the earlier decision in *Bank v.*

³ 249 U. S. 223, 233, 234 (1919).

⁴ 190 Pac. (Kan.) 601 (1920).

⁵ 215 Mass. 1 (1913).

⁶ 110 Atl. (Pa.) 169 (1920).

⁷ 217 S. W. (Mo.) 493 (1919).

Rockefeller,⁸ which construed the Missouri statutes regulating the formation of corporations. They provided that the articles of agreement should set out the amount of the capital stock and "that the same has been *bona fide* subscribed, and one half thereof actually paid up in lawful money of the United States;" that a copy of the articles of agreement should be filed in the office of the Secretary of State, and that the Secretary of State "shall give a certificate that said corporation has been duly organized, and the amount of its capital, and such certificate shall be taken by all courts of this State as evidence of the corporate existence of such corporation." The plaintiff alleged that certain articles of agreement contained statements as to the capital subscribed and paid up which were false and were known by the subscribers to be false, and that therefore no corporation had been formed. But the court refused to hold that the legislature intended that the making of honest statements in the articles of agreement should be a condition precedent to incorporation, and held that the legislature intended the certificate by the Secretary of State should have all the force and effect of a legislative charter (the court at places speaks of the corporation as being a corporation *de facto*, but, on this interpretation of the statutes, it would of course be a corporation *de jure*, with its charter subject to forfeiture in *quo warranto*).

In the principal case⁹ the court construed the Missouri statutes regulating the increase of capital stock. They provided that "any corporation increasing its capital stock shall, before the same shall take effect, cause to be paid up of such increase of capital not less than fifty per cent in lawful money of the United States;" that a statement should be filed in the office of the Secretary of State,¹⁰ "who shall thereupon issue a certificate that such corporation has complied with the law — and the amount to which such capital stock is increased or decreased; and such certificate shall be taken in all courts of this state as evidence of such increase or decrease of stock, and thereupon the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate."

A statement was filed in the office of the Secretary of State, stating that the full amount of an increase of capital stock had been

⁸ 195 Mo. 15, 93 S. W. 761 (1906).

⁹ 217 S. W. (Mo.) 493 (1919).

¹⁰ REV. STAT. MO., § 3356 (1909).

paid up; and the Secretary of State issued the certificate contemplated under this provision. The plaintiff wished to show that the statement was false, and that nothing had been paid on such increased stock. The court below gave judgment for the defendant; but the Supreme Court reversed this, distinguished the case from *Bank v. Rockefeller*, went behind the certificate, inquired into the fact of payment, and held the stock not to have been increased. It is submitted that the decision is right, and, moreover, that the statutory provisions here construed are similar to those construed in *Bank v. Rockefeller*, and that a like construction should have been given to the provisions there construed.

In the principal case, an unsecured creditor of a corporation obtained a decree cancelling a deed acquired by the purchaser at a foreclosure sale of corporate property given as security for certain second mortgage bonds. The statute forbade an increase of the bonded indebtedness beyond the amount of the "authorized capital." The alleged increase of stock was made as a basis for an increase of the bonded indebtedness. As the stock was not increased, these second mortgage bonds were held to be invalid. The purchaser at the foreclosure sale had actual or constructive notice that the stock had not been properly increased.

It should be added that the second mortgage bonds might also have been held to be invalid on other grounds mentioned by the court but not here discussed.

PAYMENT OF SUBSCRIPTIONS TO CAPITAL STOCK

*Dee Co. v. Proviso Coal Co.*¹¹ A and B conveyed their business to a corporation and received \$25,000 par value of the corporation's stock in payment. The corporation became insolvent, and A and B were held liable to pay the difference between \$25,000 and the actual value of the property transferred to the corporation. Judicial inquiry as to the actual value was made. The "good faith" of A and B was not questioned; but "payment with property for capital stock is no payment except to the extent of the true value of the property."

The conditions on which a corporation may issue stock are for the legislature to determine. It is a statutory question, not a common-law question.

¹¹ 290 Ill. 252, 125 N. E. 24 (1919).

Several legislatures have within the last decade authorized corporations to issue shares without a par value, and powerful arguments can be made for the wisdom of such legislation. So far as creditors are concerned there is, under such legislation, nothing to be said but *caveat creditor*.

If the legislature requires the corporation to have a par value — to put the dollar sign on the stock — it is conceivable that a legislature might nevertheless permit the stock to be issued on terms which had no relation whatever to such dollar sign. It might expressly authorize shares to be issued at a discount or for overvalued property. Such legislation is regrettable, but it is not beyond legislative competence.¹²

But the usual statutory situation is that the legislature requires a par value, and requires "payment" of that par value. The reasonable interpretation of such statutes is that the legislature did not intend the shares to be issued at a discount or for overvalued property, that a protection to creditors was contemplated, and that the legislative intent would be defeated unless there be payment in cash equal to the par value of the shares, or in property of a market value equal to the par value of the shares. Under such legislation a corporation would be unauthorized to issue stock at a discount, or for property taken by the corporation at a valuation in excess of its market value.

Despite the extraordinary English decisions and the decisions of many American courts made in the nineteenth century, the tendency of American courts, certainly since the decision of *See v. Heppenheimer*,¹³ has been to insist upon an actual, as distinguished from a conventional, payment. The principal case so interprets the Illinois statute in question.

It may be added that, where stock is issued for property, and there is room for an intelligent difference of opinion as to the market value of that property, the value set upon the property by the corporation should stand, unless plainly wrong. This much leeway may well be given. But there was nothing in the facts of the principal case to bring it within such a rule.

Wallace v. Weinstein.¹⁴ Under the law of Delaware a corporation cannot lawfully capitalize prospective profits.

¹² See subd. 9 of § 1105 E of the Code of Virginia, 1904.

¹³ 69 N. J. Eq. 36, 61 Atl. 843 (1905).

¹⁴ 257 Fed. 625 (1919).

Zierath v. Claggett.¹⁵ The court held that where stock was improperly issued for overvalued property, and the original subscribers were therefore liable to creditors, the same liability attached to all transferees of the stock. It did not distinguish between transferees who were *bona fide* purchasers of the stock and those who were not.

Statutes forbidding the issue of stock having a par value for overvalued property should be, and usually are, construed not to negative corporate capacity, but only to negative corporate authority to make such an issue. For if the transaction were held to be utterly void, the alleged subscribers, if sued to complete the payment of their subscriptions, would escape on the ground that they were not subscribers at all.

There has been an illegal transaction, and it is for the courts to apply an appropriate remedy. Such remedy is found by predicating the same results upon the transaction as would follow if there had been (1) a subscription to the stock, and (2) a separable agreement between the subscriber and the corporation that the shares should be deemed to be full paid although they were not in fact full paid. In such case the subscription would stand, and the agreement for a conventional payment would be stricken down as illegal, the payment actually made would be treated only as a payment on account, and the subscriber would be under liability to complete the payment.

If the original subscriber transfers his stock to a person having notice that the stock was improperly issued as full paid, the courts may reasonably impose upon the transferee an obligation similar to that which they impose upon the transferor. But it should be recognized that the liability both of the subscriber and of his transferee with notice is not predicated upon the actual agreement of the parties, but is imposed by law because the actual agreement was illegal.

A legislature might no doubt go further and make liable every holder of stock, including *bona fide* purchasers, if the stock had not been fully paid. And the recent case of *Shugart v. Maytag*¹⁶ interprets the South Dakota statute as contemplating that result. But the imposition of such liability upon a purchaser of stock issued as full paid by the corporation who had no notice that it had been improperly so issued, goes beyond the bounds of what a court may

¹⁵ 188 Pac. (Cal. App.) 837 (1920).

¹⁶ 176 N. W. (Iowa) 886 (1920).

reasonably do. The decision in the principal case is, it is submitted, plainly wrong.

The case is easily distinguishable from *Perkins v. Cowles*.¹⁷ There stock had been issued, and there had been a payment of less value than the par value. The transferee was led by the representations of his transferor to believe that the stock had been issued as full paid by the corporation; but the transferee failed to establish that the corporation had issued it as full paid, or had represented that it was so issued. Under such circumstances the court properly held the transferee to be under a liability to complete payment. In that case the corporation had a claim against the subscriber for a further payment, and the transferee of stock issued as only partially paid must complete the payment if the corporation calls for such further payment while he is the holder of the stock. But in the principal case the corporation had issued the stock as full paid; there was no corporate asset for a further payment; such further payment could only be required through imposition of liability, and there is no proper basis for imposing such liability upon a person who was neither a party to the illegal transaction nor a purchaser with notice of the product of such illegal transaction.

The overwhelming weight of authority in this country is against the imposition by the courts of liability upon the purchaser of stock issued by the corporation as full paid who had no notice at the time of his purchase that it had been improperly so issued. For a recent case, see *Smoot v. Larsen*.¹⁸

PROMOTERS

Hart-Toole Furniture Co. v. Shahan.¹⁹ Shahan was employed by persons who intended to form a corporation for the purpose of carrying on a furniture business. He supervised the preparation of a store, and appraised articles which the organizers wanted to purchase. After the services were rendered the corporation was formed, as planned, and the corporation, by its manager, agreed to pay plaintiff for these services. The court sustained a verdict for the plaintiff, on the ground that "the receipt of the benefit of past service is a sufficient consideration to support a subsequent agreement therefor" in such a case.

¹⁷ 157 Cal. 625, 108 Pac. 711 (1910).

¹⁸ 189 Pac. (Idaho) 1105 (1920).

¹⁹ 220 S. W. (Tex. Civ. App.) 181 (1920).

It is submitted that the result is right, but that it is unfortunate to base it upon such reasoning. When Shahan performed the services for the organizers, they were bound personally to pay him. All parties contemplated that the corporation, when formed, would take over the obligation of the organizers; if the corporation, when formed, promised Shahan to do so, there was a proper basis for predicating a novation, Shahan accepting the corporation as his debtor in place of the organizers.

*Carle v. Corhan.*²⁰ Plaintiffs owned a lease of real estate, a theatre license, and certain contracts and personal property. On November 29, 1916, they entered into a written contract whereby they agreed to sell all this property to "The American Theatre, Inc., a corporation in process of formation." The defendants Carle and Monjot intended to form such a corporation, and negotiated the purchase. To the contract were affixed the names of the plaintiffs, and the name "American Theatre Co. Inc., by F. Carle." Forthwith, part of the consideration was paid in cash, and the plaintiffs executed a transfer of the lease and license to the "American Theatre, Incorporated." On December 6, 1916, a paper was executed purporting to be a deed of trust conveying this property to a trustee to secure the unpaid purchase price represented by sundry notes. The deed of trust was signed "American Theatre Co. Inc. F. Carle Pres., Will Monjot, Sec." (The acknowledgment was in due form for an acknowledgment by a corporation.) The notes were signed in the same manner. On December 15, 1916, the American Theatre, Incorporated, became a legal unit. This corporation took over the property from the promoters, and assumed liability on the notes. The corporation thereafter paid the plaintiffs \$100 on one of the notes, and gave a new note (presumably for the balance of the note on which \$100 had been paid), signed in the same manner as the original note.

The court held that Carle and Monjot were not personally liable on the notes.

"There is a general rule that persons dealing with promoters of corporations to be thereafter formed are allowed the double security of the promoters and the corporation when it comes into being; but where it appears that the credit was extended solely to a corporation which was

²⁰ 103 S. E. (Va.) 699 (1920).

then in process of formation, and which shortly thereafter procured its charter, the rule does not apply.”²¹

Outsiders may, at the instance of promoters, make an offer to a corporation to be formed which may be accepted by the corporation, when formed, if not previously withdrawn. But the transactions of November 29 and December 6 cannot fairly be construed as amounting only to this. The promoters wanted the outsiders to be forthwith bound; they wanted and received immediate delivery of the property, and the contract then made and the notes then given were their contract and their notes.

But where a contract is made by promoters avowedly in behalf of a corporation to be formed, the parties intend that the promoters shall serve only as a stop-gap, and it is proper to imply consent in advance by the outsiders to a novation whereby the corporation is to be taken in place of the promoter. If after the corporation is formed there are dealings between the outsiders and the corporation in which the corporation recognizes itself as bound, there is no reason why it should not be found that a novation has been accomplished (if the formalities are satisfied which are required by law for the kind of contract in question,—for example, if there be a writing where a contract is made relating to the sale of real estate).

If new notes had been issued in place of all the notes given on December 6, there would clearly be an end of the promoters' liability. And when the \$100 was paid, and one new note was given, the trier of the facts might well find that the outsiders and the corporation impliedly agreed that their obligations and rights should be the same as though new notes had been given in place of all the old notes. This would give the promoters an equitable defense against liability on the old notes.

It may be added that, if the outsiders may fairly be held to have contracted in advance to take the corporation in place of the promoters, and the corporation, when formed, offers to take the place of the promoters, the refusal of the outsiders then to enter into a novation should be a defense to the promoters.

In *Kelner v. Baxter*²² the argument was not made that the contract with the promoters might fairly be interpreted as contemplating a novation; and, moreover, after the company was formed, there were no dealings between it and the outsiders, and it does not

²¹ 103 S. E. (Va.) 702, 703 (1920).

²² L. R. 2 C. P. 174 (1866).

clearly appear even that the company offered to the outsiders to take over the liability in the place of the promoters.

*In re Olympic Reinsurance Co.*²³ An existing company offered its shares for public subscription. The offering was underwritten by A, and A made a sub-underwriting agreement with B. In consideration of the promise of payment by A to B of certain commissions, B agreed to subscribe for a certain number of shares in default of public subscription; handed A what the court found to be the equivalent of an application for shares; and agreed that the application should be irrevocable and that "this contract shall notwithstanding any withdrawal on our part be sufficient to authorize and empower the Directors to allot to us the above-mentioned shares and enter our name on the Register of Members in respect thereof." A handed the contract to the company. The question chiefly considered by the court was whether the directors had authority to allot the shares to B, in spite of and after an attempt by him to withdraw, and the court held that they had.

Here was a contract between A and B, under which B contracted with A that he would keep open an offer to C. If B has promised A to keep open an offer to A, A may accept, despite an attempted withdrawal, — the courts impose upon B the same consequences as would have followed if he had had the state of mind which he agreed to have. It is a step beyond that doctrine to hold that C, a beneficiary of the contract between A and B, may accept an offer of B's, which B has agreed with A should remain open to be accepted by C; but it is submitted that that step may properly be taken.

The court held B to be bound, but by a different process of reasoning. It said that B had given authority to A to carry out the sub-underwriting agreement; that this authority extended not only to the making of the application but also to the maintenance of the application to the date of its acceptance by the company, that such an authority was coupled with an interest (the interest of the underwriters to be partially relieved from the burden of their contract with the company), and therefore was irrevocable, relying on *Car-michael's Case*.²⁴ In that case the authority from B to A to apply for an allotment in the name of B was express, and was expressly

²³ [1920] 2 Ch. 341.

²⁴ [1896] 2 Ch. 643.

made irrevocable; in the principal case the court is of opinion that an intent to give an irrevocable authority is fairly to be implied.

It is an open question whether the American courts will follow this doctrine, but it is submitted that such a doctrine is unobjectionable as a matter of legal reasoning, and is highly desirable as a means of satisfactorily enforcing such agreements. If B, for a consideration, makes A his agent, and agrees that the agency shall be irrevocable, and it is intended by the parties that A shall be entitled to exercise this power for his own benefit, then there is not, in substance, any fiduciary relationship between A and B. A has not agreed to act for B; on the contrary, B has agreed that A may, in B's name, do an act for A's protection. Therefore all objection drops to imposing upon B the same consequences as would have followed if he had continued in the state of mind in which he agreed to continue.

DE FACTO CORPORATIONS

*Pilsen Brewing Co. v. Wallace.*²⁵ A corporation was duly formed, named the Farmers Grain and Feed Co. Thereafter there was an attempt to change its name to the Chicago Grains and Feed Co., but this was abortive, as all the statutory provisions were not complied with. Thereafter there was, in form, a contract made by the Chicago Grains and Feed Co. with the plaintiff. Held, that the attempted change of name had not destroyed the Farmers Grain and Feed Co., that it was bound on the contract made in the name of the Chicago Grains and Feed Co., and that the members of such corporation were exposed to no liability under the contract.

ULTRA VIRES TRANSACTIONS

*McAlwaine v. Foreman.*²⁶ Certain persons purported to organize a corporation with power to acquire a leasehold estate in land, to maintain and improve a building thereon, and to do certain other acts. The incorporators had no intention that the corporation should do any of the other acts. The Illinois statute did not authorize the organization of a corporation for the purpose of acquiring and holding real estate. In form, a corporation was

²⁵ 291 Ill. 59, 125 N. E. 714 (1919).

²⁶ 292 Ill. 224, 126 N. E. 749 (1920).

organized and a lease of real estate was delivered in which the alleged corporation was lessee. It is not entirely plain from the opinion of the court whether it holds that a corporation was formed, but, assuming that a legal unit was formed, the court holds that it was *ultra vires* for it to acquire the lease. The lessor received rent under the alleged lease for 29 years. The court held that "where the act done by the corporation is beyond its legal powers the act is wholly void and of no legal effect and the legality of the act may be raised by any party affected by it"; and that the assigns of the lessor were entitled to a decree declaring the lease null and void and the claims of all persons claiming under said lease to be of no effect.

Brief comment on this case would be so inadequate that no comment is made.

*Bishop Mfg. Co. v. Sealy Oil Mill Co.*²⁷ A corporation operating cotton gins has authority to buy cotton seed from farmers, as part of a transaction in which the farmers bring their cotton to the corporation to be ginned, and to sell the cotton seed so obtained; but it has no authority to contract to sell at a future time an amount of cotton seed which it has not then on hand, and which is not based upon any estimate of the amount of seed which it can be foreseen, with reasonable certainty, will be acquired from customers. Such a contract would amount to speculating in the cotton seed market, is *ultra vires*, and the buyer cannot sustain an action for damages for failure by the corporation to deliver the cotton seed.

PURCHASE BY A CORPORATION OF SHARES OF ITS OWN STOCK

*Gasser v. Great Northern Ins. Co.*²⁸ If a corporation, upon an issue of its stock, promises to refund the money paid therefor unless it changes its place of business, and it fails to change its place of business, the stockholder may, "where no rights of creditors are involved," on tender of the stock, recover the money paid therefor.

The American law with respect to the purchase by a corporation of shares of its own stock is in an unsatisfactory condition.

At first blush, it may seem that if a corporation contracts to purchase shares of its own stock, and particularly if it makes this con-

²⁷ 220 S. W. (Tex. Civ. App.) 203 (1920). ²⁸ 176 N. W. (Minn.) 484 (1920).

tract at the time it issues the stock, it ought of course to be liable on its contract. But this overlooks or overrides the fact that the stockholder and the corporation are not the only legal units to be considered. The creditors of the corporation must be considered, and this includes future creditors as well as present creditors.

Take the ordinary case of a corporation which is required to put a par value on its shares, to obtain payment, and to make a public record of the number of shares which it has issued. Such a corporation then has a specified amount of capital, and the legislature intended that this capital should be a margin of safety for creditors. To say that this capital is a trust fund for creditors is, perhaps, to make use of a confusing, and therefore an unhappy, phrase. But the important truth is that the corporation in dealing with its capital has not the same freedom of action that a solvent individual would have in dealing with his assets; it must, in obedience to the legislative intent, consider its creditors, present and future, in dealing with the assets which constitute its capital.

Most courts would concede that it was an elementary proposition of corporation law that this capital must not be returned to its stockholders (except in liquidation).

A solvent corporation may not pay dividends out of capital. It would make no difference if the corporation had expressly agreed to pay specified dividends when it issued its stock. Such a contract would be an unauthorized contract and unenforceable. Now a transfer of capital to one of the stockholders for a surrender of his stock has precisely the same effect upon creditors as a transfer of that amount of capital to all the stockholders by the payment of a dividend.

The objection to a purchase by a corporation of its shares out of capital may, perhaps, be phrased by saying that it is contrary to the legislative intent that the corporation should effect an unannounced reduction of its announced capital stock. But it is submitted that the preferable phrasing is that it is contrary to the legislative intent that the corporation should return any part of its capital to its stockholders or to any of them, except in liquidation.

May a corporation, then, never properly purchase shares of its own stock? There would seem to be no occasion for a sweeping rule to that effect, and a purchase would be proper under any of the following circumstances: (1) if the purchase were made from sur-

plus, and the stock carried no liabilities; (2) if the corporation were solvent, and it had statutory permission to reduce its capital stock, and the court, as a condition precedent to enforcing the contract, required the corporation to avail itself of this statutory permission so that the purchase price should be in fact paid out of a surplus which emerges through the reduction of the capital stock; (3) if the corporation were solvent, and were in liquidation so that the possibility of harm to future creditors might safely be dismissed as negligible. The leading case of *Dupee v. Boston Water Power Co.*²⁹ may be explained and sustained on this ground.

But the fact that the corporation intends and expects to reissue the stock, and so replace the assets now transferred to a stockholder, should not be enough to justify the purchase. *Non constat* that the expectation will be realized; if it is not, the creditors will find in the corporate treasury not assets but a piece of paper worth nothing to them.

It is submitted that the consideration of the problem by the court in the principal case is inadequate and unconvincing. Rights of creditors are necessarily involved in any return of capital to stockholders, even when that return is made pursuant to a contract, if the consideration given by the stockholder is simply a surrender of his stock.

*Booth v. Union Fibre Co.*³⁰ A corporation promised to redeem its preferred stock at a specified price upon a specified date. At such date its liabilities exceeded its assets. Held, that, although the corporation was not in liquidation and no creditor had asked relief, the holder of preferred stock was not entitled to the redemption of his stock. The necessary effect of a redemption would be to imperil the rights of creditors.

*Johnson v. Canfield Surgart Co.*³¹ Corporate assets were paid to stockholders to such an extent that it became insolvent, and the public had no notice of the fact. The existing creditors were paid but only by creating other creditors in their place. The court held that the stockholders must refund. This is a development of the Illinois law a step beyond the doctrine of *Clapp v. Peterson*.³²

²⁹ 114 Mass. 37 (1873).

³¹ 292 Ill. 101, 126 N. E. 608 (1920).

³⁰ 171 N. W. (Minn.) 307 (1919).

³² 104 Ill. 26 (1882).

DIRECTORS AND OFFICERS

*Farwell v. Pyle-National Co.*³³ A corporation acquired a license to manufacture and sell certain patented articles, and obligated itself to pay therefor a certain sum in cash, plus royalties on a specified basis. A director of the corporation purchased from the licensors an assignment of all their rights. This purchase was made for a consideration less than the actual value of the rights assigned, the director had acquired knowledge of the value by reason of his position, and the corporation was financially able to make the purchase itself at the time the director made the purchase. Held, that the benefit of the purchase belonged in equity to the corporation (subject to reimbursement of the director for the amount paid).

There is no rule that a director may never purchase from third persons the obligations of the corporation for his own account. But he must not compete with the corporation in the purchase of its obligations. And, if corporate obligations are for sale, it is the duty of the director to see to it that the corporation has the first opportunity to buy, if it is financially able to buy. It would seem to be sound to require a director, whenever he seeks to take advantage of the purchase for his own account of a corporate obligation, to prove that at the time of the purchase the corporation was either unwilling or unable to make the purchase itself.

*Keely v. Black.*³⁴ The Government wished telephonic service under the control of the Bell system provided to Camp Dix. The camp was in the territory of the Farmers Telephone Company, and an arrangement accomplishing what the Government desired was made between the Farmers Telephone Company, and the New York Telephone Company which was one of the Bell Companies. A part of this arrangement was that the president of the Farmers Telephone Company should acquire and turn over to the New York Telephone Company a controlling interest in the stock of the Farmers Telephone Company, and he was to receive a stated sum over the par of the stock for so doing. He owned some stock himself, he acquired at par all but eighty shares of the remainder, turned over his own stock and the stock so acquired, and received the agreed

³³ 289 Ill. 157, 124 N. E. 449 (1919).

³⁴ 90 N. J. Eq. 439, 111 Atl. 22 (1919).

payment. The lower court held that he must pay to the Farmers Telephone Company the amount received by him in excess of the par value. The decree of the lower court was reversed, the court holding that he had not made a gain out of a sale of corporate property. "He had a perfect right, as an individual, to purchase the stock from the holders thereof at such prices as he and they should agree upon, and after buying it he was entitled to sell it again for such price as he and a purchaser should agree on." The court moreover noted that the bulk of the benefit of any such payment by him to the Farmers Telephone Company as the plaintiff sought would inure to the benefit of the Bell Company, as the owner of the bulk of the stock, and that such a result would be most inequitable.

If the whole arrangement involved two inseparable transactions, one a sale of the corporate property at less than its value to the Bell Company, and the other a payment to the president for the stock for more than its value, then the president would indirectly have benefited by a sale of the corporate property, and ought to disgorge his profit. But the upper court was satisfied that the transfer of the corporate property was on fair terms. "It is practically conceded by the complainant that it was a financial benefit to the Farmers Telephone Company to be released from the obligation of installing and operating this service."

*Southern California Home Builders' v. Young.*³⁵ The court, construing a statute, held that if directors improperly declare and pay dividends, the corporation may recover from them the amount so paid, even if, without such recovery, the corporation is able to pay all creditors.³⁶

*Crohon & Roden Co., Ltd. v. Rudnick.*³⁷ It was alleged in the declaration that a corporation had in its possession hides belonging to the plaintiff, and that it agreed that the identical proceeds from the sale of such hides should be turned immediately over to the plaintiff; that the defendant was treasurer of such corporation and well knew the terms of the contract between the corporation and the plaintiff, and agreed that the identical checks received from any sales should be turned over to the plaintiff; that the defendant

³⁵ 188 Pac. (Cal. App.) 586 (1920).

³⁶ See *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454 (1903).

³⁷ 232 Mass. 544, 122 N. E. 741 (1919).

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 during the time he was treasurer received such checks, and "negligently and carelessly disregarding the rights of the plaintiff and his own promises . . . allowed said checks to be used for other purposes." Held, on demurrer, that the declaration stated no cause of action in contract, but did state a cause of action for the conversion of the checks.³⁸

Leffert v. Jackman.³⁹ The Stock Corporation Law required the consent of the holders of not less than two-thirds of the stock to a mortgage of the corporate property. The officers of the corporation assumed in its name to give a mortgage on corporate property without procuring such consent. Held, that an assignee of the corporation for the benefit of creditors is entitled to have the alleged mortgage adjudged void.⁴⁰

RIGHTS OF MINORITY STOCKHOLDERS

Otis-Hidden Co. v. Scheirich.⁴¹ At common law a stockholder's right to inspect the books of the corporation covers all books and records, including correspondence concerning the internal affairs of the company between its nonresident president (who was the majority stockholder) and the manager.

Shea v. Parker.⁴² A stockbroker purchased one share of stock in a Massachusetts corporation. He then asked to see the stock and transfer books, and for opportunity to take copies and abstracts therefrom. He desired to use the information to be so obtained in his business as a stockbroker to enable him when inquiries were made by prospective purchasers to ascertain if any of the shares were for sale, and in "broadening the market" for the stock. The court held that he was entitled to obtain such information even for such a purpose under the terms of § 30, c. 437, of the Acts of 1903.

"It may be presumed that before enacting the statute the Legislature considered the possibility that information thus obtained might as in the case at bar have a commercial value distinct and quite apart from the

³⁸ See, *accord*, *Peruvian Guano Corporation v. Thompson*, 99 S. E. (S. C.) 808 (1919).

³⁹ 227 N. Y. 310, 125 N. E. 446 (1919).

⁴⁰ Cf. *Royal British Bank v. Turquand*, 6 E. & B. 327 (1856); *Louisville Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552 (1899).

⁴¹ 219 S. W. (Ky.) 191 (1920).

⁴² 234 Mass. 592, 126 N. E. 47 (1920).

stockholder's interest as a corporate member, and undoubtedly could have made the right of examination dependent upon the motive actuating the stockholder. It has not however done so. The words conferring the right are unlimited, and the statute is mandatory."

Southern Pacific Co. v. Bogert.⁴³ The Southern Pacific Company controlled, through a subsidiary, the majority of the stock of the Houston Railway Company. Pursuant to a reorganization agreement, mortgages were foreclosed, the properties were acquired by the Houston Railroad Company; the old company's bonds were exchanged for bonds of the new; the unsecured creditors were wiped out; the minority stockholders of the old company were given the right to acquire stock of the new company on the payment of \$71.40 a share (said to be required to satisfy the floating debt and reorganization expenses and charges), which was a prohibitive assessment, while the Southern Pacific was enabled to acquire stock of the new company upon payment of an assessment of \$26 per share (said to be the amount required to satisfy reorganization expenses and charges) and did acquire all this stock upon paying such assessment. The court required the Southern Pacific Company to deliver to minority stockholders a proper portion of the stock so received by it, with a sum equivalent to the dividends received therefrom, and interest thereon, upon their payment of the \$26 a share and interest thereon.

Of course those who hold or control the majority of the stock of a corporation must not obtain an advantage out of any reorganization which is not open on equal terms to the holders of the minority stock. Although there had been much litigation over this reorganization, the disposition of the case called only for an application of this elementary principle, and this is so recognized by the court. The stock was received by the Southern Pacific Company in 1891, and this suit was not brought until 1913; but in the interval the plaintiffs, or some of them, had sought other relief from the reorganization, and the court holds that they are not barred by laches. "Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence and the defendant was not prejudiced by the delay."

The court sustained one contention of the Southern Pacific Company. That corporation showed that it controlled, through a sub-

⁴³ 250 U. S. 483 (1919).

sidary, a large amount of the unsecured indebtedness of the old company, and the court, in effect, made an application of the principle of *Northern Pacific Ry. Co. v. Boyd*,⁴⁴ by requiring that some provision (the exact nature of which was to be determined by the lower court) should be made for giving priority over the stock of the new company to so much of the unsecured indebtedness of the old company as was controlled by the Southern Pacific Company. (The other holders of the unsecured indebtedness were not before the court.)

*Brown v. British Wheel Co., Ltd.*⁴⁵ A company was in great need of further capital. The majority, holding ninety-eight per cent of the shares, were willing to provide this if they could buy up the two per cent minority. The Companies Act provided that "a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the Articles." The majority proposed to pass an article giving the holders of ninety per cent of the stock power to require any other holder to transfer his shares to their nominee at a fair price (there was no question but that the majority were willing to pay a fair price). The court restrained the company from adopting the article. The court conceded that there would have been no objection to an original article in the form of the proposed article, but held that the provision permitting alterations must be interpreted to apply only to legal alterations, and that this alteration was illegal because not within the ordinary principles of justice and not for the benefit of the company as a whole.

A similar decision was made in *Dafen Tinplate Co. v. Llanelly Steel Co.*⁴⁶

RIGHT OF A MINORITY STOCKHOLDER, SUING IN A REPRESENTATIVE CAPACITY, TO CONTROL THE LITIGATION

Bernheim v. Wallace.⁴⁷ In *Bernheim v. Louisville Property Co.*,⁴⁸ the plaintiff sued as a minority stockholder of the Louisville Property

⁴⁴ 228 U. S. 482 (1913).

⁴⁵ [1919] 1 Ch. 290.

⁴⁶ [1920] 2 Ch. 124. See the discussion of the rights of the majority and minority in 30 HARV. L. REV. 335.

⁴⁷ 186 Ky. 459, 217 S. W. 1916 (1920). ⁴⁸ 185 Ky. 63, 214 S. W. 801 (1919).

Company alleging mismanagement of its affairs by its directors, asking for the cancellation of certain deeds, an accounting from the directors and a majority stockholder, the appointment of a receiver and a sale of the corporate assets. The court held that the deeds should be canceled, and an accounting made, that there had been such mismanagement that directors elected or to be elected by the majority stockholder ought not to continue in the control of the affairs of the corporation, and said that it was "necessary for the court to assume control of the company's affairs through a receiver," and that "the properties should be sold by order of court" and the proceeds distributed to those entitled. The cause was remanded for an accounting and all proceedings necessary to a final settlement of the affairs of the corporation not inconsistent with the opinion of the court. Thereafter by agreement of all parties of record in the suit all the property of said corporation was transferred to a trust company, upon trust to sell and distribute the proceeds, and the parties asked the lower court to enter a judgment under which certain deeds of which the plaintiff had complained should be canceled, but which otherwise (with unimportant exceptions) contained no provisions for obtaining such other relief — including an accounting, the appointment of a receiver and a sale of the corporate assets — as the plaintiff had been adjudged by the higher court to be entitled to. The lower court refused to make such disposition of the case, and the petitioner asked the higher court to issue a writ of mandamus pursuant to which it would be the duty of the lower court to make such disposition of the case. The higher court issued the writ.

The plaintiff had sued in behalf of himself and of all other minority stockholders, and had been successful in his suit. The lower court was of opinion that, as the rights of the persons interested had been settled by the higher court, and as the plaintiff was suing only in a representative capacity, there should be a decree entered in conformity with the opinion of the upper court. The upper court recognized that, after the rights of the minority stockholders had been settled by its opinion, the plaintiff could make no settlement that would be prejudicial to the interest of other minority stockholders, or that would take from them any of the rights to which they had been adjudged entitled. But the upper court held that the rendering of the opinion did not produce a situation where the only

permissible course was to have such a decree entered in the lower court as the lower court would have entered pursuant to such opinion, if the parties themselves had not agreed upon some other disposition of the case; and that it was the duty of the lower court to dispose of the case, as the parties agreed, if the rights of the minority stockholders would thereby be as fully protected as under such a decree. And the court was of opinion that such protection was afforded under the plan agreed upon by the parties.

The trust company, the court said, could liquidate the affairs of the corporation more advantageously and with less cost to the parties interested than a receiver.

Under the plan agreed upon by the parties, the plaintiff's suit was to be dismissed without prejudice in so far as it sought an accounting and the recovery of money from certain defendants. But the court said that this feature of the plan did not vitiate it. "All of its property" had been conveyed by the Louisville Property Company to the trust company, and the court said this would include, without express mention, such claims, if any, as it had against the said defendants, that a dismissal of Bernheim's suit without prejudice left such claims unaffected, and that the trust company had the same right and duty to assert and recover these claims as a receiver would have had, and would be held to a strict accountability with respect thereto. The soundness of this portion of the opinion, and therefore of the decision, is questionable. Of course after the rendering of this opinion, the trust company would probably protect itself by asserting the claims, but, without such a statement from the court, the trust company might, as a practical matter, have thought its primary, if not its only, duty under the deed was to sell the real estate and distribute the proceeds. The agreed plan threw into the dim background the claims of the corporation against its directors and majority stockholder and it is only by benevolent assumption that one suppresses the suspicion that there was intent so to do. A sounder rule would seem to be that if a plaintiff, suing in a representative capacity, is adjudged entitled to certain relief, he may make no settlement of the case unless the plan of settlement, unaided by an explanatory exposition of its effect by a court, will clearly and in all respects protect the interests of those he represents as fully as would a decree entered in conformity with the opinion of the higher court without reference to any agreement between the parties.

RIGHTS OF HOLDERS OF PREFERRED STOCK

*Michael v. Cayey-Caguas Tobacco Co.*⁴⁹ A corporation, having eight per cent preferred stock and common stock, was dissolved in 1918. There had been no profits available for dividends since 1912, and no dividends had been paid since 1912. The assets were sufficient to pay the creditors, to pay the holders of preferred stock the par value of their stock, and to leave a balance which was less than the par value of the outstanding common stock. The question was whether the holders of the common stock were entitled to the whole of this balance, or whether the holders of the preferred stock were entitled from this balance to a sum equal to eight per cent per annum of the par value of the preferred stock from the date of the last dividend payment in 1912 to the date of payment. The court held that the holders of the common stock were entitled to the whole of the balance.

The provisions governing the preferred stock stated that "the holders of preferred stock shall be entitled to receive, when and as declared, from the surplus or net profits of the company, a fixed yearly cumulative dividend of, but not exceeding, eight per centum per annum. . . . In case of liquidation or dissolution of the company prior to redemption of the preferred stock, the surplus assets and funds of the company shall be applied, first, to the payment in full [of the] par value of said preferred shares, and all accrued and unpaid dividends thereon, and after such payments, the remainder of the surplus assets and funds of the company shall belong to, and be divided pro rata among, the holders of the shares of common stock."

Under the Stock Corporation Law, no dividends could be paid except from the surplus profits arising from the business. The assets were less than debts and the par value of the preferred and the common stock, therefore there was no fund available for the payment of dividends. The effect of the provision for cumulative dividends was restricted by the court to giving a charge upon subsequent profits. The thought of the court was that no dividend accrues until there is a fund available for its payment.

The holders of the preferred stock probably expected, in case of a dissolution, to receive (before any payment was made to common

⁴⁹ 190 App. Div. 618, 180 N. Y. Supp. 532 (1920).

stockholders), in addition to their capital, a sum of money equal to dividends at the prescribed rate over the period when no such dividends had been paid. Strictly, such a payment would be interest, and not dividends.

The decision shows the need of carefully wording the provisions which are intended to assure preferred stockholders of a claim, superior to any rights of common stockholders, to the repayment of their capital, and the ultimate payment of an income therefrom at a stated annual rate. Although it is *ultra vires* for a corporation to guarantee dividends, there would seem to be no objection to an agreement by a corporation that, in case of dissolution, it will pay a stipulated rate of interest to preferred stockholders in lieu of unearned dividends before any payment is made to common stockholders.

*In re Fraser & Chalmers, Ltd.*⁵⁰ On the issue of preference shares it was provided that in the event of a winding up the holders "shall have a preferential right as regards repayment of capital—and accordingly shall be entitled to have the surplus assets applied, First, in paying off the capital paid up on the preference shares held by them respectively, and secondly, in paying off the arrears (if any) of the preferential dividend aforesaid—before any return or payment of capital is made to the holders of the other shares."⁵¹

In a winding up, it turned out that, after payments of all liabilities, preference capital and arrears of preference dividends, and ordinary capital, there was a surplus. The holders of the preference shares were held to be entitled to participate in the distribution of this surplus.

TRANSFER OF SHARES

*Crosby v. Simpson.*⁵² The owner of a stock certificate signed the transfer in blank on the back, with the words "as collateral." "The plaintiff's ownership, shown on the face of the certificate, coupled with his signature to the transfer in blank preceded by the words 'as collateral' was sufficient notice to all persons that the transfer was conditional."

⁵⁰ [1919] 2 Ch. 114.

⁵² 234 Mass. 568, 125 N. E. 616 (1920).

⁵¹ *Ibid.*, 117.

*Boston Tow Boat Co. v. Medford National Bank.*⁵³ In 1902 a certificate for shares of stock in the Boston Tow Boat Company standing in the name of Susan M. Stuart, with what purported to be a blank transfer and power of attorney signed by her, were pledged with the Medford National Bank, as security for notes which purported to be signed by her. In compliance with an order which purported to be signed by Mrs. Stuart, the bank caused the shares to be sold, and the certificate and the transfer and power of attorney were presented to the Boston Tow Boat Company, were canceled, and new certificates were issued in the names of the purchasers. The alleged signatures were forgeries, and in 1902 Mrs. Stuart brought suit against the Boston Tow Boat Company, and a decree was ultimately entered in her favor for \$6000, and this amount was paid in 1915. The Medford National Bank had been notified to defend the Stuart suit. A receiver of the Boston Tow Boat Company now seeks to compel a trust company which had succeeded to the liabilities of the Medford National Bank to pay the money it paid to Mrs. Stuart, and the expenses incurred in defending her suit. The court held that the receiver was barred by the Statute of Limitations. Its reasoning was that one who surrenders a share certificate bearing a forged indorsement, and obtains a new certificate in ignorance of the forgery, is liable upon an implied warranty of the genuineness of the signature; but that the liability is upon an implied warranty, and not upon an implied contract of indemnification (the court reasoned that such an indefinite and protracted contract of indemnity may not properly be implied from the innocent presentation of the forged transfer), and that the warranty was broken as soon as made, in 1902. The court notes that the breach was discovered by the corporation in 1902 when Mrs. Stuart brought suit.

There is a similar decision in *Pennsylvania Lehigh Coal Co. v. Blakeslee*.⁵⁴ But in *Sheffield Corporation v. Barclay*,⁵⁵ the forged transfer was presented in 1893, the forger died in 1897 and the forgery was then discovered,⁵⁶ but the report does not state whether the corporation was then informed of the discovery. In 1900, the owner sued the corporation, and recovered, and the corporation then sued the person who had presented the forged transfer, and was allowed to recover. Lord Davey said:⁵⁷

⁵³ 232 Mass. 38, 121 N. E. 491 (1919).

⁵⁵ [1903] 1 K. B. 1; [1905] A. C. 392.

⁵⁷ [1905] A. C. 392, 404.

⁵⁴ 189 Pa. 13, 41 Atl. 992 (1899).

⁵⁶ See [1903] 1 K. B. 3.

"I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title, but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires we should so hold."

DISSOLUTION

*State v. Gamble-Robinson Fruit Co.*⁵⁸ A civil remedy in the nature of *quo warranto* to procure the annulment of corporate franchises for an abuse of its powers, such abuse consisting in the doing of acts which are by statute made criminal, is not conditioned on a successful criminal prosecution under such statute.

EFFECT OF REORGANIZATION UPON CONTRACT RIGHTS

*Kansas City Soap Co. v. Illinois Cudahy Packing Co.*⁵⁹ The plaintiff and defendant contracted for the sale of goods by the defendant to the plaintiff on credit. The plaintiff thereafter assumed to convey all its property to a new corporation and the successor corporation undertook to discharge its debts. The plaintiff thereafter tendered the contract price of the goods to the defendant, who refused to deliver. Held, that the contract right could not be assigned, that it continued in the plaintiff despite the attempt to convey all its property, and that the plaintiff had not by transfer of its property so disabled itself from performance as to discharge the defendant.

TAXATION

*De Ganay v. Lederer.*⁶⁰ A citizen of France owned shares of stock in corporations organized in the United States. The certificates were in the hands of an agent in the United States, who had power to collect the income and to sell. Held, that the shares were "property . . . owned in the United States" by a person residing elsewhere, within the meaning of the federal income tax law of 1913.⁶¹

⁵⁸ 176 N. W. (N. D.) 103 (1919).

⁵⁹ 265 Fed. 108 (1920).

⁶⁰ 250 U. S. 376 (1919).

⁶¹ Cf. *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432 (1913).

Wilder v. Tax Commissioner.⁶² A corporation was in arrears to the extent of thirty-three and one-half per cent in declaring and paying the six per cent cumulative dividends provided for by the terms of its preferred stock. It, in form, declared a dividend upon such preferred stock, payable seven and one-half per cent in cash, fourteen per cent in preferred stock, and twelve per cent in common stock. The plaintiff accepted such cash and stocks. The court held that the value of the stocks so received was taxable, under a statute taxing "dividends on shares in all corporations."

But by chapter 352 of the Acts of 1920, the Massachusetts legislature has now provided that dividends "other than stock dividends paid in new stock of the company issuing the same" shall be taxable.

Osgood v. Tax Commissioner.⁶³ A tax was assessable upon gain "from purchases or sales of intangible personal property whether or not the taxpayer is engaged in the business of dealing in such property." A corporation issued both preferred and common stock. The directors caused another corporation to be organized, and all the holders of stock, preferred and common, of the first corporation exchanged their stock for the common stock of the second corporation. The first corporation then transferred all its assets to the second, which continued the business through the same officers and without outward indication of change. The petitioner exchanged some preferred and some common stock of the first corporation for common stock in the second, and was held taxable on the difference between the value of the stock given in exchange on January 1, 1916 (a date fixed by the statute in question) and the value of the stock received in exchange.

There was a change in the taxpayer's rights, not only in legal form but also in business substance.

"Although the property owned by the new corporation was identical with that owned by the old corporation, it nevertheless plainly was a different legal entity. . . . The stock obtained by the petitioner through exchange was different in kind and not merely in degree from that which she owned before. It was not the same corporation and the stock itself was different in nature. A change of investment had been made both in name and in essence."⁶⁴

⁶² 234 Mass. 470, 125 N. E. 689 (1920). ⁶³ 235 Mass. 88, 126 N. E. 371 (1920).

⁶⁴ *Ibid.*, 91.

As to the taxation of a business trust, see *Crocker v. Malley*, *supra*.⁶⁵

As to the taxation of stock dividends as income by the federal government, see the article in 33 HARVARD LAW REVIEW, 885, on "Taxability of Stock Dividends as Income."

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⁶⁵ 249 U. S. 223 (1919), *supra*, note 1.

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PREFERENCES UNDER THE BANKRUPTCY ACT — THE POSITION TAKEN BY THE FEDERAL COURTS. — In the recent case of *Grief Bros. v. Mullinix*¹ it was made an alternative ground of decision that a purchaser who has partly paid in advance for the year's product of a mill, the owner of which later goes into bankruptcy, has an equitable interest in the product on hand at the time of the bankruptcy, superior to the claims of the trustee in bankruptcy or other creditors. Although such a view is so far supported by other federal cases² that it may almost be said to have become the rule of those courts, yet it appears to be in conflict with the federal Bankruptcy Act, as well as with the principles laid down in other cases by the same courts. The difficulty consists in vesting in the purchaser any property interest within four months prior to the bankruptcy, without thereby effecting a preference under the Bankruptcy Act,³ always assuming that the purchaser can be charged with knowl-

¹ 45 A. B. R. 265. For a statement of the facts in this case, see RECENT CASES, p. 325, *infra*.

² *McNamara v. Home Land & Cattle Co.*, 105 Fed. 202 (1900); *Hurley v. A. T. & S. Ry.*, 213 U. S. 126 (1909); *Sieg v. Greene*, 225 Fed. 955 (1915). Similar views have been held in other jurisdictions. *Parker v. Garrison*, 61 Ill. 250 (1871); *Petrolia Mfg. Co. v. Jenkins*, 29 App. Div. 403 (1898); *Langton v. Waring*, 18 C. B. (N. S.) 315 (1865). See also *Lindsay v. Jackson*, 2 Paige (N. Y.), 581 (1831); *Rau v. Seidenberg*, 53 Misc. (N. Y.) 386 (1907); *Young v. Mathews*, L. R. 2 C. P. 127 (1866).

³ FEDERAL BANKRUPTCY ACT, § 60 a. As to the meaning of "creditor" in that section, see § 1, par. 9, to the effect that a creditor is one owning a provable claim, and § 63 a, which includes among provable claims any claim founded upon an open account, or upon a contract express or implied.

edge of the bankrupt's financial condition. For it must be conceded that a transfer of the property itself within four months prior to the bankruptcy, in fulfilment of a pre-existing contract obligation, does, in general, constitute a preference under the act.⁴ In other words, the purchaser, to prevail against the trustee, must show that, prior to the bankruptcy, he had a property interest in the thing claimed. The problem is to find how and when such an interest could have accrued.

It may be argued that an equitable property interest became vested in the purchaser as soon as the goods came into existence, on the ground that the contract had become one of the kind that equity will enforce specifically.⁵ This proposition is of itself open to dispute. For it is clear that, whatever jurisdiction the federal courts may possess, they, like other courts, do not ordinarily specifically enforce contracts for the sale of chattels,⁶ and the use of the added circumstance of insolvency as a ground for equitable relief is a matter not yet agreed upon.⁷ But even conceding the above theory to be sound, the main difficulty has yet to be encountered. For surely such an equitable interest, whenever it may be deemed to have its inception,⁸ cannot attach to the actual goods until those goods exist. It follows that if the equitable interest is inchoate, waiting to attach, then by making such goods within four months prior to the bankruptcy the bankrupt is transferring a property interest and thereby committing a preference.⁹

There seems to be only one way of escape from the above conclusions. If the idea of an inchoate and suspended equity be abandoned, it may be said that after the goods are in existence the law itself transfers to the purchaser an equitable interest therein,¹⁰ and that there is thus no

⁴ See REMINGTON, BANKRUPTCY, 2 ed., § 1316.

⁵ In support of such an equitable ownership in chattels as a consequence of a contract specifically enforceable, see *Currie v. White*, 45 N. Y. 822 (1871); *Black v. Homersham*, L. R. 4 Ex. Div. 24 (1878).

⁶ *Sugar Beets Product Co. v. Refining Co.*, 161 Fed. 215 (1908); *Lehman Co. v. Island City Pickle Co.*, 208 Fed. 1014 (1913).

⁷ It is said that although insolvency is never a ground for equity jurisdiction, yet it may be a circumstance inducing equity to exercise a jurisdiction it already has. See *Heilman v. Union Canal Co.*, 37 Pa. 100, 104 (1860). And many cases reach a similar result. Note 2, *supra*; *Clark v. Flint*, 22 Pick. (Mass.) 231 (1839). See *Williams v. Carpenter*, 14 Colo. 477, 24 Pac. 558 (1890).

But it may well be objected that while insolvency may render the plaintiff's remedy at law still more inadequate, at the same time it makes it unfair that the insolvent's assets be reduced in order that one creditor may be satisfied in full. And this view, that insolvency is rather a ground upon which equity will refrain from exercising its jurisdiction, is not without support. *Insurance Co. v. Olmsted*, 33 Conn. 476 (1866); *Chafee v. Sprague*, 16 R. I. 189, 13 Atl. 121 (1888); *Gillett v. Warren*, 10 N. M. 523, 62 Pac. 975 (1900). See *Belding Hall Mfg. Co. v. Lumber Co.*, 175 Fed. 335, 338 (1909).

⁸ In the principal case the court appears to think that the plaintiff's equitable interest arose at the time the contract was made. 45 A. B. R. 265, 274. Since it is impossible to have a property interest in property that does not exist, this can only mean that the plaintiff had an inchoate or suspended interest.

⁹ On this theory the preference would exist only as to the product of the four months prior to the bankruptcy, not as to the product of the two months immediately following the contract. There is no difficulty in such a separation. *In re Cobb*, 96 Fed. 821 (1899); *In re Dismal Swamp Co.*, 135 Fed. 415 (1905).

¹⁰ This, in substance, is the effect of such phrases as "equity will impose a constructive trust," or of any device by which the court is represented as creating a property interest where there was none before.

"transfer by the debtor."¹¹ This construction is somewhat supported by two cases in the Supreme Court, holding that under a statute giving a mortgagee of future goods no lien until he takes possession, it was not a preference for him to take possession within four months of the bankruptcy of his debtor.¹² These cases seem to permit a property interest to pass from debtor to creditor so long as it is not the debtor himself that effects the transfer. At its best the theory is slightly artificial. It is also open to the objection that, in situations such as that presented by the principal case, it represents equity as acting in a manner expressly forbidden to the debtor to achieve a result that the law declares to be not just but unjust.¹³ Such a theory is not a proper basis for a succession of decisions, nor is it even made use of by the courts.

Assuming, then, that a decision such as that in the principal case can only be explained as an exception to the principles of the Bankruptcy Act, it remains to inquire whether there are similar exceptions. There seems to be at least one. If a broker, who has converted stock purchased at the order of a customer, later acquires similar stock and shortly thereafter becomes a bankrupt, it is held that the customer has an equitable interest in the stock so acquired superior to the right of the trustee in bankruptcy.¹⁴ And the rule is extended to allow each of several customers a ratable share in such stock when the amount is insufficient for all.¹⁵ These decisions are open to precisely the same objection that has been taken to the principal case. One reason assigned in their support is that stock is fungible.¹⁶ But money is at least as fungible as stock, and it is settled that a *cestui que trust* gets no property interest in money subsequently acquired by a defaulting trustee,¹⁷ even when such

¹¹ See FEDERAL BANKRUPTCY ACT, § 60 a.

¹² *Thompson v. Fairbanks*, 196 U. S. 516 (1905); *Humphrey v. Tatman*, 198 U. S. 91 (1905).

¹³ The argument is frequently made for the purchaser that he is a "specific creditor," that he did not trust the bankrupt generally but looked to the goods for repayment, and that it would thus be unjust to allow general creditors any share in the money advanced as payment. In the first place, such a theory may or may not be true in fact in any particular case. It is possible that at the time of the advance the purchaser never considered the possibility of the bankruptcy of the vendor. In the second place, it is hard to say that in the principal case the purchaser trusted to any goods, because at the time of the payment there were no goods. In the third place, the theory seems somewhat to assume the question in dispute. For if it were law that a purchaser acquired no superior right in the goods, the likelihood of his trusting to such a right would be considerably reduced. In the fourth place, whatever policy may lie behind fulfilling the hopes of one purchaser, there is surely a stronger policy in securing an equal and substantial justice for all the creditors.

On the other hand, to see that the result of the principal case is unjust, it is only necessary to consider the broadest principles of bankruptcy, which declare that the fulfilment of an obligation to one creditor at the expense of the others is precisely what is to be avoided. *Insurance Co. v. Olmsted*, *supra*; *Chafee v. Sprague*, *supra*. See *Belding Hall Mfg. Co. v. Lumber Co.*, *supra*, 338.

¹⁴ *Gorman v. Littlefield*, 229 U. S. 19 (1913). See *Richardson v. Shaw*, 209 U. S. 365 (1908).

¹⁵ *Duel v. Hollins*, 241 U. S. 523 (1915). This decision is important as showing that the theory cannot really be based on an intent of the broker to make restitution. To presume such an intent where it obviously did not exist, amounts to holding that the intent is not necessary.

¹⁶ See *Gorman v. Littlefield*, *supra*, 23, 24; *Duel v. Hollins*, *supra*, 527, 528.

¹⁷ *Board of Commissioners v. Strawn*, 157 Fed. 49 (1907); *American Can Co. v. Williams*, 178 Fed. 420 (1910).

money is so far identified as to be placed in the same general account as the trust fund.¹⁸ Thus the stock cases can hardly rest upon the ground that stock is fungible.

Upon a review of the cases it is hard to avoid the conclusion that in administering the Bankruptcy Act the federal courts have in two classes of cases violated at least the spirit if not the letter of that act. Furthermore, in at least one case a federal court has shown that it is not unfamiliar with the true construction of the act, namely, that a transfer, within four months prior to bankruptcy, of a property interest by a debtor to a creditor who knows the financial condition of the debtor, is a preference.¹⁹

LIABILITY OF A PHYSICIAN FOR REVEALING OUT OF COURT HIS PATIENT'S CONFIDENCES. — It is curious that not until 1920 should a court of last resort¹ have been called on to determine a physician's liability for voluntarily revealing out of court a patient's confidences. In *Simonsen v. Swenson*² the Supreme Court of Nebraska held that a physician who disclosed to the landlady of his patient the fact that the patient was, on his diagnosis, suffering from syphilis, was not liable to the patient in damages for such a revelation. The significance of this decision has not failed to stir the medical world.³

Heretofore the tendency in the United States had been to seal the doctor's lips — to seal them at a time when they might justifiably⁴ have been open. By statutes,⁵ widely adopted since 1828,⁶ a patient's communications to his doctor (like a client's to his attorney) have been declared inadmissible as evidence. The sponsors of such statutes have sought to support this doctrine of privilege⁷ by reasoning which really

¹⁸ *Board of Commissioners v. Strawn*, *supra*; *Mercantile Trust Co. v. St. Louis Ry.*, 90 Fed. 485 (1900); *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332 (1910).

¹⁹ *Clarke v. Rogers*, 183 Fed. 518 (1910). See also the dissenting opinion in *Duel v. Hollins*, *supra*, 530. The English cases cannot be taken as authority in this matter, for by the English law a transfer is not preferential unless the controlling motive was an intent to prefer. *Ex parte Taylor*, 18 Q. B. D. 295 (1886); *Sharp v. Jackson*, [1899] A. C. 419; *Ex parte Dyer*, [1901] Q. B. 710.

¹ The question has apparently never been squarely presented in England. See "Medical Men and Professional Secrecy," 79 JUST. P. 3. And it is no less novel in the United States. See *Simonsen v. Swenson*, 177 N. W. 831 (1920).

² 177 N. W. 831 (1920). See RECENT CASES, p. 334, *infra*.

³ See 75 JOUR. AM. MED. ASSOC. 1207.

⁴ In practice, the privilege has not proved an unmitigated blessing, and has been severely criticized as a means of cloaking fraud. See 4 WIGMORE, EVIDENCE, § 2380; Albert Bach, "The Medico-Legal Aspect of Privileged Communications," 10 MEDICO-LEGAL JOUR. 33; 1 HAMILTON, SYSTEM OF LEGAL MEDICINE, 626.

⁵ At common law there was no privilege. See *The Duchess of Kingston's Trial*, 20 How. St. Tr. 355, 574 (1776). This has been deplored by occasional English dicta: Buller, J., in *Wilson v. Rastall*, 4 T. R. 753, 760 (1792); Brougham, L. C., in *Greenough v. Gaskell*, 1 My. & K. 98, 103, 39 Eng. Rep. 618, 620 (1833). But the law remains unchanged to-day in England, as it does in those American States which have not adopted the statutory innovation of privilege. *Banigan v. Banigan*, 26 R. I. 454, 59 Atl. 313 (1904).

⁶ In this year the privilege was first established by statute passed in New York. For a list of those states which have subsequently followed New York's lead, see 4 WIGMORE, EVIDENCE, § 2380.

⁷ See 3 COMMISSIONERS ON REVISION OF THE STATUTES OF NEW YORK, 737 (1836);

explains the doctor's general duty of non-disclosure. The reason, thus unhappily misapplied, is: "if the lips of the physician are not sealed, the patient may elect to deceive him rather than have his body cured at the expense of his liberty or reputation."⁸ To deny the merit of the privilege is not also to deny this reasoning. As a practical matter, it must be apparent that the social interest in free communication between the sick and their medical advisers will be fostered by the existence in the patient's mind of an assurance that his doctor is obliged not to betray what he professionally learns.

Lord Mansfield declared that the physician who voluntarily revealed out of court his patient's confidence "was guilty of a breach of honor and of great indiscretion."⁹ And there is an ethical consideration that such a practice must weaken the dignity and honor of the medical profession. Thus, in the case of *Simonson v. Swenson*, what is the doctor but the mere appanage of the hotel that hires him?¹⁰ By his betrayal of confidence he has destroyed his patient's trust and his own individuality.

These practical and ethical considerations have a legal counterpart. It has been suggested that this revelation by the doctor is a breach of a condition of secrecy implied in law, essential to the contract between physician and patient.¹¹ But need we resort to the fiction of an implied condition where the disclosure is, in fact, a clear breach of the duty arising out of the doctor's confidential relation to his patient?¹² In our law, when two men enter into a relation, duties arise. If the relation is one of inherent trust and confidence, the law gives effect to such duties, just as in the older period of equity and natural justice the chancellors infused morals into the law by requiring of fiduciaries a high degree of faith in the performance of their obligations not required by strict law. Here the duty, as even the court in *Simonsen v. Swenson* admits,¹³ is to preserve inviolate the patient's secret.

The existence of this duty has recently been fully acknowledged by the British Medical Association,¹⁴ and the duty itself is incorporated in the French Penal Code¹⁵ and in statutes of American states.¹⁶ The

3 WHARTON AND STILLÉ, MEDICAL JURISPRUDENCE, 4 ed., § 567. See also *Edington v. Insurance Co.*, 67 N. Y. 185, 194 (1871).

⁸ See COOLEY, LAW OF TORTS, 2 ed., 620.

⁹ See *The Duchess of Kingston's Trial*, *supra*, 574.

¹⁰ The defendant "acted as . . . hotel doctor when one was needed." See *Simonsen v. Swenson*, note 2, *supra*.

¹¹ See 64 JUST. P. 241, 242, and the reference therein to the holding in *AB v. CD*, *infra*.

¹² See the opinions of Lord Fullerton and Lord Ivory in *AB v. CD*, 14 Court of Sess. Ca. 177, 180 (1851). In *Smith v. Driscoll*, 94 Wash. 441, 162 Pac. 572 (1917), the court refused to discuss whether a cause of action lay in favor of a patient whose physician wrongfully divulged confidential communications: ". . . it will be assumed that for so palpable a wrong the law provides a remedy."

¹³ See note 2, *supra*, 832.

¹⁴ See a recent vote of this body quoted in 75 JOUR. AM. MED. ASSOC. 1438.

¹⁵ See CODE PÉNAL, art. 378. "*Les medecins . . . et toutes autres personnes depositaires, par état ou profession, des secrets qu'on leur confie, qui, hors le cas où la loi les oblige à se porter denonciateurs, auront révélé ces secrets, seront punis d'un emprisonnement, etc., etc. . . .*" For an example of the rigid enforcement of this provision, see the extraordinary case of Cass., 19 déc., 1885, Watelet.

¹⁶ 1913 NEB. REV. STAT., § 2721, provides that a doctor's license may be revoked for the "betrayal of a professional secret to the detriment of the patient." And see 1913 MICH. STAT., § 5110.

duty is absolute with regard to the physician. Yet there are clearly occasions when this duty must give way before the paramount interests of society. First, when, in the absence of the statutory privilege, the physician testifies as witness.¹⁷ The pursuit of justice may naturally abrogate any inferior duty. Second, when, in accordance with statutory enactment,¹⁸ he informs the properly constituted authority of his patient's disease.¹⁹ Here, the mandate of the legislature, growing from "the fundamental principle — *salus populi suprema lex*"²⁰ — is to be obeyed without question and without fear of liability. So well has statute kept pace with the progress of medicine that it is difficult to-day to imagine any contagion (seriously menacing many lives, if kept secret) which physicians are not required by law to report. But should a case arise which is not covered by statute, a report to proper authorities (or perhaps even to an individual) could doubtless be justified by showing emergency.

But in *Simonsen v. Swenson* the disclosure was volunteered to a private individual without the justification of witness box, statute, or emergency.²¹ The case stands for the triumph of medical altruism over legal duty. It sanctions the assumption by the doctor of the police power of the state with regard to disease in contravention of his relational duty to his patient, and grants to the obligor the discretion to perform his duty or not. It is difficult to see how any branch of the government other than the legislative can properly create in any individual so wide a discretion.

DECISIONS WITHOUT OPINIONS. — The failure of the majority of the United States Supreme Court to assign reasons for their conclusions in the cases on the Eighteenth Amendment¹ has been the subject of criticism.² That the Court should refuse to discuss paramount questions like the concurrent enforcing power of Congress and the States, and the validity of the Amendment is itself worthy of comment, especially in view of a feeling on the part of a minority of the profession that the power to amend the Constitution is subject to implied limitations.³ And such summary disposition of the cases raises also the larger question of the value and function of opinions in our law.

¹⁷ See 4 WIGMORE, EVIDENCE, § 2380 for cases on this point.

¹⁸ Such statutes are generally adopted in the United States. See 1902 MASS. REV. STAT., c. 75, § 50 (amended 1907, 480); 1910 N. J. COMP. STAT. HEALTH, § 247; 1918 N. Y. CONS. LAWS, c. 49, § 25.

¹⁹ *Brown v. Purdy*, 54 Super. Ct. N. Y. 109, 8 N. Y. St. Rep. 143 (1886).

²⁰ See 1 HAMILTON, SYSTEM OF LEGAL MEDICINE, 2 ed., 633.

²¹ The words employed by the physician were actionable *per se*. An action of slander may be met with the justification of truth or the excuse of privilege. The obligation in the ordinary man not to volunteer such words unless he has an actual duty to speak is so enhanced in the case of a physician by his duty not to disclose a professional secret that it would seem impossible to claim for a doctor the common-law defeasible privilege.

¹ *Rhode Island v. Palmer*, U. S. Sup. Ct., No. 29 Original, Oct. Term, 1919 (June 7, 1920).

² See concurring and dissenting opinions in *Rhode Island v. Palmer*, *supra*.

³ See William L. Marbury, "Limitations upon the Amending Power," 33 HARV. L. REV. 223. See 33 HARV. L. REV. 968.

Several arguments may be advanced in favor of rendering an opinion as distinguished from the actual decision. More immediately, a reasoned opinion not only serves to satisfy the litigants, but also promotes certainty and what Bentham calls "cognosability."⁴ In the second place, the possibility that a judge may be biased or may render a superficial judgment will be minimized if he knows that the grounds of his conclusions will be subjected to scrutiny by both the laity and the bar.⁵ Further the mere fact of a judicial opinion would appear sufficient to allay public distrust,⁶ while at the same time constituting an indispensable basis for intelligent criticism. Finally, the opinion is of peculiar significance in the Anglo-American system of case law.⁷ While judges need hardly follow Lord Mansfield's advice to write opinions for the benefit of students, they can not disregard the relation of any particular case to the body of law. It matters not which school of thought we follow, whether we agree with those who hold that decisions create law or with those others who maintain they are only declaratory of the law.⁸ Under either view, certain cases, at least, mould or modify the law.⁹ Such sources must contain the principles and the ratiocination which guided the court. Without reasons a decision is authority only for the special set of facts to which it is addressed.¹⁰ And if this were the only species of decision, the evolution of the law must proceed by some course other than judicial.

In spite of these obvious advantages, the practice of writing opinions has been the object of adverse criticism. Most serious is the argument that the written opinion is responsible for the unwieldy mass of cases with concomitant evils. It is pointed out that the iteration of opinions upon identical issues tends to confuse and conceal basic principles.¹¹

⁴ See Roscoe Pound, "Justice According to Law," 14 COL. L. REV. 103, 108-109. See 3 BENTHAM, WORKS, Bowring's ed., 243-244.

⁵ See Pound, note 4, *supra*.

⁶ Two striking instances are at hand. In 1910 the Ohio Bar Association petitioned the State Supreme Court "to indicate clearly in some appropriate form, the exact points upon which the decision rests, and the reasons influencing the Court, in order that all uncertainty may be dispelled." See 41 NAT. CORP. REP. 189.

In the same year the Erie County (N. Y.) Bar Association passed a remarkable resolution, "... it is detrimental for the judges of this state to ignore well-settled legal principles in order to enable them to render decisions which conform more closely to the sense of justice and right of the individual judge." See 22 BENCH AND BAR, 6. Subsequent discussion revealed the dissatisfaction to be based upon the absence of opinions in many cases. See 23 BENCH AND BAR, 3.

⁷ See Ezra R. Thayer, "Judicial Legislation," 5 HARV. L. REV. 172; Emlin McLain, "Evolution of the Judicial Opinion," 36 AM. L. REV. 51.

⁸ For the former view: see GRAY, THE NATURE AND SOURCES OF THE LAW, § 191. For the latter view: see JAMES C. CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION, 183-193; 1 BEALE, TREATISE ON CONFLICT OF LAWS, 150.

For a collection of authorities: see Chas. E. Carpenter, "Court Decisions and the Common Law," 17 COL. L. REV. 593.

⁹ See John W. Salmond, "The Theory of Judicial Precedents," 16 L. QUART. REV. 376.

The point is illustrated by the statement, "... gradual process of judicial inclusion and exclusion, as the cases presented for decision should require, *with the reasoning upon which such decisions may be founded*." See *Davidson v. New Orleans*, 96 U. S. 99, 104 (1878).

¹⁰ See WAMBAUGH, STUDY OF CASES, 2 ed., § 43.

¹¹ See the opinion of Thompson, C. J., in *Letzkus v. Butler*, 69 Pa. St. 277 (1871). See Francis A. Leach, "The Length of Judicial Opinions," 21 YALE L. J. 141.

Some feel that on account of the increased volume of litigation, the preparation of opinions delays the more essential operations of the court. While these defects are undeniable, it must be insisted that they are due to abuses, which can be corrected without the complete elimination of opinions.

The problem is by no means novel. The temporary cessation of reporting during the reign of Henry VIII may have been an attempted solution.¹² More recently the courts have assumed the initiative in seeking relief, in the face of legislative attempts to preserve the advantages of the opinion. Various statutes and constitutions provide that the decision be written and reasons therefor given.¹³ But in most instances, the courts, always jealous of their Constitutional prerogative,¹⁴ have regarded such provisions as directory rather than mandatory;¹⁵ an interpretation which leaves all to the discretion of the judges and renders such provisions meaningless. Some courts, including the United States Supreme Court, have met the situation by the use of *per curiam* decisions where advisable. Others have contented themselves with oral deliveries. And still others have prepared opinions which, however, were not to be officially published. Perhaps the greatest hope lies in an efficient judiciary, well versed in its precedents, so that it can distinguish the essential from the trite without too elaborate opinions for its own edification; and with the desire and ability to avoid the prolixity which is often the result of egotism or inadequate preparation.¹⁶

Whatever devices of elimination or compression be resorted to, there will always be a residuum of cases which require full discussion. One court has attempted to classify these on the basis of the development of legal principles.¹⁷ To this classification may be added questions of great public interest or political significance. It is here that the necessity of the opinion is most apparent. The advantages increase directly with the degree of interest which the decision arouses in the profession and the public. The disadvantages, since they lie largely in the danger of multiplicity, decrease with the importance of the case. No better example of such a question could be found than the decision upon the Eighteenth Amendment, and we cannot refrain from calling attention again to the complaints by a concurring justice and a dissenting justice against the absence of reasons for the decision.¹⁸

¹² "And in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like Elephantine libri of infinite length, and in mine opinion, lose somewhat of their present authority and reverence." Co. Rep., part 3, pref. 3.

See 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 458.

¹³ See 23 BENCH AND BAR, 3, 5, for a list of states.

¹⁴ See *Houston v. Williams*, 13 Cal. 25 (1859). Cf. *Ex parte Griffiths*, 118 Ind. 83 (1888).

¹⁵ See *Horner v. Amick*, 64 W. Va. 172, 175, 61 S. E. 40, 41 (1908).

¹⁶ See John H. Wigmore, "Qualities of Current Judicial Decisions," 9 Ill. L. Rev. 529, 531.

¹⁷ See opinion in *Yazoo & M. V. R. Co. v. James*, 108 Miss. 852, 67 So. 484 (1914). Among the classes: (1) cases involving the application of an old principle of which the restatement has for any reason become necessary; (2) cases involving the application of a new principle; (3) cases involving a new application of an old principle.

¹⁸ See note 2, *supra*.

EFFECT OF THE EIGHTEENTH AMENDMENT ON PRIOR EXISTING STATE LEGISLATION. — Among the problems left undecided when the Supreme Court of the United States sustained the validity of the Eighteenth Amendment¹ and with it the constitutionality of the National Prohibition Act,² was the construction to be given two phrases of section two of the Amendment: first, what is meant by the "concurrent power"³ of the federal and state governments to enforce the Amendment; and, second, what is "appropriate"⁴ state legislation for its enforcement? The court did declare that the concurrent power is not joint, nor is it such a division as exists between interstate and intrastate commerce.⁵ But it left its conception thereof to be gathered from the concurring opinion of the Chief Justice,⁶ which intimated that Congress had the duty of enacting legislation which should be operative throughout the country, but that each state could act as it saw fit within its jurisdiction as long as such acts contemplated enforcement of the Amendment and were consistent with the federal statutes. Such will be assumed to be the meaning and effect of the phrase "concurrent power."⁷

From this it would follow that appropriate state legislation for the enforcement of the Amendment must be such as coincides, or at least does not conflict, with the federal statute, *i. e.*, the Volstead Act. But for practical purposes the real question, which is raised in the two recent cases of *Commonwealth v. Nickerson*⁸ and *Ex parte Ramsey*,⁹ is whether state legislation enacted prior to the ratification of the Amendment can come within the definition of "appropriate," and, if so, how far such statutes remain in force. To determine this we must look at the nature of the states' power under the Amendment.

Before the Eighteenth Amendment became a part of the Constitution, the regulation of intoxicating liquors, apart from questions of interstate commerce, was exclusively exercised by the states under their general police power.¹⁰ The Amendment, as qualified by section two, affected this power in one of two ways: it operated either (I) as a cession of all their power by the states and a recession of a restricted power; or (II) as a cession of most of their previous power with a reservation of a restricted power.

I. If it had not been for the express power conferred upon the states by section two, the Amendment would clearly be enforceable by Congress alone.¹¹ No state prior to the ratification of this Amendment had the

¹ *Rhode Island v. Palmer*, 40 Sup. Ct. Rep. 486 (1920).

² Volstead Act, 41 STAT. AT L. 305.

³ The second section of the Eighteenth Amendment reads as follows: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

⁴ See note 3, *supra*.

⁵ *Rhode Island v. Palmer*, *supra*, eighth conclusion.

⁶ *Ibid.*, 488.

⁷ See 33 HARV. L. REV. 968.

⁸ 128 N. E. 273 (1920). See RECENT CASES, p. 328, *infra*.

⁹ 265 Fed. 950 (1920). See RECENT CASES, p. 328, *infra*.

¹⁰ *Mugler v. Kansas*, 123 U. S. 623 (1887); see License Cases, 5 How. (U. S.) 504 (1847); *In re Rahrer*, 140 U. S. 545 (1891).

¹¹ See concurring opinion of White, C. J., in *Rhode Island v. Palmer*, *supra*, 490.

right to enforce such a constitutional provision. Under this interpretation, therefore, the effect of section two was to give the states a power they did not have before.¹² But if the complete power to regulate liquor passed over to Congress, then the validity of all legislation enacted under it lapsed with it; and though in a twinkling a new power was revested in the states under which portions of the prior existing legislation might have been held good, yet this new power cannot revive defunct statutes. The Supreme Court has held that where a state liquor law was invalid in so far as it affected imported liquors, when Congress expressly allowed such liquors to fall under state regulation, the state law became operative without re-enactment.¹³ But in that case no new power was granted, and the court expressly excluded the present situation with the statement that "this is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress."¹⁴ It is, therefore, hard to see how this theory can have any other effect than to make all state legislation prior to the Eighteenth Amendment void. But the theory does not seem tenable. To say that the states in the same breath granted away a complete power and then regranted a part of it back to themselves is to talk in circles. Yet in no other way could this power be regranted; Congress certainly could not grant a constitutional power to the states under our theory of government.

II. The federal government is one of delegated powers.¹⁵ "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people."¹⁶ True, the states never had the right to enforce the Amendment before. But they had the power to prohibit the manufacture, sale, etc., of intoxicating liquors; in other words, to do exactly what the Amendment orders shall be done.¹⁷ In ratifying the Amendment they agreed to exercise this power exclusively for the enforcement of prohibition. If this be so, it would follow that the state laws in existence prior to the ratification of the Eighteenth Amendment were based upon a power which still exists, and are consequently valid if they do not conflict with the purpose of section one of the Amendment or the Volstead Act.¹⁸

Assuming the second interpretation to be correct, the question still remains, whether prior state legislation which partially conflicts with the Amendment must be discarded altogether or only *pro tanto*. It is a well-established principle that a statute may be unconstitutional in part and yet valid as to the remainder, if the valid and void parts are

¹² *Ibid.*, 490, White, C. J., said: "I assume that it will not be denied that the effect of the grant was to confer upon both Congress and the states power to do things which otherwise there would be no right to do."

¹³ *In re Rahrer*, *supra*.

¹⁴ *Ibid.*, 565.

¹⁵ See *United States v. Cruikshank*, 92 U. S. 542, 551 (1875).

¹⁶ UNITED STATES CONSTITUTION, Tenth Amendment.

¹⁷ See note 10, *supra*.

¹⁸ *Rhode Island v. Palmer*, *supra*, sixth conclusion.

separable.¹⁹ But if to give effect to so much as is valid would bring about a result not desired or contemplated by the legislature, the whole law will be held unconstitutional.²⁰ This rule applies where the legislation is enacted in the light of an existing constitutional provision. But where, as in the present case, legislation perfectly valid when passed is affected by a subsequent change in the organic law, the situation is governed by the further principle that an addition to the fundamental law only repeals such prior constitutional provisions and statutes as are in conflict with it, in whole or in part.²¹ On this basis all such portions of prior existing state legislation as contemplate the enforcement of prohibition remain in force, and are appropriate legislation under the terms of the Amendment.²²

SHOULD IMPOSSIBILITY CAUSED BY A CHANGE IN FOREIGN LAW BE AN EXCUSE FOR THE NON-PERFORMANCE OF A CONTRACT? — It has been commonly held that impossibility caused by a change in foreign law is no excuse for the non-performance of a contract.¹ This is in accordance with the original common-law theory that impossibility is never an excuse for an express undertaking.² By modern law, however, there are several exceptions to this strict doctrine, among them one, now well established, where the subject matter or the stipulated means of performance are destroyed.³ A further exception is often made where the means of performance that fail have been, in the contemplation of the parties, the only means available, even though not expressly con-

¹⁹ *Presser v. Illinois*, 116 U. S. 252 (1885); *Fisher v. McGirr*, 1 Gray (Mass.), 1 (1854); *August Busch & Co. v. Webb*, 122 Fed. 655 (1903).

²⁰ For cases where the unconstitutionality of part of a statute affected the validity of the whole, see *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902); *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601 (1895); *Commonwealth v. Hana*, 195 Mass. 262 (1907); *Warren v. Mayor & Aldermen of Charlestown*, 2 Gray (Mass.), 84 (1854).

For cases where the court held that the valid part of a statute was enforceable apart from the void part, see *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611 (1903); *Lawton v. Steele*, 119 N. Y. 226 (1890); *State v. Davis*, 72 N. J. L. 345 (1905).

²¹ *Griebel v. State*, 111 Ind. 369, 12 N. E. 700 (1887); *State v. Schluer*, 59 Ore. 18, 115 Pac. 1057 (1911); *Kansas City, Fort Scott & Memphis Railroad Co. v. Thornton*, 152 Mo. 570 (1899).

In *Trustees of University of North Carolina v. McIver*, 72 N. C. 76, 89 (1875), Pearson, C. J., concurring, aptly compared the effect of a constitutional amendment on prior constitutional provisions and existing statutes to the effect of a codicil on a will or of a second deed on the original one.

²² For cases concerning the effect of the Amendment and Volstead Act on prior federal legislation, see *United States v. Windham*, 264 Fed. 376 (1920); *United States v. Sohm*, 265 Fed. 910 (1920); *United States v. One Essex Touring Automobile*, 266 Fed. 138 (1920); *United States v. Turner*, 266 Fed. 248 (1920).

¹ *Barker v. Hodgson*, 3 M. & S. 267 (1814); *Clifford v. Watts*, L. R. 5 C. P. 578 (1870); *Ashmore v. Cox*, [1899] 1 Q. B. 436; *Tweedie Trading Co. v. James P. Macdonald*, 114 Fed. 985 (1902).

² *Paradine v. Jane*, Aleyn, 26 (1646). See also *Dyer*, 33 a. pl. 10.

³ *Taylor v. Caldwell*, 3 B. & S. 826 (1863); *Dexter v. Morton*, 47 N. Y. 62 (1871); *Ward v. Vance*, 93 Pa. 499 (1880) (specified spring from which water was to be furnished); *Clarksville Land Co. v. Harrison*, 68 N. H. 374, 44 Atl. 527 (1896) (failure of stream down which logs were to be driven).

tracted for.⁴ These exceptions, particularly the latter, are similar in principle to impossibility caused by a change in foreign law. And this analogy has been recognized and followed in a few recent decisions.⁵ Thus in *Ralli Bros. v. Compañía Naviera Sota y Aznar*⁶ a decree of a foreign government limiting the freight rates was held to excuse the charterer from paying any excess over the maximum rate specified, where his charter party had been made before the passage of the act and called for a much higher payment to be made on delivery at the foreign port.

The principle underlying the exception referred to above is similar to that upon which rests rescission of a contract for mutual mistake. Where the parties have in mind a definite assumption on which they are contracting, if that assumption is an essential part of the contract and turns out to have been ill-founded, equity considers it fair to give relief.⁷ Should not the same principle be invoked in law if this assumption later fails after the contract is made? In each case there is destruction of the contemplated basis of the contract.⁸

As a matter of fact, however, the courts, in upholding these exceptions, do not talk about mistake, but use the machinery of implied condition on the theory that where there is a contemplated means of performance, there is an implied condition that if this fail, the promisor shall be excused.⁹ Such a condition must generally be a fiction, and again makes the court's sense of fairness the real test.¹⁰

Neither of these lines of reasoning applies if both parties were not contemplating a particular means of performance. If the promisee has in mind only a general fulfilling of his order, the fact that the promisor's only means of performance is destroyed will not help him at common law.¹¹ The law will not aid a man merely because a fair bargain later turns out to be hard.¹²

⁴ *International Paper Co. v. Rockefeller*, 161 App. Div. 180, 146 N. Y. Supp. 371 (1914) (tract of woodland); *Lovering v. Buck Mountain Coal Co.*, 54 Pa. 291 (1867) (means of transportation).

⁵ *Horlock v. Beal*, [1916] 1 A. C. 486; *Scottish Navigation Co. v. Souter*, [1917] 1 K. B. 222; *The Kronprinzessin Cecile*, 244 U. S. 12 (1916).

⁶ [1920] 2 K. B. 287. See RECENT CASES, p. 328, *infra*.

The case of *Trinidad Shipping & Trading Co. v. Allston & Co.*, [1920] A. C. 888 (Privy Council), has somewhat similar facts, but can be distinguished on the ground that no payments were to be made in the foreign state.

⁷ *Riegel v. American Ins. Co.*, 153 Pa. 134, 25 Atl. 1070 (1893); *Duncan v. New York Ins. Co.*, 138 N. Y. 88, 33 N. E. 730 (1893); *Cochrane v. Wills*, 1 Ch. 58 (1865). See SALE OF GOODS ACT, § 6. See WALD'S POLLOCK ON CONTRACTS, Williston's ed., 606 *et seq.*

⁸ See *Horlock v. Beal*, [1916] 1 A. C. 486, 512.

⁹ See *Horlock v. Beal*, *supra*, 525.

¹⁰ See *F. A. Tamplin S. S. Co. v. Anglo-American Petroleum Co.*, [1916] 2 A. C. 397, 403. See 12 HARV. L. REV. 501; 19 HARV. L. REV. 462.

¹¹ *Hale v. Rawson*, 4 C. B. (N. S.) 85 (1858) (contract to sell tallow on arrival of particular ship not excused when no tallow on ship); *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980 (1908) (non-arrival of expected tins to make cans); *Blackburn Bobbin Co. v. T. W. Allen & Sons*, [1918] 2 K. B. 467 (contract to sell Finnish lumber — promisor not excused when only means of performance was forbidden shipment from Finland, when promisee did not know this).

¹² See *Cameron-Hawn Realty Co. v. City of Albany*, 207 N. Y. 377, 381, 101 N. E. 162, 163 (1913). See also *Paradine v. Jane*, *supra*, and most of the cases on this subject between these dates. The common law might reasonably, however, have adopted

But both the theories of mistake and implied condition are applicable to the principal case, where the performance was rendered impossible by a change in foreign law. Both parties contemplated that the contract should be carried out in a foreign country. In the absence of an express provision to the contrary,¹³ it can, therefore, be assumed that the parties contemplated that the transactions in foreign parts should be legal.¹⁴ And it is further true that the legality of the transaction is just as much a means of performance as the ship that carried the cargo. If foreign law, then, renders performance of the contract illegal, the contemplated means of performance are gone and both parties should be excused.

There seems, therefore, every reason to support the principal case. It apparently overrules the well-known decision of *Jacobs v. Credit Lyonnais*.¹⁵ The court attempts to distinguish the two on the ground that the impossibility in the latter case may have been due to a foreign war. But the principles outlined above should apply equally to either case, for whether the impossibility is due to a war or a change in foreign law, the contemplated basis of the contract is destroyed.

COMPULSORY REFERENCE IN ACTIONS AT LAW.—The term "compulsory reference" is ordinarily used to denote the act of a court in sending a pending cause, without the consent of one or more of the parties thereto, to a referee for examination and decision.¹ Under this procedure a jury is dispensed with and the hearing before the referee replaces a trial in court, judgment being entered or a decree made in accordance with the referee's report if it be accepted by the court.² As thus defined, compulsory reference has a very limited application in actions at law.³

the view of the civil law, which is much less strict. See FRENCH CIVIL CODE, 1148; ITALIAN CIVIL CODE, 1226. There the promisee is excused if he cannot perform the contract because of *vis major* or fortuitous accident.

¹³ The promisor can expressly contract to assume the risk of impossibility or destruction of the subject matter or means of performance. *Finney v. Bennett*, 49 Misc. 230, 97 N. Y. Supp. 291; *Berg v. Erickson*, 234 Fed. 817 (1916). See the well-known *dictum* of Maule, J., in *Canham v. Barry*, 15 C. B. 597, 619 (1855), "A man may, if he chooses, convenant that it shall rain to-morrow."

¹⁴ Probably this particular thought would not occur to the parties, but if nothing appeared to the contrary, it would be bound up in their whole conception of the transaction. See 1 COL. L. REV. 529, 533; 15 HARV. L. REV. 418.

¹⁵ 12 Q. B. D. 589 (1884). It is not clear from the case whether there was an actual illegality or merely a war. See *Scrutton, L. J.*, in *Ralli Bros. v. Compañía Naviera Sota y Aznar*, *supra*, 301.

¹ See cases, note 3, *infra*.

² See cases, note 3, *infra*.

³ The power to make such reference in actions at law does not exist at common law but is based exclusively upon statutes. *Mead v. Walker*, 17 Wis. 189 (1863).

Statutes giving this power in actions at law have usually been held to violate the right of trial by jury as guaranteed by the state constitutions. *Grim v. Norris*, 19 Cal. 140 (1861); *Russell v. Alt*, 12 Idaho, 789, 88 Pac. 416 (1907); *St. Paul, etc. R. R. Co. v. Gardner*, 19 Minn. 132 (1872); *Kuhl v. Pierce County*, 44 Nebr. 584, 62 N. W. 1066 (1895); *American Saw Co. v. First Nat. Bank*, 58 N. J. L. 438, 34 Atl. 1 (1896).

In a few states statutes permitting such reference in cases involving accounts were in existence at the time when the state constitutions were adopted, and subsequent enactments have been held constitutional on this basis. *Wentzville Tobacco Co. v.*

But the term has also been used to designate the act of a court of law in referring a pending cause to an auditor to simplify the issues, hear the evidence, and report the same, with or without his opinion thereon, to the court.⁴ Here the auditor acts as a preliminary tribunal and the cause is later tried in court, the report of the auditor being received as *prima facie* evidence of the facts and findings embodied therein.⁵ It is clear that this latter practice was unknown to the common law,⁶ and apparently it had its origin in a Massachusetts statute passed in 1817.⁷ Similar power has since been given to the courts of a few other states⁸ and the District of Columbia⁹ in cases involving accounts. Within the last two decades the federal courts in certain districts¹⁰ have adopted this practice in cases involving complicated questions of fact, although Congress has given them no express authority to do so.¹¹ Their inherent power to make such a reference without the aid of a statute has been upheld in a recent case, *In re Peterson*,¹² by the United States Supreme Court.¹³

Walker, 123 Mo. 662, 27 S. W. 639 (1894); *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76 (1907); *Trummer v. Konrad*, 32 Ore. 54, 51 Pac. 447 (1897); *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592 (1893); *Dane County v. Dunning*, 20 Wis. 210 (1866); *Lee v. Tillotson*, 24 Wend. (N. Y.) 337 (1840). See *Steck v. Colorado Fuel and Iron Co.*, 142 N. Y. 236, 37 N. E. 1 (1894). See 22 HARV. L. REV. 378.

The Seventh Amendment prevents the federal courts from making such reference even in the states last named. *United States v. Rathbone*, 27 Fed. Cas. No. 16, 121, 2 Paine, 578 (1829); *Howe Machine Co. v. Edwards*, 12 Fed. Cas. No. 6, 784, 15 Blatchf. 402 (1878); *Sulzer v. Watson*, 39 Fed. 414 (1889). And Congress has passed an act expressly prohibiting this practice in the federal courts. See REV. STAT., §§ 648, 649; 1918 COMP. STAT., §§ 1584, 1587.

In England under the Arbitration Act of 1889 a compulsory reference can be made in a cause requiring any "prolonged examination of documents or accounts, or any scientific or local investigation." See 52 & 53 VICT., c. 49, § 14.

⁴ See cases notes 8, 9, and 10, *infra*. Usually no distinction is made between these two fundamentally different classes of cases, both being cited under the heading "compulsory reference." To avoid confusion the terminology "compulsory reference for decision" will be used in referring to the practice illustrated by the first class of cases, and "compulsory reference for preliminary hearing" to designate the latter.

⁵ See cases note 10, *infra*.

⁶ See *Taff Vale Ry. Co. v. Nixon*, 1 H. L. Cas. 111, 122, 126 (1847). See C. C. Langdell, "A Brief Survey of Equity Jurisdiction," 2 HARV. L. REV. 241, 251.

⁷ See 1817 MASS. STAT., c. 142. For the present statute see 1902 MASS. REV. LAWS, c. 165, § 55.

⁸ See 1916 MAINE REV. STAT., c. 87, § 88; 1901 NEW HAMPSHIRE PUB. STAT., c. 227, §§ 1-8. In Rhode Island and Vermont such statutes were passed but were held unconstitutional. See note 18, *infra*.

⁹ See 1919 D. C. CODE OF LAWS, c. 4, § 254. See *Simmons v. Morrison*, 13 App. D. C. 161 (1898); *Lincoln v. Virginia Portland Cement Co.*, 258 Fed. 505 (1919).

¹⁰ *Fenno v. Primrose*, 119 Fed. 801 (Mass.) (1903); *Clark v. Craven*, 186 Fed. 959 (Mass.) (1911); *Vermeule v. Reilly*, 196 Fed. 226 (N. Y.) (1912); *Peterson v. Davison*, 254 Fed. 625 (N. Y.) (1918); *United States v. Wells*, 203 Fed. 146 (Tenn.) (1913).

¹¹ These cases cannot be explained on the theory that the federal courts were conforming with the procedure of the state courts as provided for in REV. STAT., § 914, 1918 COMP. STAT., § 1537. In New York and Tennessee the power to refer has not been given to the state courts. In Massachusetts the federal courts could not conform on account of the Massachusetts rule as to costs. See *Fenno v. Primrose*, *supra*, 803.

¹² U. S. Sup. Ct., October Term, 1919, No. 28. See RECENT CASES, p. 338, *infra*. Three justices dissented.

¹³ The court also held that a compulsory reference for a preliminary hearing did not violate the right of trial by jury as guaranteed by the Seventh Amendment. The same result has been reached under the state constitutions in Maine, Massachu-

In sanctioning this practice, the Supreme Court adopted the broad hypothesis that "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties."¹⁴ On a proposition so fundamental it would seem that there should be a wealth of authority; yet the court apparently found only one case even remotely in point.¹⁵ Until the present instance all the important procedural changes since the adoption of the Constitution have been of statutory origin.¹⁶ It is submitted that in *In re Peterson* is to be found a reiteration of the ancient common-law doctrine under which courts made their own rules of procedure and practice.¹⁷ Viewed in this light the decision falls little short of being epoch-making. Its importance lies in the fact that it allows greater flexibility in the administration of justice, thus saving time and money for litigants as well as courts, and enables courts to meet new problems of procedure and practice without waiting for legislative assistance.¹⁸ The principle upon which it rests seems sound

setts, and New Hampshire. *Holmes v. Hunt*, 122 Mass. 505 (1877); *Perkins v. Scott*, 57 N. H. 55 (1876). See *Howard v. Kimball*, 65 Me. 308, 327 (1876). *Contra*, *Francis v. Baker*, 11 R. I. 103 (1874); *Plimpton v. Town of Somerset*, 33 Vt. 283 (1860). Statutes making an official finding or report *prima facie* evidence of the facts and finding embodied therein have repeatedly been held constitutional. *Marx v. Hanthorn*, 148 U. S. 172 (1893) (tax deed); *Turpin v. Lemon*, 187 U. S. 51 (1902) (tax deed); *Reitler v. Harris*, 223 U. S. 412 (1912) (official entry in registry of deeds); *Meeker & Co. v. Lehigh Valley R. R. Co.*, 236 U. S. 412 (1914) (report of Interstate Commerce Commission). The same should be true of an order of a court.

¹⁴ See *In re Peterson*, note 12, *supra*.

¹⁵ *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 87-90 (1869), holding that a court of equity has inherent power to appoint "viewers" to examine a mine to estimate damages. See *Heckers v. Fowler*, 2 Wall. (U. S.) 123, 128 (1864). *Cf. Davis v. St. Louis and S. F. Ry. Co.*, 25 Fed. 786 (1885). *Contra*, see *Ackerman v. Union and New Haven Trust Co.*, 91 Conn. 501, 505, 100 Atl. 22, 24 (1917). There are many cases holding that a court has, in the absence of constitutional or legislative limitations, inherent power to make such rules as are necessary for the orderly conduct of its business. *State v. Van Cleve*, 157 Ind. 608, 62 N. E. 446 (1902); *Prinderville v. The People*, 42 Ill. 217 (1866); *Brooks v. Boswell*, 34 Mo. 474 (1864); *Zeuske v. Zeuske*, 55 Ore. 65, 105 Pac. 249 (1909); *Snyder v. Baughman*, 8 Serg. & R. (Pa.) 336 (1822); *Jones v. Spear*, 21 Vt. 426 (1849). This rule, however, extends only to the minute details of practice, such as fixing the time of trial, the time for application for change of venue, the time for presenting or filing of complaints, pleadings, etc. In many of the cases this power had been given to the courts by statute so that the holdings are mere *dicta*. See *Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351 (1908). No case has been found where the court established a new rule of procedure.

Fenno v. Primrose, *supra*, the first case to hold that a court of law has inherent power to make a compulsory reference for preliminary hearing and upon which all the subsequent cases are based, was decided upon the principle enunciated in *In re Peterson*, the court citing as authority only one case, *Davis v. St. Louis and S. F. Ry. Co.*, *supra*. There the court referred the case to an auditor to find the facts on the theory that such power existed at common law. This historical argument is clearly untenable (see note 6, *supra*), and the case was in fact overruled by REV. STAT., §§ 648, 649; 1918 COMP. STAT., §§ 1584, 1587, at the time *Fenno v. Primrose* was decided.

¹⁶ See note 15, *supra*. *Cf.*, however, Judge Doe's decisions in New Hampshire in *Lisbon v. Lyman*, 49 N. H. 553, 582 (1870); *Metcalf v. Gilmore*, 59 N. H. 417, 433 (1879); *Boody v. Watson*, 64 N. H. 162, 172 (1886); *Atty.-Gen. v. Taggart*, 66 N. H. 362, 369 (1890).

¹⁷ See Roscoe Pound, "Regulation of Procedure by Rules of Court," 10 ILL. L. REV. 163, 171.

¹⁸ For a discussion of the arguments for and against the regulation of procedure by rules of court, see Roscoe Pound, "Some Principles of Procedural Reform," 4 ILL. L.

and will undoubtedly meet with the approval of writers and students of jurisprudence. The fact that courts in the past two centuries have been content to look to the legislature for new rules of practice and procedure should not prejudice their claim to the inherent power of making new rules when confronted by situations which cannot be adequately handled under existing procedural machinery. True, their acquiescence does lend color to the suggestion that the making of rules of procedure is a legislative function, and that, under the American theory of the separation of powers, the exercise of this power by courts is *ultra vires* and hence unconstitutional.¹⁹ But "what constitutes judicial power within the meaning of the constitution is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution."²⁰ Indeed the real constitutional question would seem to be to what extent the legislature can control the details of practice and procedure in courts.²¹ In view of the fact, however, that courts in the past have accepted such legislation as controlling, it is probably true that the sweeping language of the court in *In re Peterson* is largely nullified, especially in the code states. It is nevertheless to be hoped that courts will utilize this new weapon to simplify procedure and practice in proper cases and in so far as they are not so controlled.²²

That a preliminary hearing before an auditor is an "appropriate instrument" for the performance of a court's duties seems too clear for argument. It has always been utilized in courts of equity²³ and is not without precedent in courts of law.²⁴ That such practice is "necessary" in cases involving complicated facts or accounts seems equally obvious. The volume of litigation arising under the present organization of society does not permit courts to devote their time to such cases until the groundless claims have been sifted from the legitimate, and the disputed issues have been moulded into compact form. The machinery of a law court is not fitted for the trial of such cases. It is ridiculous to speak of a trial by jury where twelve confused and bewildered jurors are left to flounder in a maze of contradictory facts.²⁵ In cases involving long or complicated accounts equity has taken jurisdiction on the theory that such cases are unsuited for trial by jury;²⁶ under present conditions

REV. 388, 403-407. See also Manley O. Hudson, "The Proposed Regulation of Missouri Procedure by Rules of Court," 17 UNIV. OF MO. LAW BULLETIN, No. 31.

¹⁹ See Pound, note 17, *supra*, 169. *

²⁰ See *State v. Harmon*, 31 Oh. St. 250, 258 (1877). See 2 WILLOUGHBY, CONSTITUTIONAL LAW, § 742.

²¹ See *Epstein v. State*, 128 N. E. (Ind.) 353 (1920).

²² The courts have been quick to take advantage of the decision in the principal case. See *Plews v. Burrage*, 266 Fed. 959, 960 (1920). *Quaere* whether the court did not carry the doctrine too far.

²³ *The Heirs of P. F. Dubourg de St. Colombe v. United States*, 7 Pet. (U. S.) 625 (1833).

²⁴ A reference by consent in an action at law has always been allowed. *Heckers v. Fowler*, 2 Wall. (U. S.) 123 (1864).

²⁵ See *Craven v. Clark*, *supra*, 960.

²⁶ In a few jurisdictions there must be mutual accounts. See C. C. Langdell, "A Brief Survey of Equity Jurisdiction," 3 HARV. L. REV. 237, 244. In either case it seems clear that in *In re Peterson* the plaintiff might have brought a bill in equity in the nature of an "equitable assumpsit" for an accounting; or that the defendant, had

much might be said for making such jurisdiction exclusive. But even in cases where no accounts are involved, so that the parties must necessarily resort to a court of law for relief, they should not be heard to complain if the court, weighing the inadequacy of the machinery of law courts and the necessity of giving time to other litigation against the desire to comply with the wishes of the litigants in a particular case, sees fit to refer the case to an auditor for a preliminary hearing.²⁷

RECENT CASES

BANKRUPTCY — PREFERENCES — FULFILMENT OF CONTRACT WITH PURCHASER WHO HAS PAID IN ADVANCE. — The plaintiff contracted with the owner of a mill for the entire output of his mill for one year, and paid part of the price in advance. Six months later the owner was adjudicated a bankrupt. The value of the mill's output up to that time was less than the money already advanced by the plaintiff. The lower court ordered the trustee in bankruptcy to continue the contract, which was done. Later, the court ordered the plaintiff to pay again to the trustee the price already advanced to the bankrupt before the bankruptcy. *Held*, that this was error. *Grief Bros. v. Mullinix*, 45 A. B. R. 265.

For a discussion of the principles involved in this case, see NOTES, p. 309, *supra*.

BILLS OF LADING — EFFECT OF INTERSTATE COMMERCE ACTS UPON VALIDITY OF EXCHANGE BILL OF LADING ISSUED WITHOUT SURRENDER OF ORIGINAL. — The plaintiff is the *bona fide* purchaser of an exchange bill of lading issued by the defendant railroad without requiring the surrender of the original bill. The Interstate Commerce Acts, as amended, make it "unlawful for any carrier to give any undue or unreasonable preference or advantage to any particular person" and require every carrier to file with the Commission schedules showing "all privileges or facilities granted and any rules or regulations which in any wise affect rates or the value of service rendered." (24 STAT. AT L. 380, 34 STAT. AT L. 586.) The defendant had filed a regulation which provided that original bills of lading must be surrendered before exchange bills would be issued. The plaintiff sues the railroad for failure to deliver shipment. *Held*, that the plaintiff cannot recover. *Pioneer Trust Co. v. Nashville, C. & St. L. R. R. Co.*, 224 S. W. 109 (Mo.).

Whether an exchange bill of lading be issued without a surrender of the original or an original bill of lading be issued without receipt of the goods, a bill of lading is outstanding without any goods behind it. By the weight of authority at common law, a *bona fide* purchaser of such a bill of lading could not recover upon it from the carrier. *Grant v. Norway*, 10 C. B. 665. *Pollard v. Vinton*, 105 U. S. 7. See *Mo., etc. R. Co. v. Hutchings Co.*, 78 Kan. 758, 764, 767, 99 Pac. 230, 232, 233. But the better rule protected the *bona fide* purchaser of the bill of lading. See WILLISTON, SALES, § 419. The Uniform Bill of Lading Act adopts this rule. See DRAFT ACT COM'RS UNIFORM STATE LAWS,

he so desired, could have enjoined the suit at law and forced the plaintiff to resort to equity for relief. *Ibid.*, 243. In such case the federal court, sitting as a court of equity, could have made a compulsory reference for decision. See *United States v. Wells*, *supra*, 151.

²⁷ See *Fenno v. Primrose*, *supra*, 806. In England compulsory reference for preliminary hearing is authorized by the Arbitration Act of 1889. See 52 & 53 VICT., c. 49, § 13.

BILLS OF LADING, § 23. This case is interesting as treating the problem as within the scope of the Acts to regulate commerce. The court seems wrong in assuming that any deviation from the filed and published regulations violates the act. Only "undue or unreasonable" preferences are prohibited. *Gamble-Robinson Commission Co. v. Chicago Ry. Co.*, 168 Fed. 161. *United States v. B. & O. R. R. Co.*, 154 Fed. 108. But where the act is violated the contract is invalid and unenforceable. *Chicago & Alton R. Co. v. Kirby*, 225 U. S. 155. *Saita & Jones v. Pa. R. Co.*, 109 Misc. 604, 179 N. Y. Supp. 471. Although this situation falls within the general operation of the Interstate Commerce Acts, it is specifically covered by the Pomerene Bill of Lading Act. See 39 STAT. AT L. 542. And it is to be hoped that in the future the obvious purpose of § 23 of the Uniform Act will be given effect in interstate transactions in spite of the inartistic changes in wording (intentionally or accidentally) made by the Pomerene enactment. If not thereby protected, the *bona fide* purchaser's best chance seems to be an action in tort for deceit. Cf. William Vance, "Liability for Unauthorized Torts of Agents," 4 MICH. L. REV. 199.

BOUNDARIES — INCONSISTENT DESCRIPTIONS — WHEN COURSES AND DISTANCES GOVERN MONUMENTS. — A patent was issued for 12,000 acres of land, the boundaries of which were described in part by monuments and in part by courses and distances. The monuments conflicted with the courses and distances and the acreage called for by the patent, and, if followed, would lead to a palpably wrong result. *Held*, that the courses and distances will govern. *Swift Coal & Timber Co. v. Sturgill*, 223 S. W. 1090 (Ky.).

The description in the deed is intended to identify the tract conveyed. And so, if the description is insufficient for identification, the conveyance is void. *Wilson v. Johnson*, 145 Ind. 40, 43 N. E. 930; *McBride v. Steinweden*, 72 Kan. 508, 83 Pac. 822. The controlling element is the intention of the parties inferred from the language of the deed. *Reed v. Proprietors of Locks and Canals*, 8 How. (U. S.) 274; *Bruensmann v. Carroll*, 52 Mo. 313. Certain rules of presumption aid in determining their intention when the elements of description conflict. Monuments ordinarily govern courses and distances. *Pernam v. Wead*, 6 Mass. 131; *Watkins v. King*, 118 Fed. 524. But the rule yields when it appears that the courses and distances are more reliable. *White v. Luning*, 93 U. S. 514; *So. Realty Co. v. Keenan*, 99 S. C. 200, 83 S. E. 39. So courses and distances normally govern recitals of area. *Sherwin v. Bilzer*, 97 Minn. 252, 106 N. W. 1046. See *Christian v. Bulbeck*, 120 Va. 74, 113, 90 S. E. 661, 673. But in extreme cases provisions as to area may control all. *Davis v. Hess*, 103 Mo. 31, 15 S. W. 324; *McDowell v. Carothers*, 75 Ore. 126, 146 Pac. 800. There is no rule of preference between conflicting courses and distances. *Preston's Heirs v. Bowmar*, 6 Wheat. (U. S.) 580; *Green v. Pennington*, 105 Va. 801, 54 S. E. 877. But cf. *Paschal v. Sweptston*, 120 Ark. 230, 235, 179 S. W. 339, 340. In this case, if the monuments were followed, the description would not conform in appearance to the plat nor even approximate the acreage called for in the patent, while, if the courses and distances were followed, the description would conform to the plat and include the specified quantity. It seems a proper case, therefore, to deny the application of the ordinary rule of presumption and to allow courses and distances to control.

CARRIERS — BAGGAGE — LIABILITY FOR LOSS OF BAGGAGE CARRIED SUBSEQUENTLY TO PASSENGER'S JOURNEY. — The plaintiff's baggage, due to her own delay, was delivered to the defendant carrier on the day following plaintiff's journey in person. The carrier took it on board his vessel and carried it to its destination. In an action for loss of part of the baggage, defendant set up the defense that he was liable only for negligence. *Held*, that the defense is valid. *Midgett v. Eastern Carolina Transportation Company*, 104 S. E. 32 (N. C.).

The authorities are divided as to whether a carrier is under insurer's liability for baggage sent ahead by one who later does not make the trip in person. *Marshall v. Pontiac R. R. Co.*, 126 Mich. 45, 85 N. W. 242; *McKibbin v. Wisconsin Ry. Co.*, 100 Minn. 270, 110 N. W. 964. Cf. *Crout v. Yazoo R. R. Co.*, 131 Tenn. 667, 176 S. W. 1027. The principal case raises the reverse problem of liability for baggage forwarded, because of the passenger's delay, after the passenger's journey. There seems to be no good reason why baggage in such a case is not as much incidental to carriage of the person as where it is carried exactly contemporaneously; and if the carrier accepts it under the circumstances and transports it he should be held to the usual absolute liability. *The Elvira Harbeck*, 8 Fed. Cas. No. 4, 424; *Graffam v. Boston & Maine R. R. Co.*, 67 Me. 234. The weight of authority is in fact opposed to the principal case. *Warner v. Burlington R. R. Co.*, 22 Ia. 166; *Wilson v. Grand Trunk Ry.*, 57 Me. 138; *Williams v. Central Ry. of N. J.*, 93 App. Div. 582, 88 N. Y. Supp. 434; aff'd 183 N. Y. 518, 76 N. E. 1116. See *Bradley v. Chicago Ry. Co.*, 147 Ill. App. 397, 404. *Perry v. Seaboard Ry. Co.*, 171 N. C. 158, 88 S. E. 156, *contra*. The court probably is influenced unconsciously by the feeling that the rule of absolute liability is an historical anomaly not required to-day, and so abrogates that rule in a doubtful situation. See Joseph H. Beale, "The Carrier's Liability: Its History," 11 HARV. L. REV. 158; HOLMES, THE COMMON LAW, 164-205. The decision may thus be explained, though hardly supported. See also 39 STAT. AT L. 441; 53 CONG. RECORD (64th Cong., 1st Sess.), 9245, 9246, 12002, 12003.

CARRIERS — BAGGAGE — WHAT CONSTITUTES BAGGAGE. — As a result of the destruction of a steamer, various claims for the loss of baggage and personal effects were presented by the passengers. The claims *inter alia* included (1) large sums of money not necessary for the purposes of the trip, (2) the camera lenses of a newspaper photographer, who was traveling to take photographs, and (3) small amounts of Liberty Bonds, retained in possession for safe-keeping and not for the purposes of the trip. *Held*, that the claims be allowed as to the camera lenses and Liberty Bonds, but disallowed as to the sums of money. *The Virginia*, 266 Fed. 437.

The baggage and personal effects of a passenger for which a carrier may be liable include whatever articles are useful or convenient for the passenger with reference to the immediate necessities of the trip or its ultimate purposes. See *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612; *Saunders v. So. Ry.*, 128 Fed. 15. And in deciding the question due regard must be paid to the social status of the passenger, and the particular nature of his journey. *Ry. Co. v. Fraloff*, 100 U. S. 24; *Repp v. Indianapolis Traction Co.*, 184 Ind. 671, 111 N. E. 614. So articles connected with the occupation that prompts the trip, as the instruments of an army surgeon, the books of a student, or the guns of a hunter, are properly baggage. *Hannibal Ry. v. Swift*, 12 Wall. (U. S.) 262; *Hopkins v. Westcott*, 6 Blatch. (U. S. C. C.) 64; *Little Rock, etc. Ry. Co. v. Record*, 74 Ark. 125, 85 S. W. 421. Clearly the lenses of the newspaper photographer come within this category. So also sums of money, however large, if necessary for the trip are recoverable. *Merrill v. Grinnell*, 30 N. Y. 594; *Ill. Centr. Ry. Co. v. Copeland*, 24 Ill. 332. But as in the principal case, money, not needed for the trip and taken for some independent reason, is not recoverable. *First Nat'l Bk. of Greenfield v. Marietta, etc. Ry. Co.*, 20 Ohio St. 259. *Levins v. N. Y., N. H. & H. Ry. Co.*, 183 Mass. 175, 66 N. E. 803. The same rule would seem applicable to the Liberty Bonds. They were not carried for the purpose of the trip, but merely for safe-keeping, and recovery as to them was improper.

CONSTITUTIONAL LAW — CLASS LEGISLATION — DUE PROCESS OF LAW — PENALTY FOR DELAYED PAYMENT OF WAGES. — Defendant owed plaintiff

\$12.32 wages at the time of his discharge. Plaintiff sued and recovered \$500 under a statute providing that wages should be paid by certain employers at specified times, and exacting an additional payment of ten per cent of the amount due for each day's default. (1913 MICHIGAN PUBLIC ACTS, Act 59: 1915 MICHIGAN COMPILED LAWS, §§ 5583-5586.) Defendant appeals on the ground that the statute violates the United States and Michigan constitutions, in denying equal protection of the laws, and in taking property without due process of law. *Held*, that the statute is unconstitutional. *Davidow v. Wadsworth Manufacturing Co.*, 53 Chicago Legal News, 98 (Mich.).

The court concerns itself chiefly with the argument that the statute discriminates between employers, and thus denies to those included the equal protection of the laws. On this ground the decision is supportable. A more interesting question is whether the imposition of the penalty is a denial of due process. More or less similar penalties have been upheld. *Missouri P. R. Co. v. Humes*, 115 U. S. 512; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26; *Fidelity Mutual Life Ass. v. Mettler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co. v. Dobney*, 189 U. S. 301; *Seaboard A. L. R. v. Seegers*, 207 U. S. 73; *Yazoo & M. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217; *Kansas C. S. R. Co. v. Anderson*, 233 U. S. 325; *Skinner v. Garnett Gold-Mining Co.*, 96 Fed. 735; *Farrell v. Atlantic C. L. R. Co.*, 82 S. C. 410, 64 S. E. 226; *Phillips v. Missouri P. R. Co.*, 86 Mo. 540; *Houston & T. C. R. Co. v. Harry*, 63 Tex. 256. Where penalties have been declared unconstitutional, the *ratio decidendi* has usually been discrimination. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150; *Atchison, T. & S. F. R. Co. v. Vosburg*, 238 U. S. 56; *Wilder v. Chicago & W. M. R. Co.*, 70 Mich. 382, 38 N. W. 289. But some cases turn, at least in part, on denial of due process. *Atchison & N. R. Co. v. Baty*, 6 Nebr. 37; *San Antonio & A. P. R. Co. v. Wilson*, 19 S. W. 910 (Tex. App.). Whether or not the mere size of a penalty otherwise constitutional may bring it within the constitutional prohibition has not been decided, though there are intimations to that effect. See *Southwestern T. & T. Co. v. Danaher*, 238 U. S. 482; *Seaboard A. L. R. v. Seegers*, *supra*, 78-79; *Waters-Pierce Oil Co. v. State of Texas*, 212 U. S. 86, 111. Statutes are unconstitutional if the size of the penalty indirectly coerces one to forego testing the validity of the statute. *Missouri P. R. Co. v. Tucker*, 230 U. S. 340. But such cases are not authority for holding that size alone, where it has no such effect, may make a penalty unconstitutional. The application of the Fourteenth Amendment is largely a matter of practical judgment; and a slight variation of fact may cause the court to distinguish cases seemingly alike. Compare *Gulf, C. & S. F. R. Co. v. Ellis*, *supra*, and *Fidelity Mutual Life Ass. v. Mettler*, *supra*. It is impossible to argue authoritatively from precedent, which is useful only as a guide. See COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES, 118.

CONSTITUTIONAL LAW — EIGHTEENTH AMENDMENT — EFFECT ON PRIOR EXISTING STATE LEGISLATION. — After the Eighteenth Amendment went into effect, defendant was convicted under a pre-existing state statute of selling liquor without a license. Defendant appealed on the ground that the state law is no longer enforceable. *Held*, that the conviction be affirmed. *Commonwealth v. Nickerson*, 128 N. E. 273 (Mass.).

Defendants were arrested for having liquor in their possession in violation of a Florida statute. The defendants applied for a writ of *habeas corpus*. *Held*, that the prisoners be remanded. *Ex parte Ramsey*, 265 Fed. 950.

For a discussion of these cases, see NOTES, p. 317, *supra*.

CONTRACTS — DEFENSES: IMPOSSIBILITY — CHANGE IN FOREIGN LAW. — The defendants chartered a ship from a Spanish company to carry cargo from Calcutta to Barcelona, payment to be made in Spain upon arrival of the goods.

The defendants were an English company and the contract was made in England. Subsequent to the making of the contract the Spanish government issued a decree fixing the freight rate at a much lower price than that stipulated in the contract. The cargo was delivered in Barcelona, but the defendants refused to pay more than the legal rate. *Held*, that the plaintiff cannot recover. *Ralli Bros. v. Compañía Naviera Sota y Aznar*, [1920] 2 K. B. 287.

For a discussion of the principles involved in this case, see NOTES, *supra*, p. 319.

CONTRACTS — DIVISIBLE CONTRACTS — BUYER'S FAILURE TO PAY AS EXCUSE FOR SELLER'S NON-PERFORMANCE. — The plaintiff contracted to deliver goods to the defendant, on 30 days' credit, in certain instalments, January, February, and "after March 1st." He shipped none until February and made intermittent partial deliveries until June. The defendant accepted all partial deliveries, paying for the first two only and finally refusing to pay anything further unless the plaintiff recognize his claim for damages and give assurance of future shipments. The plaintiff "rescinded" the contract and sued for the price of the goods accepted. The defendant admitted this liability but counterclaimed for damages for the plaintiff's failure to deliver goods as per contract. *Held*, that the counterclaim for goods due before "rescission" be allowed. *Goodyear Tire & R. Co. v. Vulcanized P. Co.*, 228 N. Y. 118, 126 N. E. 711.

A continued nonpayment by the buyer under an instalment contract, constituting a material breach, justifies the seller's refusal to perform further. *Kokomo Strawboard Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248; *Jensen v. Goss*, 28 Cal. App. Dec. 135, 179 Pac. 225. It is immaterial that the seller owes an equivalent or greater amount of damages for prior breach on his part. *J. K. Armsby Co. v. Grays Harbor Commercial Co.*, 62 Ore. 173, 123 Pac. 32; *Standard Coal Co. v. Eclipse Coal Co.*, 102 S. E. 137 (Ga.). *Contra*, *Sperry, etc. Co. v. O'Neill-Adams Co.*, 185 Fed. 231. See 2 WILLISTON, CONTRACTS, §§ 859, 867. Moreover a refusal to pay except on some condition which the buyer has no right to impose has the same effect. *Stephenson v. Cady*, 117 Mass. 6; *Munroe v. Trenton, etc. Co.*, 206 Fed. 456. But see *Hjorth v. Albert Lea Mach. Co.*, 172 N. W. 488 (Minn.). The demand that the seller recognize the buyer's claim for damages is such an unjustifiable condition. *Harber Bros. Co. v. Moffat Cycle Co.*, 151 Ill. 84, 37 N. E. 676; *Na'l Contracting Co. v. Vulcanite Portland Cement Co.*, 192 Mass. 247, 78 N. E. 414. The buyer's conduct in the principal case thus justified the seller's absolute refusal to proceed. But the failure to deliver the January and February instalments preceded any breach by the buyer who has therefore a right to damages. This is not waived by mere acceptance of the partial, late deliveries. *Hall v. New Hartford Canning Co.*, 153 App. Div. 562, 138 N. Y. Supp. 866; *Wisconsin Lumber Co. v. Pacific Tank Co.*, 76 Wash. 452, 136 Pac. 691. But see *Mason v. Valentine Co.*, 180 App. Div. 823, 168 N. Y. Supp. 159. Thus far the case may be supported. The first default in payment by the buyer, however, gave the seller the right to suspend further deliveries. *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516; *Ackerman v. Santa Rosa-Vallejo Tanning Co.*, 257 Fed. 369. Hence the reasoning of the court in allowing damages for the seller's defective performance between this time and the misnamed "rescission" is unacceptable, contrary to authority, and to prior New York decisions. *Gardner v. Clark*, 21 N. Y. 399; *American Broom & Brush Co. v. Addikes*, 19 Misc. 36, 42 N. Y. Supp. 871.

CORPORATIONS — STOCKHOLDERS — CONSTRUCTION OF STATUTE INVOLVING LIABILITY OF STOCKHOLDERS FOR TORTS. — A statute provided that a stockholder should be personally liable to the extent of the amount unpaid on his stock for the "debts" of a corporation. 1919 SO. DAK. REV. CODE, § 8779.

Plaintiff secured a judgment against a corporation for a tort committed by it, and then sued the defendant stockholder under the statute. Plaintiff was nonsuited. *Held*, that the judgment be affirmed. *Clinton Mining & Mineral Co. v. Beacom*, 266 Fed. 621 (C. C. A.).

The principal case raises solely a question of statutory construction, for at common law a stockholder was not liable for the torts of a corporation. *Terry v. Little*, 101 U. S. 216. The authorities are divided, some holding with the principal case that the term "debts" or "liability to creditors" includes only contractual claims. *Savage v. Shaw*, 195 Mass. 571, 81 N. E. 303; *Avery v. McClure*, 94 Miss. 172, 47 So. 901. *Contra*, *Henley v. Myers*, 76 Kan. 723, 93 Pac. 168; *Rogers v. Stag Mining Co.*, 185 Mo. App. 659, 171 S. W. 676. This strict construction is perhaps justified where the statute penalizes officers or stockholders for failure to perform a duty. *Leighton v. Campbell*, 17 R. I. 51, 20 Atl. 14; *Howard v. Long*, 142 Ga. 789, 83 S. E. 852. But in the principal case the remedial nature of the statute should lead the courts to a liberal interpretation. See *Chase v. Curtis*, 113 U. S. 452, 463. The legislature, having created a legal unit, desires to protect those who may deal with it, and consequently gives creditors the remedy of compelling stockholders to pay in full for their stock. It would seem immaterial, therefore, whether claimants have dealt with the corporation contractually, or have been damaged by its misfeasance. The word "debts" is broad enough to cover both situations, especially if the claim has been reduced to judgment. The principal case relies on no authority except an inadequate reference to Blackstone; and it reaches an unfortunate result. In view of such a decision, however, legislatures would do well hereafter to use more specific language. See *Grindle v. Stone*, 78 Me. 176, 3 Atl. 183; *Linniger v. Botsford*, 32 Cal. App. 386 163 Pac. 63.

DAMAGES — MEASURE OF DAMAGES — TEMPORARY LOSS OF USE OF A DAMAGED PLEASURE VEHICLE. — The plaintiff's pleasure car was damaged and temporarily put out of commission by the defendant's negligence. *Held*, that the plaintiff could recover for the loss of use. *Dettmar v. Burns Bros.*, 181 N. Y. Supp. 146.

Where a vehicle used for business purposes is damaged its owner may recover for the temporary loss of use. *Andries v. Everitt Co.*, 177 Mich. 110, 142 N. W. 1067; *So. Ry. v. Kentucky Grocery Co.*, 166 Ky. 94, 178 S. W. 1162. But where the car is one used for pleasure, damages for such loss have on occasion been denied, mainly on the ground that they were speculative. *Foley v. Forty Second St., etc. Ry. Co.*, 52 Misc. Rep. 183, 101 N. Y. Supp. 780; *Hunter v. Quaintance*, 168 Pac. (Col.) 918. The distinction is unsound. Since the *jus fruendi* comprehends the right to use a thing for pleasure purposes as well as the right to employ it in business, an infringement of either is a legal wrong. The value of the right is in both cases capable of objective determination, because it is measured not by the use made of the chattel by its owner but by its potential utility. See *The Mediana*, 1900 A. C. 113, 117; See 1 SEDGWICK, DAMAGES, 9 ed., § 243*b*. And even if the assessment of damages does involve some practical difficulty that does not make the injury unreal and is no ground for denying recovery altogether. *Allison v. Chandler*, 11 Mich. 542. Or this line of reasoning the principal case, in accord with the great weight of authority, allows a recovery regardless of the character of the use. *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413; *Perkins v. Brown*, 132 Tenn. 294, 177 S. W. 1158. See 21 HARV. L. REV. 445.

DEEDS — ACKNOWLEDGMENT BEFORE INTERESTED PARTY. — The secretary of the plaintiff corporation in his capacity as a notary public attested a bill of sale in which the corporation was the grantee. The bill was recorded and the

record offered in evidence in a suit for the property therein described. *Held*, that the evidence be excluded as the acknowledgment was not sufficient to admit the bill to record. *Citizens' Trust Co. v. Butler*, 103 S. E. 852 (Ga.).

The report does not say whether or not the secretary was a stockholder. One does not connote the other. *Florida Savings Bank v. Rivers*, 36 Fla. 575, 18 So. 850; 1 MORAWETZ, PRIVATE CORPORATIONS, § 505. If he was not, the case is certainly wrong. *Sawyer v. Cox*, 63 Ill. 130, 135; *Horbach v. Tyrrell*, 48 Neb. 514, 67 N. W. 485. If he was, the decision is in accord with the weight of authority. *Ogden Building Association v. Mensch*, 196 Ill. 554, 63 N. E. 1049; *Hayes v. Southern Association*, 124 Ala. 663, 26 So. 527. Two reasons are given for this disqualification. One is that taking an acknowledgment is a judicial act. *Heilman v. Kroh*, 155 Pa. St. 1, 25 Atl. 751; *Murrell v. Diggs*, 84 Va. 900, 6 S. E. 461. But this is inconsistent with the rule that the agent or attorney of a party financially interested is not disqualified. *National Cash Register Co. v. Lesko*, 77 Conn. 276, 58 Atl. 967; *Penn v. Garvin*, 56 Ark. 511, 20 S. W. 410. And it is inconsistent with the same rule as to a relative or husband. *Lynch v. Livingston*, 6 N. Y. 422; *Kimball v. Johnson*, 14 Wis. 674. Moreover, it is opposed to the weight of authority. *Learned v. Riley*, 96 Mass. 109. The second reason given is public policy. *Hayes v. Southern Association*, *supra*; JONES, CHATTEL MORTGAGES, 5 ed., § 249. But there is a public policy on the other side in the unavailability of records. As a general rule a stockholder is not more interested than an attorney or husband. A notary is not like a juror or witness to a will, he is a person commissioned by the state to hold a position of trust. And a suspicious grantor can always pick another notary. A few decisions do hold that a stockholder is qualified. *Read v. Toledo Loan Co.*, 68 Oh. St. 280, 67 N. E. 729; *Cooper v. Hamilton Loan Association*, 97 Tenn. 285, 37 S. W. 12.

ELECTRIC WIRES — CONFLICTING RIGHTS OF TELEPHONE AND POWER COMPANIES — INDUCTION AND CONDUCTION. — A South Dakota statute provides that electric power lines erected on the highways shall not interfere with telephone lines already there (1919 REVISED CODE SO. DAKOTA, §§ 8591, 8594). The defendant power company erected its lines on a street occupied by the plaintiff telephone company. The electricity from the power line was carried over to the lines of the telephone company by electro-magnetic induction, rendering the telephone line useless unless a metallic return circuit were installed. *Held*, that the defendant pay for the installation of the return circuit. *Dakota Central Tel. Co. v. Spink County Power Co.*, 176 N. W. 143 (S. D.).

On the ground that priority of time gives priority of right some courts without the aid of a statute have reached the same result. *Paris Elec. Co. v. S. W. Tel. Co.*, 27 S. W. 902 (Texas); *W. U. Tel. Co. v. Los Angeles Elec. Co.*, 76 Fed. 178. See *Tri-County Mut. Tel. Co. v. Bridgewater Elec. Power Co.*, 40 S. D. 410, 414, 167 N. W. 501, 503. See CURTIS, ELECTRICITY, § 362. Other courts have held that neither company has a superior right to the use of the street, and hence that neither can object to incidental injury resulting from the legitimate exercise of the other's legal right. *Cumberland Tel. & Tel. Co. v. United Elec. R. R.*, 42 Fed. 273. See THOMPSON, ELECTRICITY, 57. Many cases denying relief, however, involve interference by trolley lines with prior telephone lines, which are sometimes distinguished from the principal case on the ground that the telephone line must take the risk of interference by those using the street for its primary purpose of travel. *Cincinnati Inclined Plane R. R. v. City & Suburb. Tel. Assn.*, 48 Ohio St. 390, 27 N. E. 890; *Hudson River Tel. Co. v. Waterliet Turnpike & R. R. Co.*, 135 N. Y. 393, 32 N. E. 148. See CURTIS, ELECTRICITY, § 355. If this distinction is sound, a telephone company could not recover for interference by an electric company used for

lighting the streets. See *W. U. Tel. Co. v. Los Angeles Elec. Co.*, *supra*, 181. Whatever be the true rule at common law, the court rightly decided that, under the statute, the power company must bear the expense necessary to prevent injury, even though this involved improvements on the telephone line.

EQUITY — JURISDICTION — STREET RAILWAYS — FRANCHISES — INJUNCTION AGAINST PASSAGE OF A RESOLUTION INVOLVING A FORFEITURE. — A franchise contract between the city and a traction company provided for a forfeiture of all the rights under it in case certain construction work was not completed at a stipulated time. The municipal board, to which power was delegated, was about to pass a resolution declaring a forfeiture because of the non-performance of the conditions. The district court gave an order granting a permanent injunction against such action by the board. The city appealed. *Held*, that the order be reversed. *Gas & Electric Securities Co. v. Manhattan & Queens Traction Corp.*, 266 Fed. 625 (C. C. A.).

It is a well-recognized principle that equity will not enjoin the passage of municipal ordinances or resolutions which are legislative in character. See *Hatcher v. Dallas*, 133 S. W. (Tex.) 914, 921. Also see 23 HARV. L. REV. 470. The restraining power is limited ordinarily to enjoining the enforcement, rather than the passage, of *ultra vires* legislative measures by a municipality. See 4 POMEROY, EQ. JURIS., 4 ed., § 1763. The authorities uniformly hold that the granting of a franchise is a legislative function. See 1 NELLIS ON STREET RAILWAYS, 2 ed., § 22. The difficulty arises in determining whether the declaration of a forfeiture of a franchise is a legislative or a judicial question. The federal court falls into the error of concluding that if granting a franchise is a legislative act, the repealing of it necessarily must be of similar character. *Mercantile Trust Co. v. Denver*, 161 Fed. 769. It would seem that it is a judicial act as it involves the application with discretion of principles of law to the facts to determine whether the forfeiture has occurred. *Knickerbocker Trust Co. v. Kalamazoo*, 182 Fed. 865. And if there were such a forfeiture as to be abhorrent to equity, there should be no inherent lack of power to act. *North Jersey St. Ry. Co. v. South Orange*, 58 N. J. E. 83, 43 Atl. 53; *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316. The result in the present case may be justified by recognizing that the completion of the road is a condition precedent to the existence of a vested right under the franchise, and that the traction company was merely operating under a license. Hence in reality no forfeiture in the equitable sense was worked, and it is not incumbent upon equity to act.

EQUITY — PROCEDURE — PARTIES — INDISPENSABLE PARTIES — RIGHT OF SALESMAN OF A CORPORATION TO ENJOIN STRIKING EMPLOYEES WITHOUT JOINING THE CORPORATION AS PARTY PLAINTIFF. — The plaintiff, who received in addition to his salary as salesman a commission in proportion to the output of the corporation, sought to enjoin strikers from improperly interfering with the work of the employees of the company. The corporation was not joined as a party. If the corporation was a necessary party plaintiff, there was no such diversity of citizenship as to warrant the jurisdiction of the federal court. *Held*, that there was no jurisdiction. *Davis v. Henry*, 266 Fed. 261 (C. C. A.).

It is well established in equity that a party is indispensable if its rights will necessarily be affected by the decree, or if without the party, a final determination consistent with equitable principles is impossible. *Shields v. Barrow*, 17 How. (U. S.) 130; *Minnesota v. Northern Securities Co.*, 184 U. S. 199. So generally, where the plaintiff's interest is identified with that of the corporation and involves an internal matter of the corporation, the corporation is a necessary party plaintiff. *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Iron Molders' Union v. Niles-Bement-Pond Co.*, 258 Fed. 408. And if this

rule were not applied in the principal case, any employee, however subordinate, might conceivably obtain an injunction without the intervention of the corporation. Yet clearly the corporation would be affected by the result. Some cases appearing in conflict with the principal case are explicable on the ground that the corporation's interest was really dissimilar, or even antagonistic to the plaintiff's interest. See *Carroll v. Chesapeake & Ohio Coal Agency Co.*, 124 Fed. 305; *Doctor v. Harrington*, 196 U. S. 579. Other cases have allowed the holder of mortgage bonds to enjoin striking employees of a corporation, though the corporation was not joined as a party plaintiff. *Ex parte Haggerty*, 124 Fed. 441; *Jennings v. United States*, 264 Fed. 399. But cf. *Consolidated Water Co. v. City of San Diego*, 93 Fed. 849. Possibly these cases are distinguishable from the principal case, because of the distinct interest of the bondholder; but if not, it seems that the principal case enunciates the sounder rule of practice.

INTERSTATE COMMERCE — CONTROL BY STATES — EXCESSIVE INSPECTION FEE AS A BURDEN ON INTERSTATE COMMERCE. — A state statute required the inspection of all petroleum oil sold in the state, imposed a fee many times the cost of inspection, and declared a violation of the requirement a misdemeanor. Petitioner imported oil from other states and sold it partly by the original tank cars in which it was imported and partly by retail from such cars. Petitioner prayed that the enforcement of the statute against its business be enjoined. *Held*, that the collection of fees for the inspection of oil sold in the original tank cars be enjoined. *Texas Co. v. Brown*, 266 Fed. 577.

A state may not exclude nor interfere with the sale of objects of interstate commerce in their original packages. *Leisy v. Hardin*, 135 U. S. 100; *Schollenberger v. Pennsylvania*, 171 U. S. 1. It may, however, provide for their inspection and fix a fee for the same. *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380; *Savage v. Jones*, 225 U. S. 501. A genuine inspection fee is valid even though somewhat excessive. *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345; *Pure Oil Co. v. Minnesota*, 248 U. S. 158. But where a fee is so excessive as to indicate a disguised revenue measure it has, in recent decisions with which the principal case accords, been held an unconstitutional burden on interstate commerce. *Foot v. Maryland*, 232 U. S. 494; *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576. This is so though the transit is ended and an identical fee is imposed on domestic goods. *Castle v. Mason*, 91 Ohio St. 296, 110 N. E. 463; *Standard Oil Co. v. Graves*, 249 U. S. 389. See also *Askren v. Continental Oil Co.*, 252 U. S. 444. These decisions seem to conflict with the authority holding that a state may impose a non-discriminatory property tax on interstate goods which, though still in their original packages, have come to rest within it. *Brown v. Houston*, 114 U. S. 622; *Pittsburgh & S. Coal Co. v. Bates*, 156 U. S. 577. The distinction may be that here, by making the so-called "inspection" tax a prerequisite to sale, the state is wrongfully attempting to regulate the disposition of goods still in interstate commerce. See *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 521. See also JUDSON, INTERSTATE COMMERCE, §§ 18, 19. This technical distinction results, however, in this case, in unfair discrimination against domestic goods.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — FALLING ASLEEP AS BREAKING COURSE OF EMPLOYMENT. — Deceased was engaged in exceptionally fatiguing work, such that workers went out to rest for a few minutes every "now and then." Deceased went a hundred yards to another building, lay down on a pile of bricks and slept three hours. The foreman, as a joke, threw a brick on the roof, to wake him. The brick passed through the roof and struck him in the stomach, causing fatal injuries. Plaintiff, a

dependent, sued under the Employers' Liability Act of New Jersey. *P. L.* 1911, p. 136. *Held*, that the accident did not arise in the course of the employment. *Colucci v. Edison Cement Co.*, 111 Atl. 4 (N. J.).

Definitions of the words "in the course of the employment" have varied. See BRADBURY, WORKMEN'S COMPENSATION, 3 ed., c. 13. It is settled that employment includes more than the hours for which wages are paid. *Sharp v. Johnson*, [1905] 2 K. B. 139. An employee who remains to eat lunch on the premises, from choice, is not out of the course of his employment merely because he draws no pay. *Blovelt v. Sawyer*, [1904] 1 K. B. 271. The broader view is that anyone doing at the place of work what might reasonably be expected is in the course of his employment. See *Moore v. Manchester Liners*, [1910] A. C. 498, 500. See Francis H. Bohlen, "A Problem in the Drafting of Workmen's Compensation Acts," 25 HARV. L. REV. 401, 406. If a man is employed to keep awake, *e. g.*, as a watchman, sleeping is an abandonment of the work. *Gifford v. Patterson*, 222 N. Y. 4. Otherwise, going to sleep during the work does not *per se* break the course of the employment. *Dixon v. Andrews*, 91 N. J. L. 373, 103 Atl. 410. The court distinguishes the principal case in that deceased, like the watchman in *Gifford v. Patterson*, abandoned his work. But if resting upon the premises was an incident to the work, this distinction seems somewhat artificial.

PARENT AND CHILD — EMANCIPATION — EFFECT OF ENLISTMENT ON DUTY TO SUPPORT. — By a divorce decree the mother was awarded custody of a minor son. Shortly thereafter the son went back to live with the father. During this period he contracted for his services and disposed of his wages as he saw fit. He subsequently joined the marines with his father's consent but without the knowledge of his mother. The father was killed, and the son claimed under the workmen's compensation act as one whom the deceased was under a legal obligation to support. 1911 ILL. LAWS, 315. *Held*, that the claimant is not entitled to recover. *Iroquois Iron Co. v. Industrial Comm.*, 128 N. E. 289 (Ill.).

The father is under a legal duty to support his children. *Spenser v. Spenser*, 97 Minn. 56, 105 N. W. 483; see TIFFANY, PERSONS AND DOMESTIC RELATIONS, §§ 114, 115. Emancipation of a child able to support himself releases the father from this obligation. *Varney v. Young*, 11 Ver. 258. But award of custody to the mother does not destroy the father's duty to support the child. *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 471; see 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 1223. Such an award, however, terminates all other parental rights of the father and transfers them to the mother. *Lee v. People*, 53 Colo. 507, 127 Pac. 1023; *Wilkinson v. Deming*, 80 Ill. 342. Consequently in the principal case, as emancipation would destroy the right of custody which had been awarded to the mother, she alone could emancipate and end the father's duty to support. The court overlooked this significant factor, but reached the correct result, as it seems there was emancipation by the mother. Enlistment with parental consent emancipates. *Baker v. Baker*, 41 Ver. 55; see also *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821. Moreover, enlistment without consent seems to emancipate, at least until it is ended, as power to control is removed from the parent. *Com. ex rel. Engle v. Morris*, 1 Phila. 381; *Dean v. Oregon R. and Navigation Co.*, 44 Wash. 564, 87 Pac. 824. Even before the enlistment, however, emancipation by the mother is evident. Where a minor contracts on his own account for his services with the knowledge of his parent, emancipation is implied. *Rounds Bros. v. McDaniel*, 133 Ky. 669, 118 S. W. 956.

PHYSICIANS AND SURGEONS — LIABILITY OF PHYSICIAN FOR REVEALING CONFIDENTIAL INFORMATION REGARDING PATIENT OUT OF COURT. — The

defendant physician reasonably diagnosed the plaintiff's disease as syphilis. While later making a professional call upon the landlady of the hotel where the plaintiff lodged, the defendant warned her of the plaintiff's infection. Following his advice, the landlady forced the plaintiff to leave. He now sues the physician for damages flowing from the breach of duty in divulging a professional confidence. *Held*, that the plaintiff may not recover. *Simonsen v. Swenson*, 177 N. W. 831 (Neb.).

For a discussion of the principles involved in this case, see NOTES, p. 312, *supra*.

RELEASE — TITLE — EFFECT OF RELEASE OF CARRIER FOR LOSS OF BAGGAGE ON TITLE THEREOF — The defendant, a carrier, concluding that a trunk which the plaintiff had shipped had been lost, paid him \$50, "in full release and satisfaction of any and all claims account of shipping." Shortly afterwards the trunk was found and the plaintiff demanded it. The defendant refused to deliver it unless it was repaid the \$50, and the plaintiff brought action to recover possession of the trunk. *Held*, that the plaintiff can recover. *Roe v. American Ry. Express Co.*, 182 N. Y. Supp. 895.

The rights of the parties depend on the construction of the release. The universal principle for the construction of written instruments, including releases, is that the intention of the parties indicated by the whole writing governs. WALD'S *POLLOCK ON CONTRACTS*, 3 ed., 317. See *Texas and Pacific Ry. Co. v. Dashiell*, 198 U. S. 521. In this case two constructions were possible. If the parties intended a release of all demands, the plaintiff had no standing in court. See BACON'S *ABR.*, tit. Release, I (1). His remedy would then be to have the release avoided for mutual mistake of fact. *Great Northern Ry. Co. v. Fowler*, 136 Fed. 118. However, the shipper may well have intended to release the carrier from liability for damage but to keep his right *in rem* for what it was worth. See *Betts v. Lee*, 5 Johns. (N. Y.) 348. Ordinarily in case of injury a carrier does not take title but merely pays damages for the injury. *Brand v. Weir*, 57 N. Y. Supp. 731. A judgment for less than full value does not pass title. *Barb v. Fish*, 8 Blackf. (Ind.) 481. Hence a settlement for less than full value should not pass title. The decision would seem correct, but the court might well have given more consideration to a case presenting facts apparently never before adjudicated.

SOVEREIGN — PROCEDURE — JOINDER OF ATTORNEY-GENERAL WHENEVER RIGHTS OF THE SOVEREIGN MAY BE AFFECTED. — The Crown granted land to a railway in fee simple. Later the Crown purported to grant a portion of this same land to a settler, and in this subsequent grant the Crown reserved to itself certain mineral and timber rights. The railway brings an action against the settler for a declaration that the Crown grant to him was inoperative, and asks an order joining the Attorney-General because of the Crown's interest. *Held*, that the Attorney-General be joined. *Esquimalt and Nanaimo Ry. Co. v. Wilson*, [1920] A. C. 358.

Had this been a suit against the Crown, a petition of right would have been necessary. *Taylor v. Attorney-General*, 8 Sim. 413. Similarly, in the United States, permission of the sovereign would have to be obtained. *Kansas v. United States*, 204 U. S. 331. But the fact that the sovereign has an interest will not necessarily make the suit one against the sovereign. The sovereign's rights may be only incidentally affected, as in the principal case. *Dyson v. Attorney-General*, [1911] 1 K. B. 410; *Wheeler v. City of Chicago*, 68 Fed. 526. But, because of the existence of such an interest, the sovereign should be represented, and the Attorney-General is the appropriate representative. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607. He may be joined at the request of a party. *Ellis v. Duke of Bedford*, [1899] 1 Ch. 494; see *Dyson v.*

Attorney-General, supra. Or he may appear of his own accord as an intervening party. *Florida v. Georgia*, 17 How. (U. S.) 478; *Perkins v. Bradley*, 1 Hare, 219. The point seems well settled, but apparently it is not as well known as its utility would merit.

SPECIFIC PERFORMANCE — DEFENSES — LACK OF MUTUALITY OF REMEDY. — The assignee of the vendee of a contract for the sale of land brings a bill against the vendor for specific performance, offering at the same time to carry out all of the vendee's obligations. *Held*, that specific performance be denied for lack of mutuality of obligation and remedy. *Schuyler v. Kirk-Brown Realty Co.*, 184 N. Y. Supp. 95.

This case demonstrates the unfortunate results of a literal application of the doctrine of the lack of mutuality of remedy. The rule is well settled in most jurisdictions that the assignee of the vendee may have specific performance against the vendor. *Lenman v. Jones*, 222 U. S. 51; *Miller v. Whittier*, 32 Me. 203. And, indeed, a like result has been achieved, at times, in New York. *Dodge v. Miller*, 81 Hun, 102, 30 N. Y. Supp. 726. In the main, however, the New York courts have applied the "mutuality" formula in its most exaggerated form, to wit: that if the contract cannot be specifically enforced for any reason against one of the parties, then, and for that reason alone, he is not entitled to the remedy of specific performance against his adversary. See *Wadick v. Mace*, 191 N. Y. 1, 4, 83 N. E. 571, 572. See 16 COL. L. REV. 443. Such use of the rule has been frequently criticized. 20 HARV. L. REV. 57; 3 COL. L. REV. 1. It is regrettable that a court which recognizes mutuality of performance, as distinguished from mutuality of remedy, as possibly the more desirable conception, should refuse to apply it. In the principal case, mutuality of performance could be secured to the vendor, as had been properly done in the lower court, by a decree conditioned upon performance by the vendee or his assignee. See 33 HARV. L. REV. 955.

STATUTE OF FRAUDS — SUFFICIENT MEMORANDUM — TERMS SET FORTH IN PLEADING SIGNED BY COUNSEL — PRIOR VERBAL CONTRACT WITH ANOTHER PARTY. — The plaintiff sued for specific performance of a written agreement to sell a house to him. The defendant pleaded a prior agreement to sell the house to a third person, and set forth the terms of the agreement in the pleading, which was signed, as usual, by his counsel. There was no other memorandum of this first contract sufficient to satisfy the Statute of Frauds. *Held*, that specific performance be denied. *Grindell v. Bass*, [1920] 2 Ch. 487.

Under the Statute of Frauds only the "party to be charged" need sign a "note or memorandum" of the contract. A writing signed by the vendor is sufficient to support a suit by the vendee. *Fowle v. Freeman*, 9 Ves. Jr. 351; *Justice v. Lang*, 42 N. Y. 493. It is not necessary that the agent who signs the memorandum be authorized to make a note of the agreement; it is sufficient that he had authority to sign the paper in which its terms are set forth. *Cycle Corp. v. Humber*, [1899] 2 Q. B. 414. Nor is it necessary that there be an intent to make a binding memorandum. *Daniels v. Trefusis*, [1914] 1 Ch. 788; *Beckwith v. Clark*, 188 Fed. 171 (C. C. A.). The pleading was therefore a memorandum sufficient to bind the defendant in a suit by the third person. Both purchasers have valid contracts evidenced by sufficient writings. The purpose of denying specific performance must be to protect, not the defendant, but the prior purchaser. If in such a situation either party secured a conveyance, the legal title thus vested would prevail. *Emery v. Boston Terminal Co.*, 178 Mass. 172, 59 N. E. 763; *Maguire v. Heraty*, 163 Pa. 381, 30 Atl. 151. Here, however, neither has legal title, and it is proper that the prior equity should prevail. And since the writing is only evidential of the contract,

in determining priority it is proper that the time of the contract, not of the writing, should govern.

TORTS — UNUSUAL CASES OF TORT LIABILITY — MENTAL ANGUISH CAUSED BY PRACTICAL JOKE — DAMAGES. — A tradition in the plaintiff's family concerned an ancestral pot of gold buried in the neighborhood. On the basis of a map, shown her by a fortune teller, the plaintiff commenced to dig for treasure. As a practical joke the defendants hid a sealed pail, filled with dirt, in a place where the plaintiff must naturally unearth it. She found the pail, and, in accordance with its accompanying directions, solemnly opened it in the presence of all the heirs. She now sues for financial outlay and mental anguish over disappointed hopes. The plaintiff having died *pendente lite*, her heirs continue the suit. *Held*, that the heirs may recover \$500. *Nickerson v. Hodges*, 84 So. 37 (La.).

Society gives a license to enjoy the free exercise of one's faculties. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343, 361. But it is generally admitted that individuals will not be secured in freely exercising their faculties for the purpose of injuring others. *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Janvier v. Sweeney and Barker*, [1919] 2 K. B. 316; see 28 HARV. L. REV. 343, 362. By exceeding this social license in their practical joking the defendants above doubtless gave to the plaintiff, had she survived, a valid right of action against them. By the Code the plaintiff's heirs succeed to the plaintiff's right. LA. R. C. C., Art. 2315. The court says: "If Miss Nickerson were still living, we should be disposed to award her damages in a substantial sum." But, as to her heirs, "a judgment of \$500 will reasonably serve the ends of justice." A Midsummer Night's prank does not call for Midsummer Night's justice. By law the heirs, as legal successors to the deceased, must be entitled to all the "substantial sum" or nothing. They might well protest this judgment as the true mother protested when Solomon would have halved the baby between the disputing harlots.

TRESPASS TO REALTY — CONTINUOUS TRESPASS — LIMITATION OF ACTION. — In 1912 defendant county seized a strip of plaintiff's land, without color of right, and built a highway. In 1920, as a defense against an action of trespass *quare clausum fregit*, defendant pleaded the statute of limitations. The court charged that the plaintiff could recover, without first retaking possession, and that the statute was not a bar to a recovery of damages for the last six years of occupation. *Held*, that the charge was correct. *Morey v. Essex County*, 110 Atl. 905 (N. J.).

When a trespass on realty is a completed act the cause of action accrues and the statute of limitations runs from that moment. *Kansas Pacific Ry. v. Muhlman*, 17 Kan. 224. And consequential damage occurring later cannot turn it into a continuing trespass. *Louisville Ry. v. Wiggington*, 156 Ky. 400, 161 S. W. 209. But when the trespass is a continuing injury to possession the statute runs afresh from each day's wrong. See *Milton v. Puffer*, 207 Mass. 416. The court here treats the plaintiff as having lost possession by the seizure. If so, there could be no continuing injury to his possession. But the result reached seems correct because defendant, appropriating at most a right of way, did not really gain possession. Some states treat such an appropriation as a completed trespass, because it makes a permanent alteration in plaintiff's land. *Adams v. Macon Ry.*, 141 Ga. 701, 81 S. E. 1110. But the use of an assumed right of way is in its nature a continuing wrong, and the weight of authority agrees with the decision. *Building Company v. Chicago*, 207 Ill. App. 244; *Carl v. Sheboygan Rd.*, 46 Wis. 625, 1 N. W. 295.

TRIAL — MODES OF TRIAL — COMPULSORY REFERENCE FOR A PRELIMINARY HEARING. — The plaintiff brought an action at law in a United States District Court for a balance due on an account containing 298 items. The defendant set up by way of counter-claim an account containing 402 items. Upon motion of the defendant and against the objection of the plaintiff, the Court appointed an auditor to define and simplify the issues, hear the evidence, and report the same together with his opinion on the disputed issues, to the Court. The order provided, however, that the final determination of all issues of fact was to be made by the jury at the trial. *Held*, that courts of law have inherent power to make such reference. *In re Peterson*, U. S. Sup. Ct., October Term, 1919, No. 28.

For a discussion of this case, see NOTES, p. 321, *supra*.

BOOK REVIEWS

ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS. By Albert M. Kales. Chicago: Callaghan & Co. 1920. pp. xxxvi, 948.

In common with Mr. Kales' previous works, this volume possesses a rare combination of qualities — the product of a diligent and masterful scholarship; it also comes fresh from "the firing line of actual litigation." The distinction has fallen to few law writers in America of occupying the foremost place among the students in a field and of enjoying at the same time a recognized pre-eminence among practitioners in that field. One may surely say that it was Gray's; and when he set out to write a model textbook on the rule against perpetuities, he was singularly successful in stating growing rules in terms which have stood the strains of litigation and heated contest. Mr. Kales is generally recognized to have succeeded Mr. Gray in his premiership in the law of future interests in America; and this treatise promises to do for a larger field much the same kind of service as Gray's for the rule against perpetuities.

Fifteen years have passed since the publication of the author's shorter volume on Future Interests in Illinois, and it has doubtless in that time fulfilled his purpose to make the members of the Illinois bar more intimately acquainted with Mr. Gray's "learning and discrimination in the handling of fundamental problems in the law of future interests." But it has done more — in illuminating so many corners of the law in other states, it has placed every student of the law of future interests in debt to Mr. Kales' own learning and discrimination in handling the same problems. And this debt has grown since the publication in 1917 of Mr. Kales' collection of cases on the law of future interests — a revision and enlargement of Mr. Gray's collection, but greatly improving the latter's analysis and arrangement. Throughout this period, also, Mr. Kales' magazine articles have proved to be indispensable aids to teachers and students, and the present volume contains (p. liv) a welcome bibliography of some thirty of them, used wholly or in part in its preparation. Material in legal periodicals seems to be so neglected by the profession that this treatise would serve a very useful purpose if it had done no more than to make these articles available in book form.

But the volume is much more than a new edition of the author's previous writings. The Introduction to the Law of Estates and Future Interests (in Book I) is largely new and is a very refreshing restatement of the background of our modern law; on some topics, *e. g.*, the nature and destructibility of contingent remainders, the treatment is quite unlike that to be found in the classic English treatises and from a twentieth century point of view decidedly

more rational. Book II on the Interpretation of Writings is a useful attempt to put order into the chaos which has resulted from the modern aversion to precedents in the construction of wills — chaos which has grown worse since Mr. Gray wrote that "when the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation"; and the suggestions in the chapter on the Art of Interpretation ought to be at the elbow of every judge who has to make the last guess as to what testators might have intended. The author's own discussion of the problems which arise in determining whether remainders are vested or contingent (c. xv) exemplifies the utility of his suggestions as to methods of construction, and is the most thorough treatment of these problems made in connection with the American cases.

The analysis of the "calculus of estates" (Book III) is an essential introduction to the law of future interests, though it has necessitated some inconveniences in arrangement, such as the scattered treatment of the effect of the Illinois statute on estates tail in widely separated chapters. Book IV on Future Interests and Book V on Illegal Conditions and Restraints on Alienation are adapted from the author's earlier treatise, but with some notable additions. The section dealing with the inclusion of adopted children in limitations to classes is unique and exceedingly useful. The series of problems which may arise in connection with *Clafin v. Clafin* is nowhere else to be found. On such a point as the validity of shifting interests created by deed, the argument ought to prove convincing in any state where the common-law principle of no fee on a fee still holds its magic power.

On most of the topics covered, the special treatment of the Illinois situation should be no handicap to the use of the treatise by lawyers in other states; and though primarily a treatment of local law, it is the most useful general treatise yet published in America on the law of estates and future interests. In Illinois, of course, it is a veritable Jarman. In a few instances more attention might have been paid to recent developments in the law of other jurisdictions and perhaps to the published studies of local law in other states; one of these instances is the effect of statutes on estates tail like the Illinois statute (p. 392), in connection with which *Frame v. Humphreys* should no longer be cited to show that primogeniture survives in Missouri. The omission of some important topics, such as the effect of the rule against perpetuities on the validity of a contract in a case like *Worthing Corporation v. Heather*, is doubtless due to limitations of space.

It would be difficult to dissent from Mr. Kales' conclusion that a deed in Illinois may still operate under the statute of uses if for any reason it cannot be effective as a statutory grant. Yet this raises the question whether our conveyances in America have not by this time achieved an independent position, whether even apart from modern statutes it has not become possible to convey land without resort to the support of the statute of uses. Professor Rood's conclusion that "the statute of uses, the doctrines concerning uses, and conveyances operating by virtue of the statute of uses, have little or nothing to do with the validity of the ordinary conveyance in the great majority of the states," contains the suggestion that our law of conveyancing may by this time have got new roots. And in line with this, one may wonder whether our law of future interests can not also slough off some of its feudal origins.

Admitting the necessity for Mr. Kales' chapter on the Feudal Land Law and for a student's mastering it in order to understand and deal with present-day decisions, the question remains whether something is not to be said for those critics in England who talk of abolishing the law of real property. Is it unthinkable that we shall some day have in America attempts, like those now being made in the pending Law of Property Bill in England, to rebuild the

foundations of this part of our law? In England, these attempts are being made by the most experienced conveyancers, and they date from the suggestions of so eminent a property lawyer as Joshua Williams. In America, the time was certainly not ripe for any departure until Gray and Kales had done their work. But with their assistance, is not the way opening up for a new approach — for some inquiry into the extent to which such rules as those forbidding remoteness and restraints are accomplishing desirable social and economic results, for some modernizing of our common-law heritages which will make their handling less esoteric and their application more certain? Mr. Kales has laid the foundations for some beginnings in this direction in the law of Illinois — where it is needed quite as much as anywhere in the country — and his articles in the first volume of the Illinois Law Review show how alive he is to the need and to the possibility of meeting it constructively.

One first step might be some inquiry into the working of the New York legislation of 1830, which is the only attempt made in America at a thorough overhauling of the law of future interests. Certain it is that we cannot stop with analysis. Some of our law of future interests was imported from England just as the movement for change was beginning to bear fruit there, and so important a jurisdiction as Illinois still keeps rules — as that concerning the destructibility of a contingent remainder — which English law has been free from for the better part of a century. We seem to have arrived at a time when the American law of real property needs Americanization — and the task should be undertaken by the experts of Mr. Kales' understanding and soundness before it falls into less worthy hands.

M. O. H.

A MEMOIR OF THE RIGHT HONORABLE SIR WILLIAM ANSON. Edited by Herbert Hensley Henson. New York: Oxford University Press. 1920. pp. 7-242.

In this little volume the friends of Sir William Anson have joined to express the regard and esteem which the gentle-mannered Warden of All Souls inspired in all who knew him. The composite character of the biography involves some repetition, but the editor has stolen our thunder by pointing out that this defect was inevitable. What repetition there is but accentuates the essentials of Anson's character and achievements and never becomes tedious. A pleasant feature of the book is the printing at the end of each chapter of a letter or two written by Anson himself. In these letters the several memoirs, each from a different pen, find an immediate guarantee of their faithfulness.

Anson's name must be placed high in the law. "The Law of Contract" and "Law and Custom of the Constitution" had become classical before the author's death. These books and years spent in instructing students in the law were his generous contribution to the "revival of legal teaching" at Oxford. It is interesting to note that at about the time Langdell and his successors were developing new methods in legal instruction at Harvard, a little group of men at Oxford (Bryce, Dicey, Maine, Grueber, Anson, Digby) were lifting legal teaching from the rut in which it had lain for the century since Blackstone. Anson's services to education found broader scope than in the law alone. He labored for all the interests of Oxford, as Warden of All Souls, Vice Chancellor, and finally as Burgess for the University. While in Parliament as parliamentary secretary for the Department of Education, although nominally under his chief in the Cabinet, he exercised in reality supreme direction of national education. *Bene natus* he was, Anson gave the lie to *mediocriter doctus* the ancient reproach of Fellows of All Souls.

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CURRENT LAND LAW REFORM IN ENGLAND

IF the spirits of Coke and Fearne and Preston are wandering about the British Isles in these times, one can imagine that they are not altogether happy about the direction in which recent proposals for land law reform seem to be pointing. It would be baneful enough to the expounders of the "lean and wasteful learning" of our system of land law if these proposals formed part of a general program of land reform, undertaken by a Cobden crusading for free trade in land as in corn,¹ or by a socialist or labor party seeking to establish some end of social justice;² but to find them originating with experienced conveyancers and fathered by lord chancellors in such a way as to indicate complete freedom from influences outside the profession — then they are little short of scandalous, and the "authorities" have indeed reason to feel discomfited.

One hardly dares to imagine the reception which an American bar association might accord to a proposal that in the future all

¹ In his last speech at Rochdale, 23 November, 1864, Richard Cobden said: "If I were five and twenty or thirty . . . I would take Adam Smith in hand, and I would have a League for free trade in Land just as we have a League for free trade in Corn." 2 COBDEN, *SPEECHES*, p. 367. Cf. JOSEPH KAY, *FREE TRADE IN LAND*, 6 ed. (1881).

² The agitation for reform of the land law in England seems to have been at its height in the seventies, when the Land Tenure Reform Association and the Land and Labor League were active. HOBHOUSE, *DEAD HAND*, p. 163. But it seems to have subsided since, and it is in no way connected with the proposed changes in land law under discussion. Nor do these changes proceed in any way from the campaign of the nationalizers, like the Land Nationalisation Society and the Land Restoration League, described in SHAW LEFEVRE, *AGRARIAN TENURES* (1893), pp. 300, 305.

freeholds should be treated as leaseholds. And if such a proposal were coupled with a serious suggestion that the statute of uses should be repealed and many legal interests left to find protection in equity, it might be thought to smack of attacking the Constitution.³ Yet these proposals form the backbone of a scheme for reforming English land law, which was carefully elaborated by experts under the ægis of a special government committee, to which Lord Birkenhead gave the stamp of government approval, and which was favorably considered by a joint committee of the two Houses of Parliament after it had passed a second reading in the House of Lords.⁴ And when the Lord Chancellor adjourned the discussion of these features of the Law of Property Bill which is pending in the House of Lords, such professional leaders as Lord Haldane and Lord Buckmaster could not refrain from expressing their regret.⁵

America is not so remote from legislative currents in England that such a revolution might not leap across the Atlantic, and we may very properly seek to understand its meaning and its purpose. The original acceptance of English land law in America was not effected without important reservations.⁶ We were saved from copyholds and manors, and in most states entails got little foothold.⁷ Whether the English conception of tenure did or did not find

³ Cf. *Gillilan v. Gillilan*, 278 Mo. 99, 112 (1919), where Chief Justice Bond, in speaking of the statutory substitute for estates tail, said that "the doctrine of primogeniture is radically opposed to the spirit, if not the letter of both" the federal constitution and the state laws, and "the idea that any such preference in the descent of real property could co-exist in the laws of any of the states, with the axioms of the Federal Constitution guaranteeing equal protection of the laws to all persons and a republican form of government for each state, or with the social and political life modeled on these fundamental principles, is an unthinkable absurdity." Yet Massachusetts still has primogeniture as to estates tail. *Wight v. Thayer*, 1 Gray (Mass.), 284 (1854).

⁴ On 3 March, 1920. 39 PARLIAMENTARY DEBATES, 280. The report of the Joint Select Committee was printed as a White Paper (No. 106) on 30 June, 1920.

⁵ On 26 July, 1920. 41 PARL. DEBATES, 490. Part I of the Bill, which includes the proposals for assimilation, was held over, but apparently not abandoned.

⁶ Cf. the Massachusetts law of 1641, providing "That all our Lands and Heritages shall be free from all Fines and Licenses, upon Alienations, and from all Hariots, Wardships, Liveries, Primerseizins, year, day and waste, Escheats and forfeitures upon the Death of Parents or Ancestors, natural, unnatural, casual or judicial and that for ever." MASS. COLONIAL LAWS (1887 reprint), p. 88.

⁷ Professor Jameson has attributed their unpopularity in the early years of the republic to the social revolution which accompanied the secession of the colonies. *Bos-*

its way into American law,⁸ we have acted as if it had; the law of estates was swallowed whole, and if one would speak with conventional accuracy he must perhaps still say that while chattels are owned absolutely, land in many states can only be *held*. The fact that such language is out of keeping with current thought, even among lawyers and judges themselves, may mean that the profession has legislated tenure out of existence by neglecting it. Seisin is still a reality in modern law, though its foundations have long since become obsolete.⁹ Under the sweeping rule that the English common law was accepted in America only to the extent of its applicability to American conditions, many innovations have been established. But there has been little systematic effort to appraise American conditions, or to measure the extent to which the English land law would serve them, and perhaps some of our law had already outlived its usefulness in England when we imported it to America.¹⁰ Little of our law of real property antedates the Revo-

ton Transcript, 12 Nov., 1920. In the early part of the nineteenth century, there was a general feeling that entails were inconsistent with American democracy, as evidenced in the provision in the Missouri statute adopting the common law, that "the doctrine of entails shall never be allowed." Act of 19 January, 1816. 1 MO. TERR. LAWS, p. 436. The New York Revision Commissioners in their REPORT of 1828, p. 61, urged that "it should never be forgotten, that it is the partibility, the frequent division, and unchecked alienation of property, that are essential to the health and vigor of our republican institutions."

⁸ GRAY, PERPETUITIES, 3 ed., § 23; Hudson, "Land Tenure in Missouri," 8 LAW SERIES, MISSOURI BULLETIN, 4. Tenure in New York was made "allodial and not feudal" by the Act of 20 February, 1787. On tenure in other British settlements, see *Atty. Gen. v. Brown*, 2 S. C. (New South Wales) 30, 35, 39 (1847); *Veale v. Brown*, 1 John. N. Z. C. A. 152, 157 (1868); *In re Stone's Estate*, 1 WESTERN WEEKLY, 563 (Saskatchewan) (1920). The 1920 Bill does not propose to abolish tenure in England altogether; copyhold tenure would disappear under it, but the assimilation of freeholds to leaseholds would not affect the conception that all land in England is *held* and not *owned*.

⁹ "The old Anglo Saxon theory, or rather fact, of seizin . . . is none the less a living part of the real estate law of to-day because in the daily practice of conveyancers it has become so obscured by the intricacies and ramifications of our record titles, that as Sir Frederick Pollock says, 'It is possible for even learned persons to treat it as obsolete.'" Davis, J., in MASSACHUSETTS LAND COURT DECISIONS, p. 7 (1899). Cf. *Early v. Early*, 134 N. C. 258, 265, 46 S. E. 503 (1904); WILLIAMS, SEISIN OF THE FREEHOLD, (1878).

¹⁰ Our failure to modernize some of the rules borrowed from England did not escape attention in England. Thus Lord St. Leonards, then Edward Sugden, writing to James Humphreys in 1826, said (p. 76): "It is a singular circumstance, that whilst we complain of our law of property, and are so anxious for new laws, the infant state of America is daily adopting ours, with scarcely any variation, and particularly those

lution. In most jurisdictions it has grown up since the beginning of the nineteenth century, and as we excluded the recent English statutes in adopting the common law we have lost the benefit of many statutory improvements then already made in England. As the legislation of the reform period in England began to free the English law of its anachronisms, we were taking over the common law in unadulterated form. It is not strange that some of its historical rules still survive with us after they have been all but forgotten in England.¹¹ The result in America has been tolerable only because the needs of a new and busy land market have given us informalities in conveyancing, and the settlement of the West our system of land registry.

Nor has the advantage of our fresh start been capitalized for legislative improvement in our land law after its adoption. The outstanding if not the only thoroughgoing attempt made in America to overhaul the imported law of real property is that of the New York Revision Commissioners in 1828.¹² Their report shows that they had carefully studied the latest currents in land law reform in England.¹³ If one may regret that their work was not revised a decade later, after the reports of the English Real Property Commissioners and the dozen or more English statutes based upon their recommendations, he must nevertheless be grateful for the intelligence with which they sought to render the New York law "more plain and easy to be understood." When the New

portions of the operation of which we appear to complain most loudly." SUGDEN, *LETTERS TO JAMES HUMPHREYS*, p. 76 (1827).

¹¹ For instance, although the ENGLISH REAL PROPERTY ACT of 1845 made impossible the failure of a contingent remainder because of the termination of the particular estate by forfeiture, surrender, or merger, this pitfall must still be guarded against in Illinois and some other American jurisdictions. *Gray v. Shinn*, 293 Ill. 573, 127 N. E. 755 (1920); *Randolph v. Wilkinson*, 128 N. E. (Ill.) 525 (1920). See *KALES, ESTATES*, § 106.

¹² The second part of the report of the Commissioners appointed in 1825, dealing with "the acquisition, the enjoyment, and the transmission of real and personal property, and concerning the domestic relations," was issued in several instalments in 1827 and 1828. See also the *REPORT OF THE COMMISSIONERS OF STATUTORY REVISION OF 1896*, p. 481; and the *REPORT OF THE BOARD OF STATUTORY CONSOLIDATION* in 1907, p. 4896.

¹³ It contains numerous references to HUMPHREYS, *OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY, WITH OUTLINES FOR A SYSTEMATIC REFORM* (1826); to SUGDEN, *LETTERS TO JAMES HUMPHREYS* (1827); and to Lord Brougham's famous speech on *THE PRESENT STATE OF THE LAW*, delivered in the House of Commons, 7 February, 1828.

York statutes of 1830 were imitated in Michigan, Minnesota, and Wisconsin, and to some extent in California and the Dakotas, they underwent few changes, and they have since escaped significant revision.¹⁴ In other American jurisdictions, even in the legislation incident to setting up the new jurisdictions in Western states, there have been few attempts to modernize the heritage which Blackstone's executorship assured to us. If now and then a significant change is made, as in the 1916 Massachusetts Contingent Remainders Act, it is more likely to be the result of a professional sensation than the product of a scientific study of the serviceability of our land law to the needs of modern communities. In a field conspicuous for its aloofness from the play of moral conceptions, where legal rules are quite unaffected by changing social theory and political organization, we have shown little disposition in America for scientific evaluation; and but for the work of a few law school men like Gray and Kales and Rood, our jurisprudence would have been almost stagnant. The judges have not rebelled, only because their doctrines of intention and their rules of interpretation have furnished the necessary escape when courts have been embarrassed by outcroppings of the ancient feudal law; but the advocate cannot always be sure that the escape will be found, nor how it will be found, and the public takes the risks of this "uncognoscibility" in expensive litigation.¹⁵

It has not been so in England, partly because more numerous survivals have made the situation more acute, and perhaps partly because habituation to investigation by royal commissions has played such a large rôle in legislation and government. Though Lord St. Leonards had found it possible to say in 1826 that the general rules of the law of property were "as perfect as human intelligence could make them,"¹⁶ it was impossible for the law of

¹⁴ In the 1919 WISCONSIN STAT., for example, the whole of chapter 95 on Real Property, and the Nature and Qualities of Estates Therein, seems to date from 1849, with the single addition of the § 2070 *a*.

¹⁵ For example, *Biwer v. Martin*, 128 N. E. (Ill.) 518 (1920), in which the Supreme Court of Illinois holds that a covenant of warranty in a deed creating a contingent remainder precluded its destruction by merger of the particular estate and the reversion. See also *State ex rel. Farley v. Welsh*, 175 Mo. App. 303, 162 S. W. 637 (1913), where the escape was found by giving to the same limitation very different results as to the realty and the personalty. But in *Frame v. Humphreys*, 164 Mo. 336, 64 S. W. 116 (1901), the escape was not found.

¹⁶ In his letter of 25 October, 1826, to James Humphreys, 3 ed. (1827).

real property to escape the spirit of the reform period of 1832. The Prescription Act of that year, and the Real Property Limitation Act, the Dower Act, the Fines and Recoveries Act, the Inheritance Act, and the Administration of Estates Act of 1833, and the Wills Act of 1837 engrafted a substantial body of modern notions upon the feudal system without seriously disturbing it. At no period since has the law of real property been permitted to fall out of the sight of English legislators. The Real Property Act of 1845 and the Amending Acts of 1859 and 1860 brought important modifications, of some of which we are still in need in some jurisdictions in America. The Registration of Title Act in 1862 and the Land Transfer Acts of 1875 and 1897 have sought with questionable success the still debated advantages of land registration, making it compulsory in London and optional throughout England; in conferring the legal estate on the personal representative, the Land Transfer Act of 1897 has all but made over the law concerning devolution of real property.¹⁷ The Contingent Remainders Act of 1877, the result of a professional sensation,¹⁸ took another short step away from the feudal law of contingent remainders by relieving them altogether of dependence on particular estates. The Conveyancing Act of 1881, amended in 1882 and 1911, is an important milestone in the history of "code-word" conveyancing. The Settled Land Acts of 1882, 1884, and 1890, based upon one of the most useful legal inventions of modern times, by which a life tenant of an entailed or settled estate can convey so as to bind his successors, have made notable progress toward facilitating the transfer of land in which estates are held by numerous persons. Other legislation of great importance in a general consideration of the social and economic utility of land law,¹⁹ such as the Corn Pro-

¹⁷ As instanced in *Re Robson*, [1916] 1 Ch. 116, where a contingent remainder was saved on the ground of its being equitable by reason of this provision in the LAND TRANSFER ACT. But *cf.* *Barrett v. Barrett*, 18 State Rep. (N. S. W.), 637 (1918).

¹⁸ In *Cunliffe v. Brancker*, 3 Ch. Div. 393 (1876).

¹⁹ Some statutes which do not directly relate to land law have had a very wide influence also; among these should be mentioned the SOLICITORS' REMUNERATION ACT of 1881, abolishing the 72-words-for-a-shilling rule for compensating solicitors, and putting their remuneration on a commission basis. On the evils of the old rule, see comment by JOSHUA WILLIAMS, 2 JUR. SOC. PAPERS, p. 597 (1858-63).

The present study does not cover such legislation as the proposed amendments to the Corn Production Act of 1917, one of which would empower the Minister of Agriculture and Fisheries to appoint a receiver to take charge of any agricultural land

duction Act of 1917, may be left out of account in dealing only with the changes in real property law itself. Some indication of English legislative activity is to be had from a list of statutes dealing with land law, ascribing fourteen statutes to the eighteenth and one hundred and thirty-eight to the nineteenth century.²⁰

During this period the profession in England has also had the advantage of numerous extensive and more or less scientific inquiries into the operation of real property law. The Real Property Commission of 1828, the Royal Commission of 1854 on Registration of Title, the Royal Commission of 1868 appointed to inquire into the operations of the Land Transfer Act of 1862, the Select Committee of 1878 on Land Titles and Transfer (known as Mr. Osborne Morgan's Committee), and the Royal Commission of 1908 on the Land Transfer Acts, have laid a scientific foundation for reconstructing the English system of land law.²¹ Indeed, in few fields of law has there been afforded such opportunity for intelligent appraisal of its service.

But in spite of the volume of legislation, discontent with the existing situation still prevails in many quarters, especially among professional experts and conveyancers.²² The 1911 report of the

which in the opinion of an agricultural committee was being cultivated or managed "in such a manner as to prejudice materially the production of food thereon." See 134 *PARL. DEBATES* 1601 (1920); 65 *SOL. JOUR.* 54.

²⁰ In JENKS, *MODERN LAND LAW* (1899), p. xiv.

²¹ The Commission of 1828 made four reports: in 1829 (10 *PARL. PAPERS*), in 1830 (11 *PARL. PAPERS*), in 1831-2 (23 *PARL. PAPERS*), in 1833 (22 *PARL. PAPERS*). The 1854 Commission made its report in 1857; the 1868 Commission in 1870, and attempts were made to give effect to its recommendations in bills introduced in Parliament in 1870, 1873, and 1874; the Select Committee of 1878 made a report in July, 1878, and after being reappointed, a second report in June, 1879; the 1908 Commission published its final report in 1911 (*Cd.* 5483). The minutes of evidence taken before these commissions are invaluable. On the work of the 1908 Commission see FORTESCUE BRICKDALE, *METHODS OF LAND TRANSFER* (1914), p. 175 *et seq.*

The three reports of the Chancery Commission of 1850 should also be mentioned in this connection, especially the second report on "the state of the law in relation to matters testamentary" published in 1854.

²² "The English law of real property is a disgrace to a country which aspires to be numbered amongst civilized nations." Mr. T. Cyprian Williams, in 2 *MINUTES OF EVIDENCE BEFORE LAND TRANSFER COMMISSION* OF 1908, p. 362. "Our law of real property is in fact a hopeless jumble of inconsistent doctrines, causing the student a great waste of time in his attempts to master it, and providing innumerable pitfalls for the unskilled practitioner." Mr. Charles Sweet, in 24 *L. QUART. REV.* 26, 34 (1909). "English Land Law, full of interest for the historian, is full of traps for the practitioner, who must always be on the watch to see that some archaic rule does not spring up at

Royal Commission on the Land Transfer Acts teems with expressions of dissatisfaction, some of which are so extreme that one would be inclined to disregard them if they were not spoken by such experienced leaders of the profession. If the reform forces have in the past contented themselves with modifications of an existing system, they have in recent years become bolder in proposing reforms so radical that little would remain of the common law system of real property — they even speak of “abolishing the law of real property.”²³

Nor is this discontent frittered away in words. Attempts at drastic legislative change are so persistent that some fruition would seem inevitable if the activity continues, whatever the fate of the present Bill. In 1897, Lord Davey introduced into the House of Lords the so-called “Wolstenholme Bill,”²⁴ which would have had the effect of abolishing all estates except fees simple and estates for years, and of leaving all other interests to take effect in equity. In 1907, the decision in *Copestake v. Hoper*,²⁵ with its startling reminder of the lingering feudal law of heriot, served effective munition to discontent. In 1908 a Royal Commission on the Land Transfer Acts was appointed, and its report in 1911 is a mine of comment and suggestion. In 1913, Lord Chancellor Haldane introduced a Real Property Bill and a Conveyancing Bill,²⁶ the latter of which

an inopportune moment, to wreck his careful and prosaic plans.” MR. EDWARD JENKS, DIGEST OF ENGLISH CIVIL LAW (1911), Bk III, p. xix. “That the present law of real property is cumbrous, archaic and expensive no one acquainted with it can deny.” MR. ARTHUR UNDERHILL, THE LINE OF LEAST RESISTANCE (1919), p. 1. “The existing law of real property is archaic and unnecessarily complicated.” ACQUISITION AND VALUATION OF LAND COMMITTEE, 4TH REPORT (1919), p. 10. “I am certain that posterity will say, ‘How was it that a nation so practical as the British nation for so long tolerated so many inconvenient and costly anachronisms?’” Lord Chancellor Birkenhead in the House of Lords, 3 March, 1920, 39 PARL. DEBATES, 264.

²³ 31 L. QUART. REV. 353.

²⁴ Mr. E. P. Wolstenholme, author of a treatise on the CONVEYANCING ACTS, was a member of the Land Transfer Commission of 1868, and was spoken of (in 21 L. QUART. REV. 24) as “perhaps the greatest living authority on the practice of conveyancing.” He was responsible for the underlying ideas of the CONVEYANCING ACT of 1881, and of the SETTLED LAND ACT of 1882 which has been characterized as the “greatest real property act of the century” by Mr. ARTHUR UNDERHILL, in A CENTURY OF LAW REFORM, p. 291. The scheme embodied in the bill of 1897 and with which his name has been associated, was first put forward by him in a paper read before the Juridical Society in 1862. 2 JURID. SOC. PAPERS, 1858-1863, p. 533. It was also described by him before the 1878 Select Committee, REPORT of 1878, p. 210.

²⁵ [1907] 1 Ch. 366, [1908] 2 Ch. 10.

²⁶ Commented on by Mr. Arthur Underhill in 30 L. QUART. REV. 35.

adopted the Wolstenholme scheme to some extent, and the two were later combined in a Real Property and Conveyancing Bill, which was again introduced in 1914.

In January, 1919, the Ministry of Reconstruction requested the Acquisition and Valuation of Land Committee "to consider the present position of land transfer in England and Wales and to advise what action should be taken to facilitate and cheapen the transfer of land."²⁷ During its inquiry, this committee "became convinced that the main defects in the existing system of conveyancing do not lie either in the Conveyancing Acts or in the practice of conveyancing, but in the general law of real property." The members of the committee agreed unanimously "that the existing law of real property is archaic and unnecessarily complicated, and that no great improvement in the existing systems of transfer of land, whether registered or unregistered, can be effected until the law of real property has been radically simplified." This conclusion led the committee to recommend the enactment of amendments in the law of real property and conveyancing, as "absolutely necessary to cheapen and facilitate the transfer of land." The proposed amendments are embodied in the so-called Cherry Bill, recently introduced in the House of Lords by Lord Chancellor Birkenhead.²⁸

The Bill is exceedingly bulky and it covers a wide range of topics.²⁹ "Its great length is due, not to provisions for abolishing the exist-

²⁷ This committee was originally appointed by the Prime Minister in 1917. Its first report in January, 1918 (Cd. 8998), and its second report in November, 1918 (Cd. 9229), dealt with the acquisition of land for public purposes; its third report in March, 1919 (Cd. 156), dealt with the acquisition of mines; and its fourth report in November, 1919 (Cd. 424), with land transfer.

²⁸ Mr. B. L. Cherry, one of the leading conveyancing counsel in London, had a prominent part in framing the bill, and it is therefore known by his name. He was also one of the draftsmen of Lord Haldane's Bill in 1914.

Numerous comments on the unamended bill have been published, of which the more important are those by Mr. Arthur Underhill, in 36 L. QUART. REV. 107; by Mr. Charles P. Sanger, in 20 COL. L. REV. 652; and the editorial articles in 64 SOL. JOUR., 373, 388, 407, 460. See also the comparative study of "Property Law Reform at Home and Overseas," by Mr. Hogg, in 64 SOLICITORS' JOUR., 385, 405, 421, 442, 458. The report of the Conveyancers' Institute's Committee has also been published in 64 SOLICITORS' JOUR., 741 (28 August, 1920). The Amendments in the Bill made by the Joint Committee are discussed in 150 L. T. 67, 89.

²⁹ The amended bill contains 185 clauses, in addition to the sixteen schedules — 276 pages altogether.

ing law, but to provisions introduced in order to stop gaps in it." Much of it is devoted to amendments which would be necessitated in the Settled Land Acts, the Conveyancing Acts, and the Trustee Acts, by the changed bases of the law of real property. The elaborate provisions for changes in the system of land registration are of great local interest, but less important to an American observer because of our very different systems. The most interesting if not the most far-reaching proposals are those for assimilating freeholds to leaseholds, for repealing the statute of uses, and for placing "all interests in land, except legal estates in fee simple and for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement." But other features of the Bill will also merit careful consideration.

It is easy to envisage the proposed abolition of copyhold tenure, but on first impression the suggestion that two radically different branches of law may be assimilated smacks of the impossible, even in an age of miracles worked by legislative fiat. It is not a new idea, however. Two generations have elapsed since Joshua Williams proposed the abolition of the greatest difference between real and personal property by having estates pass like chattels to the personal representative on the death of the owner.³⁰ This step toward assimilation was actually taken in the Land Transfer Act of 1897.³¹ The proposal of complete assimilation was discussed before the Select Committee of 1878,³² and it was considered at some length and approved by the Land Transfer Commission of 1908, which found that it would be a "material aid to a satisfactory system of land registry."³³ It had formed a part of Mr. Wolstenholme's Bill of 1896, which was designed "to make the title to land approximate as nearly as circumstances permit to the title to stock," and also of Lord Haldane's Bill of 1914. The recent commission,

³⁰ In a paper before the Juridical Society in 1862. 2 JUR. SOC. PAPERS, 1858-1863, pp. 589, 615.

³¹ 60 & 61 VICT. c. 65. Part I of the Act of 1897 "has a curious history. The draft was originally prepared, I believe, by the late Lord Selbourne, with a view to assimilating the devolution of the *beneficial* interests in land to that of personal estate." B. L. Cherry, in 2 MINUTES OF EVIDENCE BEFORE LAND TRANSFER COMMISSION OF 1908, p. 209.

³² See REPORT OF July, 1878, p. 82, where the suggestion is attributed to Mr. Senior.

³³ See REPORT OF 1911, p. 53. See also the preface to SANGER, WILLS AND INTES-TACIES (1914).

reporting in 1918, gave it unqualified endorsement,³⁴ and it is the basic part of the attempt to reform the law of real property in the 1920 Bill.

The essential differences between movables and immovables have found recognition in all systems of law, and if our categories of real and personal property were based solely on such differences, assimilation would doubtless be unthinkable. But it is an anomaly which a person schooled in another system of law must find difficult of comprehension, that in our law a fee simple is treated as real property, whereas a term for ten thousand years in the same land would be treated as personal property and be dealt with in a very different way. In America, one may explain that terms of such length do not in fact occur. In England, however, the difference has not lost its practical importance, in spite of the provision in the Conveyancing Act of 1881 making terms of two hundred or more years easily convertible into freeholds.³⁵ But anomalies have often found themselves agreeable bedfellows in the common law, and a busy profession demands other reasons before it is impressed with the necessity for reforms. The protagonists of assimilation in England urge the general unsatisfactoriness of real property law, its many survivals of rules which have outgrown their usefulness, the difficulty in mastering its details, and the expense and inconvenience attending conveyances, as against the simplicity and satisfactoriness of the law of chattels real. One must be convinced of the necessity for a general reform before he will see any necessity for considering the proposal to assimilate. The question will then remain whether assimilation is the best remedy for the ills to be escaped. It is due to the frequent comparison of land and shares by the advocates of similar registry systems for both that this avenue seems so close at hand. And we have a precedent in the resort to the law of leaseholds for the action of ejectment.

The method of assimilation proposed in the 1920 bill has a simple appearance. The Bill would enact that

³⁴ FOURTH REPORT, 1919, p. 11.

³⁵ While a limit was at one time set on the number of years for which a term could be created — in COKE, LITTLETON, 45 *b*, forty years is said to have been the ancient limit, but it must have been abandoned at an early date, — it has now long been clear that no limit exists. An American jurisdiction might have some difficulty in dealing constitutionally with long terms as they are dealt with in the Conveyancing Act of 1881. In a few states, there is a statutory limit on the length of terms. See MINN. GENERAL STATS. 1913, p. 2074; ALABAMA CODE OF 1907, § 3418.

"every estate in fee simple in freehold land . . . whether in possession, reversion or remainder, shall, subject to and in accordance with the provisions of this Act, for all purposes, whether of disposition, settlement on persons in succession or otherwise, transmission, devolution . . . distribution and administration on death, have all the incidents of a chattel real estate held for a term of years certain, save that such estates shall continue in perpetuity and may be called freehold estates in fee simple."

Such a reform would have the obvious advantage of blazing no new and untried paths; it would not create a new body of law, but would provide a new application of existing law. As a simplifying expedient, it might prove effective; the mysteries of seisin would vanish at once, and conveyances would lose much of their ominousness. Mr. Underhill thinks it would "do away with all the complexities and anomalies of the existing law of freeholds . . .; would abolish tenure and seisin and other dry bones of feudalism; would render obsolete the existing equitable rules as to conversion as between heirs and next of kin; would simplify the administration of assets on death; and would, at all events, unify the law of land."³⁶ But as an escape from the feudal bases of the law of real property, one may doubt whether this method would be altogether successful. Like the historic failure of the statute of uses, it might serve to perpetuate what it is designed to extirp and extinguish; for the law of chattels real cannot be thoroughly understood apart from the law of freeholds with which it has grown, and to handle the one, it may still continue necessary to master the other, so that the necessity of the student's knowing the old "calculus of estates" would still remain.³⁷ The transition involved would not be free from difficulties—for instance, the existing uncertainties in the law of future interests in chattels real, as explained by Professor Gray,³⁸ would be enhanced in importance.

³⁶ In *THE LINE OF LEAST RESISTANCE*, p. 29.

³⁷ The Report of the Conveyancers' Institute therefore expresses the fear that the bill would have the "fault, which has characterized all real property legislation since that of 1833, viz., that it adds to the now well-nigh intolerable burden of what a student of English law must learn, and takes but little away." 64 *SOLICITORS' JOUR.* 741 (28 August, 1920).

³⁸ In an article entitled "Future Interests in Personal Property," 14 *HARV. L. REV.* 397. See also Hudson, "Executory Limitations of Property in Missouri," 11 *LAW SERIES, MISSOURI BULL.*, p. 29. It is interesting to note that Professor Gray concluded his study by asking (p. 420), "Would it be too bold a step on the part of the

If the law of freeholds were assimilated to the law of leaseholds, it would obviously be necessary either to repeal the statute of uses or to extend its application to personalty. The proposals for reforming the law of real property in the early part of the last century were designed to extend rather than to limit the application of the statute of uses, and to escape the narrow construction which the courts had placed upon it.³⁹ It was the conclusion of the Real Property Commissioners of 1828 that while a "system of infinite subtlety" had been built upon the statute, yet "most of the evils which it was meant to remedy remain."⁴⁰ In 1862, Mr. Joshua Williams in a paper before the Juridical Society urged the repeal of the statute of uses.⁴¹ He thought it would have the effect of abolishing much useless learning which since the restoration of trusts of freehold estates only "cumbers the ground and not infrequently entangles the practitioner." The Select Committee of 1879 recommended that the statute should be repealed, on the ground that it provides "for a state of things which has long since passed away."⁴² If one could accept the dictum attributed to Lord Chancellor Hardwicke that its only effect has been to add three words to a conveyance,⁴³ the repeal of the statute would not need to be viewed very seriously.

courts to drop this bit of antiquated scholasticism [as to future interests] and put chattels real in the same position as chattels personal?" Mr. Arthur Underhill seems to think this step has been taken — "the law only recognizes an absolute owner of a term of years, just as it only recognizes an absolute owner of stocks or shares." THE LINE OF LEAST RESISTANCE, p. 22.

³⁹ HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY (1827), p. 273; and BROUGHAM, PRESENT STATE OF THE LAW (1828), p. 57. It was due to these proposals that the New York Revision Commissioners framed the New York legislation which they foresaw might be "viewed by some as an alarming innovation," but as to the adoption of which they felt "a serious anxiety." REPORT OF 1828, p. 41. Hence the New York statute effects a much more extensive execution of the use than was accomplished by the English statute.

⁴⁰ FIRST REPORT OF REAL PROPERTY COMMISSIONERS (1829), p. 8.

⁴¹ 2 JUR. SOC. PAPERS (1858-63), 589, 623.

⁴² "Among the various pitfalls for the unwary presented by statutes, providing for a state of things which has long since passed away, few have led to more expense or litigation than that stronghold of conveyancing pedantry, the statute of uses. Your Committee see no reason why it should not at once be repealed." 1879 REPORT OF SELECT COMMITTEE, p. ix. See also p. xiv, and the 1911 REPORT OF THE LAND TRANSFER COMMISSION, p. 380.

⁴³ In *Hopkins v. Hopkins*, 1 Atkyns, 580, 591 (1738). The authenticity of this remark was questioned in the early part of the nineteenth century, "as not to be found in a ms. note of *Hopkins v. Hopkins*." BROUGHAM, STATE OF THE LAW (1828), p. 57,

The statute of uses served very useful purposes in an era of legislative inactivity. Its aid in liberalizing the law as to future estates and in simplifying the methods of conveyancing is not to be minimized. The New York Revision Commissioners concluded that its advantages could be kept without retaining uses as they were perpetuated by construction of the statute, while the recent commission in England thought they could be kept without retaining the statute. Few purposes seem to be served by the statute to-day. Its application can be thwarted very simply by creating a use on a use, or by an active trust. In *inter vivos* conveyances, the operation of the statute is perhaps unnecessary even in those jurisdictions where statutory grant is unknown, for bargain and sale may now have achieved the position of a common law conveyance, even where the statute of uses is said not to be in force.⁴⁴ In devises, the intention of a testator may be effectuated without employing the statute, though it seems difficult to accept the statement that the statute "does not of its own force apply to wills."⁴⁵ If powers of appointment still depend on the statute for their efficacy, independent support would need to be given them, as the English bill provides. The statute may serve some convenience in avoiding the necessity of a conveyance by a trustee whose duties have been performed,⁴⁶ but this necessity would be obviated quite

note. It was pointed out by Dean Ames in 21 HARV. L. REV. 274, that "Lord Hardwicke himself . . . put the matter much more justly" in *Buckinghamshire v. Drury*, 2 Eden, 60, 65 (1761).

⁴⁴ Thus a conveyance by deed which would have been good as a covenant to stand seised has been upheld where the statute of uses was not in force. *Thompson v. Thompson*, 17 Ohio St. 649 (1867). "Several courts have declared — with a simplicity that might startle the wise man filled with legal learning, but most acceptable to every one not sufficiently learned to have lost his common sense — that the forms of conveyance in common and inveterate use ought to be, and will be, sustained, without much regard to the requirements of the ancient common law, or whether any statute has altered or abrogated such requirements." Professor Rood, "The Statute of Uses and the Modern Deed," 4 MICH. L. REV. 109, 114.

⁴⁵ Cf. *Re Brooke*, [1894] 1 Ch. 43, 48.

⁴⁶ Cf. *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173 (1896), and *Reichert v. Missouri, etc. Coal Co.*, 231 Ill. 238, 83 N. E. 166 (1907).

The statute of uses was repealed in New Zealand in 1905; and it is said not to be in force in several American jurisdictions. See Rood, "The Statute of Uses and the Modern Deed," 4 MICH. L. REV. 109, 122 (1905). The 1919 CONVEYANCING ACT in New South Wales provides that (Section 44) "Every limitation which may be made by way of use operating under the statute of uses" may be made by direct conveyance.

The 1905 NEW ZEALAND STAT., p. 257, provides that the whole legal and equitable

easily by a statutory provision that when the purpose of a trust ceases the trustee's estate or title ends.⁴⁷ In short, so little inconvenience would result from repealing the statute that this seems to offer no insuperable difficulty to assimilation. But it is in connection with another proposal in the English bill that it has its chief advantage — the proposal for limiting the creation of legal interests and for enabling purchasers to take free of all equitable interests even though they have notice.

The variety of estates and interests which may be created in land has long made conveyancing a difficult matter, less so in America than in England because of our registry system. The mere assimilation of freeholds to leaseholds would not greatly simplify nor shorten conveyances. So the proposed reform would extend a principle already adopted in the Settled Land Acts and restrict the number of legal estates which may be created and with which a purchaser must concern himself, leaving all other interests to take effect in equity and relieving purchasers of the burden of notice of them. It was the general purpose of the Settled Land Act of 1882

"to give to an owner for the time being, having a beneficial interest in land under a settlement, whether the subject of settlement be an estate in fee simple or a less estate, power to dispose of or deal with the land or the estate or interest therein which is settled, so as to turn it to the best account, in the same manner as if he were a prudent owner absolutely entitled to the subject-matter of the settlement, and having complete power of disposition; care being at the same time taken to preserve the *corpus* of the property for the benefit of the successors in title of the owner for the time being."⁴⁸

Mr. Wolstenholme had long urged the extension of this principle to concurrent as well as to all successive interests, and the framers of the Cherry Bill attempt to accomplish this by providing that

title shall vest on a transfer, but may be so conveyed in trust; and that limitations previously made by way of shifting and springing uses may be made directly. This form is unfortunate, for it perpetuates the old learning apart from which the statute cannot be applied.

⁴⁷ As in § 109 of the N. Y. Real Property Law. CONSOL. LAWS 1909, c. 52.

⁴⁸ WOLSTENHOLME AND TURNER, SETTLED LAND ACT, 1882, p. 1. James Humphreys' proposals in 1827 looked in the same direction. HUMPHREYS, REAL PROPERTY, p. 292.

legal interests shall be confined to fees simple, terms for years, rent charges, and easements,⁴⁹ and by converting all other legal estates or interests into equitable interests, providing also that legal estates cannot be created in an undivided share in land. This would leave executory limitations and devises, for instance, to take effect in equity, and all equitable estates and interests would be "kept off the title," but would be protected as to the proceeds of any sale by provisions not unlike those adopted in the Settled Land Acts, requiring that the proceeds as capital money be paid to trustees. The bill was described in the Lord Chancellor's memorandum as placing "all interests in land, except legal estates in fee simple or for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement," and as freeing "a purchaser in good faith from any obligation to look behind the curtain." So radical a step could hardly be taken where the innovation had not already been made in the Settled Land Act provisions for effectuating a life tenant's conveyance of the fee of settled land. It extends the principle by which a trustee with power of sale can pass a title to a purchaser who knows of the cestui's interest and the latter's ownership is shifted to the proceeds. These two familiar ideas soften the proposal to an English lawyer, though it has been the subject of a vehement protest in the House of Lords.⁵⁰

The provisions of the bill for abolishing the law of estates are carefully elaborated. Since legal life estates and legal estates tail do not exist in chattels real, assimilation would abolish them altogether. The life estate is enlarged to a fee simple, in line with the policy of the Settled Land Acts making life tenants in a sense trustees for their successors; and the proposed amendments to the Settled Land Acts proceed on the principle that "subject to proper safeguards being provided for the remainderman, the tenant for life or other statutory owner of full age should be placed on approximately the same footing as an absolute owner." On the death of a life tenant, the land passes to his representative in trust for the successors. Estates tail are left entirely to equity, so far as the interests after the first taker's are concerned, with provision for barring the entail by will; and instead of abolishing entailed interests, as might formerly have been anticipated, they are to be

⁴⁹ Section 2 of the proposed Bill spells these out in greater detail.

⁵⁰ By Lord Cave. But see Mr. Underhill's reply in 36 L. QUART. REV. 113.

extended to chattels personal.⁵¹ The mortgagee's interest is made a term for three thousand years "subject to a provision for cesser corresponding to the right of redemption." Less important provisions are included for abolishing *interesse termini*; for requiring a term to take effect not more than twenty-one years after its creation; and for converting perpetually renewable leaseholds into long terms.

It is gratifying to see the proposal to sweep away the rule of *Whitby v. Mitchell*,⁵² often referred to as the rule against double possibilities, and this part of the bill may be regarded as a triumph for Mr. Gray, who insisted that *Whitby v. Mitchell* only revived an "alleged relic of antiquity."⁵³ It seems difficult to agree with the objection to abolishing the rule as stated in the report of the Conveyancers' Institute Committee, that it would "enable land to be tied up for at least a generation further than is now possible."⁵⁴ There is stronger reason now for judicial rejection of the rule in America, in view of this indication of the doubtful English attitude toward it. It is interesting to find an eminent commentator on the Bill, regretting that it does not include amendments to the "ordinary rule against perpetuities which often causes great injustice, and is a trap for the unwary."⁵⁵ Such amendments had formed a part of Lord Haldane's Bill in 1914. We are in need of such legislation

⁵¹ "We thought it right that it should be open to the weaver who lives in a cottage to say that his furniture shall go to his son's son after him." Lord Haldane, in the House of Lords, 26 July, 1920, 41 PARL. DEBATES, 494. But the course of opinion in recent years had seemed to call for the abolition of entails. Bills to this end were introduced in 1877, 1878, and 1882, and in DE VILLIERS, HISTORY OF REAL AND PERSONAL PROPERTY (1901), p. 65, it is confidently asserted that "the proposal which promises to be first adopted by law is that of abolishing estates tail either altogether or as soon as the tenant in tail comes of age." The convenience of entails in dealing with heirlooms and family treasures is obvious.

It is interesting to note that the 1919 CONVEYANCING ACT in New South Wales follows the statutes of several American states giving a life estate to the first taker, "with a remainder to his heirs or the heirs of his body as purchasers."

⁵² 44 Ch. D. 85 (1890). But if assimilation were effected, it might be thought unnecessary to deal with *Whitby v. Mitchell* in view of the decision in *In re Bowles*, [1902] 2 Ch. 650, refusing to apply it to personalty.

⁵³ In 29 L. QUART. REV. 31.

⁵⁴ 64 SOLICITORS' JOUR. 741.

⁵⁵ Mr. Arthur Underhill, in 36 L. QUART. REV. 114. See also the suggestion of Mr. W. Whitworth for amending the rule against perpetuities, in 64 SOLICITOR'S JOUR. (12 June, 1920) 567; the reform he proposes would validate a future interest if the event postponing its vesting actually happens within the period allowed. It has already been enacted in Victoria and New South Wales. 64 SOLICITOR'S JOUR. 581.

in America, and if a recent decision in Massachusetts is to be followed,⁵⁶ the situation will be very inconvenient without it.

Assimilation also carries in its train the necessity for important changes in the law of conveyancing and descent. It is proposed that in a conveyance a fee simple shall pass without words of limitation, unless a contrary intent appears,⁵⁷ and similar effect is assigned to conveyances to corporations sole; and the bill would allow a person "to convey or vest or purport to convey or vest land to or in himself." The period of title would be reduced from forty to thirty years. Numerous amendments to the Conveyancing Acts and Settled Land Acts are of more local interest. The elaborate provisions by which undivided shares shall in future take effect behind a trust for sale are designed to put an end to the evils of common ownership which Mr. Underhill describes in such lurid terms.⁵⁸ The creation of machinery for easily securing the discharge or modification of restrictive covenants affecting freehold land might raise very troublesome constitutional questions if it were attempted in America.⁵⁹

But it is in the law of descent that the most far-reaching consequences of assimilation may be anticipated, for it is here that the most glaring anomalies resulting from our differences between real property and chattels real are to be found. In cases of intestacy, the Bill would abolish altogether descent to the heir. It would pass all real and personal property to the personal representative in trust for sale, and extensive powers would be conferred on the representative, continuing during any minority or the subsistence

⁵⁶ *Eastman Marble Co. v. Vermont Marble Co.*, 128 N. E. (Mass.) 177 (1920), denying a recovery of damages for violation of a contract to convey land within twenty-five years.

⁵⁷ Since 1837, the ENGLISH WILLS ACT has provided that a fee simple may pass by devise without words of limitation. The CONVEYANCING ACT of 1881 enacted that a conveyance to A "in fee simple" should be sufficient without the word "heirs." This has preserved the necessity for words of limitation, for in *Re Ethel*, etc., [1901] 1 Ch. 945, it was held that A took only a life estate by a conveyance to him "in fee." And it has been a mooted point whether "in simple fee" will have the effect of "in fee simple." See Mr. T. Cyprian Williams in 2 MINUTES OF EVIDENCE BEFORE LAND TRANSFER COMMISSION OF 1908, p. 374.

⁵⁸ In 36 L. QUART. REV. 116.

⁵⁹ Cf. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 243, 117 N. E. 244 (1917), discussed in 31 HARV. L. REV. 876; and *Bull v. Burton*, 227 N. Y. 101, 124 N. E. 111 (1919), discussed in 33 HARV. L. REV. 820.

The 1918 REAL PROPERTY ACT in Victoria (No. 2962) and the 1919 CONVEYANCING ACT in New South Wales (No. 6) also deal with the release of restrictive covenants.

of any life interest. It would abolish all existing canons of descent, as well as curtesy, dower, and escheat, and would substitute statutory trusts for the surviving spouse or issue or parents or for those entitled under the statute of distributions. Primogeniture as thus abolished would probably have few mourners. It is explained in the accompanying memorandum that "the plan adopted gives effect to what, it is conceived, the majority of the intestates would have done if well-drawn wills had been prepared for them, and at the same time removes the complications and injustice which would have resulted if the present archaic law of intestacy, applicable to personal estate, had been adopted without amendment."

The proposals for land law reform in England have revolved in recent years around the conflict between those who want more complete registration and those who want simplification of the existing law; the former seem willing to simplify only if they get registration, while the latter seem unwilling to accept compulsory registration unless they get simplification. Both groups seem in danger of defeat by common opponents who oppose all change. With our systems of land registry, it is difficult for Americans to appreciate the difficulties of title investigation in England, and with our freedom from copyholds and varieties of tenures perhaps we do not appreciate, either, the impelling reasons for simplification.

Whether the central ideas of the present bill could be conveniently employed in America or not, the fact that they are being so seriously discussed in England should recommend them to our consideration. Our present situation cannot endure forever. A time is almost certain to come when some of the feudal roots will die and when new roots must be established. Judicial neglect is usually a poor method of legislation, for it leaves open the constant possibility of the embarrassment which would follow judicial revival. Much of the uncertainty in our law of future interests to-day is due to our failure to cut off the dead roots of the feudal system.⁶⁰ The departures already made in England are little known to us, and perhaps our teaching proceeds too much in the field of the old law without betrayal of their existence.

It was not a hopeful conclusion of the Real Property Commis-

⁶⁰ To determine the effect of a warranty deed, the Supreme Court of Illinois recently found it necessary to go back to the doctrine of lineal warranty before the statute of *QUIA EMPTORES* in 1290. *Biwer v. Martin*, 128 N. E. (Ill.) 518 (1920).

sioners in 1829 that "after all the amelioration of which the law of real property in this country is susceptible, the public must not expect that it can be rendered free from complexity and obscurity." They reminded us that "it is as impossible suddenly to change the laws as the language of any country"; although a year before the New York Revision Commissioners had not shrunk from making the attempt, in pursuance of their mandate "to render the acts more plain and easy to be understood," and after almost a century can it be said that their attempt has failed?⁶¹ Moreover, the numerous changes since made in England have not borne out the Commissioners' fears. While it cannot be said that a century of legislative tinkering has freed the English law from complexity and obscurity, it has brought relief from some of the very things that the Commissioners feared to disturb. Perhaps property law is not so unlike other branches of jurisprudence as to be exempt from the possibility of useful inventions. It is encouraging, at any rate, to find that the ideas for which Joshua Williams was contending in 1862 have been kept alive for a half century and now seem to be bearing fruit. Whatever the fate of the Cherry Bill, it must at least serve as an important contribution to the labor which must precede any sound legislation in this field, and it gives some promise that the efforts of Lord Haldane and Lord Birkenhead may be continued by other Lord Chancellors. And while the time may never come when each man can be his own conveyancer, we may look forward to a day when it will be possible for lawyers to understand every-day land law without a range of four centuries in their research.

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⁶¹ Professor Gray characterized the provisions concerning the law of trusts, in the New York statutes, as "crude and reckless legislation [which] seems to have been as unsuccessful in practice as it deserved to be." GRAY, *RESTRAINTS ON ALIENATION*, 2 ed., § 282. And Professor Everett Fraser finds the effect of the New York legislation to be the creation of a "system of law arbitrary and crabbed in its nature." 3 *MINN. L. REV.* 323. Cf. CANFIELD, *CASES ON TRUSTS AND POWERS IN NEW YORK*, p. iv. Certainly a thorough appraisal of the various New York innovations should precede any land law reform in America.

CONCERNING SEARCHES AND SEIZURES

THE Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitutional provisions more or less similar to this one exist in all the States¹ except in New York where such a limitation appears in the Civil Rights Law.²

It is well known that the adoption in 1791 of the first ten amendments resulted from the agitation for a Bill of Rights which attended the ratification of the Constitution.³ Massachusetts,

¹ Alabama: *I*, 9 (1819), *I*, 5 (1901); Arizona: 8 (1911); Arkansas: *II*, 9 (1836), *II*, 15 (1874); California: *I*, 19 (1849), *I*, 19 (1879); Colorado: *II*, 7 (1876); Connecticut: *I*, 8 (1818); Delaware: *I*, 6 (1792), *I*, 6 (1897); Florida: *I*, 7 (1838), Decl. of Rights, 22 (1885); Georgia: *I*, 18 (1865), *I*, *I*, XVI (1877); Idaho: *I*, 17 (1889); Illinois: *VIII*, 7 (1818), *II*, 6 (1870); Indiana: *I*, 8 (1816), *I*, 11 (1851); Iowa: *I*, 8 (1864), *I*, 8 (1857); Kansas: *I*, 14 (1855), Bill of Rights, 15 (1859); Kentucky: *XII*, 9 (1792), Bill of Rights, 10 (1890); Louisiana: *VII*, Art. 108 (1864), Bill of Rights, 7 (1898); Maine: *I*, 5 (1819); Maryland: Decl. of Rights, *XXIII* (1776), Decl. of Rights, 26 (1867); Massachusetts: *I*, Art. XIV (1780); Michigan: *I*, 8 (1835), *VI*, 26 (1850); Minnesota: *I*, 10 (1857); Mississippi: *I*, 9 (1817), 3, 23,⁵ (1890); Missouri: *XIII*, 13 (1820), *II*, 11 (1875); Montana: *III*, 7 (1889); Nebraska: *I*, 11 (1886-87), *I*, 7 (1875); Nevada: *I*, 18 (1864); New Hampshire: *I*, *XIX* (1784), Bill of Rights, 19 (1902); New Jersey: *I*, 6 (1844); New Mexico: *II*, 10 (1910); North Carolina: Decl. of Rights, *XI* (1776), *I*, 15 (1876); North Dakota: *I*, 18 (1889); Ohio: *VIII*, 5 (1802), *I*, 14 (1851); Oklahoma: *II*, 30 (1907); Oregon: *I*, 9 (1857); Pennsylvania: Decl. of Rights, *X* (1776), *I*, 8 (1873); Rhode Island: *I*, 6 (1842); South Carolina: *I*, 22 (1868), *I*, 16 (1895); South Dakota: *VI*, 11 (1899); Tennessee: *XI*, 7 (1796), *I*, 7 (1870); Texas: *I*, 7 (1845), *I*, 7 (1867); Utah: *I*, 14 (1895); Vermont: *I*, *XI* (1777), *I*, 11 (1793); Virginia: Bill of Rights, 10 (1776), *I*, 10 (1902); Washington: *I*, 7 (1889); West Virginia: *II*, 3 (1861-63), *III*, 6 (1872); Wisconsin: *I*, 11 (1848); Wyoming: *I*, 4 (1889). The reference in italics is to the earliest Constitution in which such provision appears. Taken from House Documents, 59th Congress, Vols. 87-91, Federal and State Constitutions (Thorpe), Government Printing office 1909 (7 vols.). See also Federal and State Constitutions (Poore), Government Printing office, 1877 (2 vols.).

² Section 8, originally adopted in 1828; REV. STAT. pt. 1, ch. 4, § 11.

³ Weeks v. United States, 232 U. S. 383, 390 (1914); Annals of Congress 1789-91 (Gales & Seaton, 1834) pp. 440-468, 783-790, 795-808; 2 BANCROFT, HISTORY OF THE

Virginia and New York led in this agitation. The language of the Fourth Amendment, indeed, is almost identical with that in the Massachusetts Declaration of Rights of 1765,⁴ and in the same state's Constitution of 1780.⁵

The demand for this amendment can be traced to two nearly contemporaneous incidents in the history of England and the American colonies.⁶ From ancient times it had been customary for justices to issue search warrants for the seizure of stolen property. The circumstances under which such warrants might be issued were discussed by Lord Coke⁷ and Sir Matthew Hale.⁸ They were looked upon with disfavor. As was said by Lord Camden, they "crept into the law by imperceptible practice."⁹ By the time of Charles II, however, search warrants were issued in Star Chamber proceedings to find evidence among the papers of political suspects.¹⁰ It was obviously not convenient to be as specific in such cases as practice had required in searching for stolen goods. So there grew up the easy method of issuing general warrants which permitted the widest discretion to petty officials. These general warrants soon became common in proceedings for

FORMATION OF THE CONSTITUTION (1882), 241-248, 267, 272, 276, 291, 311, 315; 2 ELLIOT, DEBATES IN STATE CONVENTIONS ON CONSTITUTION (1881), 123, 177; vol. 3, pp. 651-658; THORPE, CONSTITUTIONAL HISTORY OF UNITED STATES (1901), pp. 199-263; CURTIS, CONSTITUTIONAL HISTORY OF UNITED STATES (1896), pp. 153-159; McLoughlin, *The Confederation and the Constitution* (1905) (Am. Nation, vol. 10), p. 305; Bassett, *The Federalist System* (1906) (Am. Nation, vol. 11) pp. 21-23.

⁴ STIMSON, *THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS* (1908), pp. 45, 46, 87.

⁵ Part 1, Art. XIV.

⁶ 4 WIGMORE, *EVIDENCE* (1905), p. 3126; STORY ON THE CONSTITUTION, 5 ed. (1891), p. 648; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. (1906), 375, 380; *Boyd v. United States*, 116 U. S. 616 (1886); *Stockwell v. United States*, 3 Cliff. (U. S.) 284 (1870); *People v. Marxhausen*, 204 Mich. 559, 574, 171 N. W. 557 (1919); *Colyer v. Skeffington*, 265 Fed. 17, 25 (1920); *Haywood v. United States*, 268 Fed. (C. C. A. 7th) — (1920).

⁷ *INSTITUTES*, Bk. 4, pp. 176, 177, cited *People ex rel. Simpson v. Kempner*, 208 N. Y. 16, 20, 101 N. E. 794 (1913); BLACKSTONE'S COMMENTARIES, Chase's 3 ed., (1908), p. 997.

⁸ 2 Pl. Cr. 149, cited *People ex rel. Simpson v. Kempner*, 208 N. Y. 16, 20, 101 N. E. 794 (1913). 2 BOUVIER'S LAW DICTIONARY (Rawle's Rev., 1897), p. 969.

⁹ *Entick v. Carrington*, 19 How. St. Tr. 1029, 1067 (1765).

¹⁰ *Trial of Algernon Sidney for High Treason*, 9 How. St. Tr. 818, 853, 868, 901, 985 (1683).

sedition libel against printers and authors.¹¹ Under George III they became, in effect, authorizations to the so-called messengers to arrest anyone and to search any house in order to apprehend the unnamed authors of the alleged libels and seize their private papers.¹² Wilkes, the great champion against the government in this as in many other matters, by his insistence destroyed the practice.¹³ The objectionable warrants were declared illegal by Lord Camden in *Entick v. Carrington*,¹⁴ by Lord Mansfield in *Money v. Leach*,¹⁵ by Lord Pratt in *Huckle v. Money*,¹⁶ and finally by the House of Commons.¹⁷

All the actions brought by Wilkes and his associates were in trespass against the officers who executed the warrants and the officials who caused them to be issued. It is this remedy

¹¹ *Entick v. Carrington*, 19 How. St. Tr. 1029, 1069-71 (1765); 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND (new ed., 1912), p. 124. See DE LOLME, CONSTITUTION OF ENGLAND, 4 ed. (1874), p. 486.

¹² *Entick v. Carrington*, 19 How. St. Tr. 1029, 1063 (1765). See also 1 BOUVIER'S LAW DIC., p. 878; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed. (1903), p. 426; and cases collected in 19 How. St. Tr., pp. 1001-1176 and 1406-1416; BROOM, CONSTITUTIONAL LAW AND CASES, 2 ed. (1885), pp. 522-607. Also cases and documents in ROBERTSON, SELECT STATUTES, ETC. TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY (1904), pp. 30, 31, 36, 37, 299-329.

¹³ *Boyd v. United States*, 116 U. S. 616, 625 (1886); 4 WIGMORE, EVIDENCE, 3126; 2 MAY, CONST. HIST. OF ENGLAND, 124-130; BROOM, CONST. LAW AND CASES, 2 ed. (1885), pp. 609-611; CHAFEE, FREEDOM OF SPEECH (1920), pp. 296-298.

¹⁴ 19 How. St. Tr. 1029 (1765) (also BROOM, CONST. LAW AND CASES, 2 ed., p. 555). This case did not really involve the question of general warrants, as *Entick's* name was specifically mentioned. It is, however, directly concerned with the right of search and seizure. See 2 MAY, CONST. HIST. OF ENGLAND (1912), p. 128.

¹⁵ 3 Burr. 1742 (1765) (also 19 How. St. Tr. 1001, and BROOM, CONST. LAW AND CASES, 2 ed., p. 552). The case was decided on the narrow point that the defendant had not conformed to the warrant, but the judges expressed their opinion as to the validity of general warrants. No question of search or seizure was involved.

¹⁶ 2 Wilson, 205 (1763). See also *Wilkes v. Wood*, 19 How. St. Tr. 1153 (1763) (also Lofft, 1).

¹⁷ Commons Journal, April 22 and 25 (1766). See 19 How. St. Tr. 1074 (1765); 1 BOUVIER'S LAW DIC., p. 879; BL. COMM., Chase's 3 ed. (1908), p. 908. See also BROOM, CONST. LAW AND CASES, 2 ed., pp. 607-609. For pamphlet discussion prior to the final vote, see, among others, Townshend Defense of the Minority in the House of Commons on the Question relating to General Warrants (J. Almon, 1764); Lloyd, Defense of the Majority (J. Wilkie, 1764); Meredith, Reply to the Defense of the Majority (J. Almon, 1764); Letter concerning libels, warrants, etc. (J. Almon, 1765); Considerations on the Legality of General Warrants (W. Nicoll, 1765). See also letter to the Earls Egremont and Halifax on the Seizure of Papers (J. Williams, 1763). Most of these are in a collection published by J. Almon, 1766 (N. Y. Public Library, C K., p. v, 135).

which has always been the direct means for the redress of such wrongs.¹⁸

Lord Camden's opinion in the *Entick* case is the groundwork for all subsequent discussion. It is considered one of the landmarks of English liberty.¹⁹ Lord Camden links the privilege against unreasonable searches with that against self-incrimination and condemns not only the general character of the warrants but also the fact that they are issued to search out evidence, a ruling of great importance:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle."²⁰

At about this time similar proceedings were taking place on this side of the ocean. They related not to political but to commercial offenses, briefly to smuggling. Smuggling was a general offense, both in England and in the colonies.²¹ Shortly before the close of the French and Indian war, in order to obtain money for meeting its cost and to suppress an extensive illegal traffic with the enemy islands, the attempt was made to discover smugglers and to confiscate their goods by the use of writs of assistance.²² These in their oppressive nature much resembled the general warrants used in England and were good indefinitely in the hands of any officer.²³ Otis, then Attorney General in the colony of Massachusetts, resigned his office to attack these warrants. In a speech of great eloquence he questioned the power of Parliament to authorize

¹⁸ See *Kilbourn v. Thompson*, 103 U. S. 168 (1880); *West v. Cabell*, 153 U. S. 78 (1894); *United States v. Maresca*, 266 Fed. 713 (1920); *Bell v. Clapp*, 10 Johns. (N. Y.) 263 (1813); *Sailly v. Smith*, 11 Johns. (N. Y.) 500 (1814); *Johnson v. Comstock*, 14 Hun (N. Y.), 238 (1878); *Kercheval v. Allen*, 220 Fed. (C. C. A. 8th) 262 (1915). See also 49 L. R. A. (N. S.) 770.

¹⁹ See *Boyd v. United States*, 116 U. S. 616, 626 (1886).

²⁰ 19 How. St. Tr. 1029, 1073, (1765).

²¹ 1 TREVELYAN, *THE AMERICAN REVOLUTION* (1905), pp. 97-101.

²² See *Boyd v. United States*, 116 U. S. 616, 624 (1886); COOLEY, *CONST. LIM.*, 7 ed., p. 427; 3 CHANNING, *HISTORY OF THE UNITED STATES* (1912), 2-4; Letter, John Adams to William Tudor, March 29, 1817, reprinted in *Old South Leaflets*, Vol. VIII, No. 179, p. 59; Howard, *Preliminaries of the Revolution* (1905) (*Am. Nation*, vol. 8), pp. 71-73.

²³ 1 BOUVIER'S *LAW DIC.*, Rawle's Rev., p. 879.

such writs. The Court, almost persuaded, sent to England for advice, but pursuant to orders received from the ministers later issued the writs.²⁴ Here was the beginning of that long course of repression that ended in the American Revolution.²⁵

As was said by John Adams:²⁶

"Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the Child Independence was born."

It is, therefore, apparent that the Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won,²⁷ that finds another expression in the maxim "every man's home is his castle."²⁸ Indeed it has been described as deriving direct from Magna Carta.²⁹

No further light on contemporary interpretation is obtained from an investigation of the proceedings of the various State Con-

²⁴ Paxton's case, Quincy's Mass. Rep., 51 (1761), and note by Gray in Appendix, 395; Letter, John Adams to William Tudor, March 29, 1817, reprinted in Old South Leaflets, Vol. VIII, No. 179; American History Leaflets (Channing & Hart), No. 33 (1912) on James Otis's Speech on the Writs of Assistance, 1761. See Green, Remarks before the Massachusetts Historical Society, Dec. 11, 1890 on James Otis's Argument against the Writs of Assistance, 1761, for discussion of sources. See also 3 CHANNING, HIST. OF THE UNITED STATES, 4, 5; Howard, Preliminaries of the Revolution (1905) (Am. Nation, vol. 8), pp. 70-83; 2 BANCROFT, HIST. OF THE UNITED STATES (1890), 546-548; 2 HILDRETH, HIST. OF THE UNITED STATES, 199; COOLEY, CONST. LIM., 7 ed., p. 427; 2 WATSON ON THE CONSTITUTION (1910), 1415; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. (1906), 375, 380; People v. Marxhausen, 204 Mich. 559, 574, 171 N. W. 557 (1919).

²⁵ See American History Leaflets (Channing & Hart), No. 33 (1912), on James Otis's Speech on the Writs of Assistance, 1761, p. 1; Howard, Prelim. of the Revolution (1905) (Am. Nation, vol. 8), pp. 70, 82; 2 BANCROFT, HIST. OF THE UNITED STATES (1890), p. 546; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. (1906), 380. See also Haywood v. United States, 268 Fed. (C. C. A. 7th) (1920). CHAFEE, FREEDOM OF SPEECH (1920), p. 299.

²⁶ Letter, John Adams to William Tudor, March 29, 1817, Old South Leaflets, vol. 8, No. 179, p. 60. See also Tudor, Life of Otis (1823), Chap. V, reprinted in Am. Hist. Leaflets, No. 33 (1912) on James Otis's Speech on the Writs of Assistance, (1761), pp. 8-14, quoted in People v. Marxhausen, 204 Mich. 559, 574, 171 N. W. 557 (1919).

²⁷ BLACK, CONST. LAW, 3 ed. (1910), p. 608; 2 STORY ON THE CONSTITUTION, 5 ed. (1891), 648, § 1902; WATSON ON THE CONSTITUTION (1910), p. 1414. See also Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (1765) and Otis's speech, note 24.

²⁸ COOLEY, CONST. LIM., 7 ed., p. 425; MCCLAIN, CONST. LAW (1905), p. 313; VON HOLST, CONST. LAW (1887), p. 257.

²⁹ STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS (1908), p. 46. See also Otis's speech, note 24, and Huckle v. Money, 2 Wilson 205 (1763).

ventions called to ratify the Constitution and of the proceedings of the Congress which submitted this amendment.³⁰

Two things had been declared by Lord Camden: that general warrants were void for uncertainty and that search for evidence violated the principle against self-incrimination. Such, then, would seem to be the law which the Amendment was intended to perpetuate. It is significant that the Amendment itself is in two parts — one which forbids "unreasonable searches," and the other which requires certain specific particulars to be observed before warrants may be issued. This prohibition against "unreasonable searches" must, therefore, have been intended to cover something other than the form of the warrant.

This is the view taken by many of the commentators on the Constitution, notably Cooley.³¹ It first received judicial expression in the famous case of *Boyd v. United States*.³² The opinion of Mr. Justice Bradley in this case was objected to by the two concurring Justices,³³ and has since been variously criticized on the ground that the discussion in relation to the Fourth Amendment was *obiter*.³⁴

It must be conceded at the outset that this criticism is just. The case turned upon the validity of a statute which provided that if the claimant of property, under forfeiture at the instance of revenue officers, failed to produce invoices called for by the District Attorney, then the allegations of the District Attorney would

³⁰ See authorities in note 3, and particularly *Annals of Congress, 1789-1791* (Gales and Seaton, 1834), at pp. 452, 456, 783; THORPE, *CONST. HISTORY OF UNITED STATES* (1901), pp. 207, 214, 226, 245, 257; 1 ELLIOTT, *DEBATES IN STATE CONVENTIONS ON CONSTITUTION* (1881), 328; vol. 2, p. 177; vol. 3, p. 657. It is, however, interesting to note that the amendment underwent a radical change of form, apparently, after adoption by the House of Representatives, in a Committee of Three appointed to prepare the Amendments to be sent to the Senate. In the original form the amendment seemed directed only against general warrants, like the Virginia rather than the Massachusetts Constitution.

³¹ COOLEY, *CONST. LIM.*, 7 ed., p. 431; see also BLACK, *CONST. LAW*, 3 ed. (1910), p. 613. See general discussion in CHAFEE, *FREEDOM OF SPEECH*, pp. 299-301.

³² 116 U. S. 616 (1886).

³³ *Ibid.*, 639-641.

³⁴ See 4 COL. L. REV., 60, and cases cited; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375, 384, 386; 4 WIGMORE, *EVIDENCE*, 3125-3127; *Adams v. New York*, 192 U. S. 585, 597 (1904); *Hale v. Henkel*, 201 U. S. 43, 71, 73 (1906); *United States v. Wilson*, 163 Fed. 338, 340 (1908); but see *Weeks v. United States*, 232 U. S. 383 (1914); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

be deemed admitted. In the case in question, the invoices had been produced under protest and used as part of the government's case. It was held by the Court that this was error in that the statute in effect authorized an unreasonable search and also that the claimant was compelled to testify against himself. This second consideration would have sufficed for the decision of the case, and such was the view of the minority.

On the other hand, as has already been seen, the connection between the privilege against self-incrimination and the right to be free from unreasonable searches is much closer than the critics of the opinion concede.³⁵ The majority opinion so truly reflects the spirit of the American people, that it is recognized as a basic authority.³⁶

The importance of this opinion is two-fold: it decides that any measure, regardless of its form, which accomplishes the same result as an unauthorized search will be deemed similarly repugnant to the Fourth Amendment:

"It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure."³⁷

It also distinguishes between the search for things themselves prohibited, and that for books and papers sought as evidence:³⁸

³⁵ See 4 WIGMORE, EVIDENCE, 3122-3127. Wigmore's discussion of the nature of the privilege against self-incrimination at pages 3122-3124 is foreshadowed in one of the pamphlets written at the time of the Wilkes cases: Considerations on the Legality of General Warrants (W. Nicoll, 1765). But the opinion of the antagonists of the warrants seems to have been clearly that search for evidence itself was unlawful as a violation of the privilege. See, for instance, Meredith's Reply, Letter concerning Libels, and Letter to the Earls Egremont and Halifax, cited *supra*, note 17. See also CHAFFEE, FREEDOM OF SPEECH (1920), p. 303 and note, and p. 307.

³⁶ See I. S. C. C. v. Brimson, 154 U. S. 447 (1894); Interstate Com. Comm. v. Baird, 194 U. S. 25 (1904); Wilson v. United States, 221 U. S. 361 (1911); Weeks v. United States, 232 U. S. 383 (1914); Perlman v. United States, 247 U. S. 7 (1918), and citations in Shepard.

³⁷ 116 U. S. 616, 622 (1886).

³⁸ Overruling in this connection Stockwell v. United States, 3 Cliff. (U. S.) 284 (1870) and other cases holding such searches constitutional. See criticism of earlier practice in Eaton, Discussion of the Constitutionality of the Act of Congress of March 2, 1867 (N. Y. Chamber of Commerce, 1874).

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not."³⁹

The Boyd case also decided that the Fourth Amendment applied to forfeiture cases as well as to strictly criminal proceedings.⁴⁰

Now, it had been the unvarying law that upon the trial of a criminal case, the Court, largely to prevent raising a collateral issue, would receive any competent evidence without inquiring into the means by which it had been procured.⁴¹ Nevertheless, on the authority of the Boyd case, a Federal District Court decided that the mere reception on the trial of evidence, obtained as the result of illegal search, constituted reversible error.⁴² An identical result has been reached in Iowa and a few other states,⁴³ but the old rule was reaffirmed by the Supreme Court of the United States on appeal from a New York decision.⁴⁴ This is in accord with the overwhelming weight of authority.⁴⁵

³⁹ 116 U. S. 616, 623 (1886).

⁴⁰ *Ibid.*, 633.

⁴¹ *Com. v. Dana*, 2 Metc. (Mass.) 329 (1841); *State v. Flynn*, 36 N. H. 64 (1858); 4 WIGMORE, EVIDENCE, 2954; 4 COL. L. REV. 60; 14 COL. L. REV. 338; 13 HARV. L. REV. 302; 33 HARV. L. REV. 869; see below notes 43-48 for recent cases.

⁴² *United States v. Wong Quong Wong*, 94 Fed. 832 (1899). See also *Flagg v. United States*, 233 Fed. (C. C. A., 2d) 481 (1916).

⁴³ *State v. Sheridan*, 121 Ia. 164, 96 N. W. 730 (1903); *State v. Height*, 117 Iowa, 650, 661 *et seq.*, 91 N. W. 935 (1902); *Blum v. State*, 94 Md. 375, 51 Atl. 26 (1902); *Town of Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 141 (1916); *State v. Salmon*, 73 Vt. 212 (1901) [but see *State v. Krinski*, 78 Vt. 162, 62 Atl. 37 (1905)]; see also *Underwood v. State*, 13 Ga. App. 206, 78 S. E. 1103 (1913), overruled in *Calhoun v. State*, 144 Ga. 679, 87 S. E. 893 (1915).

⁴⁴ *Adams v. New York*, 192 U. S. 585 (1904).

⁴⁵ *Shields v. State*, 104 Ala. 35, 16 So. 85 (1893); *Pope v. State*, 168 Ala. 33, 53 So. 292 (1910); *O'Neal v. Parker*, 83 Ark. 133, 103 S. W. 165 (1907); *People v. Le Doux*, 155 Cal. 535, 546-548, 102 Pac. 517 (1909); *Imboden v. People*, 40 Colo. 142, 180, 90 Pac. 608 (1907); *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046 (1896) (strong dissent); *Lee v. State*, 69 Fla. 255, 67 So. 883 (1915); *Williams v. State*, 100 Ga. 511, 28 S. E. 624 (1897); *Calhoun v. State*, 144 Ga. 679, 87 S. E. 893 (1915); *State v. Anderson*, 31 Idaho, 514, 174 Pac. 124 (1918) (strong dissent); *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085 (1891); *People v. Paisley*, 288 Ill. 310, 315, 123 N. E. 573 (1919); *State v. Miller*, 63 Kan. 62, 64 Pac. 1033 (1901); *State v. Turner*, 82 Kan. 787, 109 Pac. 654 (1910); *State v. Aspara*, 113 La. 940, 951, 37 So. 883 (1904); *City of Shreveport v.*

The Supreme Court of the United States upheld the conviction in New York on the double ground that there was no illegality because the seizure was incidental to the execution of a valid warrant⁴⁶ (although testimony was offered to show that there never had been any warrant) and that the issue could not be collaterally raised. The Federal Courts have generally ruled in accordance with the second ground of the decision in this case,⁴⁷ even where the seizure was without any warrant whatever.⁴⁸

Knowles, 136 La. 770, 67 So. 824 (1915); *State v. Burroughs*, 72 Me. 479 (1881); *Lawrence v. State*, 103 Md. 17, 33-37, 63 Atl. 96 (1906); *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910 (1893); *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (1905); *People v. Aldorfer*, 164 Mich. 676, 130 N. W. 351 (1911); *State v. Stoffels*, 89 Minn. 205, 94 N. W. 675 (1903); *State v. Rogne*, 115 Minn. 204, 132 N. W. 5 (1911); *Pringle v. State*, 108 Miss. 802, 67 So. 455 (1914); *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002 (1895); *State v. Sharpless*, 212 Mo. 176, 197, 111 S. W. 69 (1908); *State v. Fuller*, 34 Mont. 12, 23, 85 Pac. 369 (1906); *Nixon v. State*, 92 Neb. 115, 138 N. W. 136 (1912); *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202 (1905); but see *State v. Mausert*, 88 N. J. L. 286, 95 Atl. 991 (1915); *State v. Barela*, 23 N. M. 395, 168 Pac. 545 (1917); *People v. Adams*, 176 N. Y. 351, 68 N. E. 636 (1903); *People v. McDonald*, 177 App. Div. 806, 165 N. Y. Supp. 41 (1917); *State v. Wallace*, 162 N. C. 622, 78 S. E. 1 (1913); *Silva v. State*, 6 Okla. Cr. 97, 116 Pac. 199 (1911); *State v. McDaniel*, 39 Ore. 161, 65 Pac. 520 (1901); *State v. Ware*, 79 Ore. 367, 154 Pac. 905, 155 Pac. 364 (1916); *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021 (1893); but see *Town of Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 441 (1916); *Cohn v. State*, 120 Tenn. 61, 109 S. W. 1149 (1907); *State v. Reese*, 44 Utah, 256, 140 Pac. 126 (1914); *State v. Krinski*, 78 Vt. 162, 62 Atl. 37 (1905); *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429 (1902); *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811 (1912). See also notes in 136 Am. St. Rep. 129; 29 L. R. A. 818; 59 L. R. A. 466; 8 L. R. A. (N. S.) 762; 34 L. R. A. (N. S.) 58; L. R. A. 1915 B. 834; L. R. A. 1916 E. 715. It should be noted that a number of these cases really relate to the privilege against self-incrimination and that in many states the issue has not been squarely presented as the search involved was held legal.

⁴⁶ This ground of the decision seems to conflict with the requirement of the Fourth Amendment as to particularity of description of the thing to be seized. See *infra*, notes 115 and 127.

⁴⁷ N. Y. Cent., etc. R. R. v. United States, 165 Fed. (C. C. A. 1st) 833 (1908); *Hardesty v. United States*, 164 Fed. (C. C. A. 6th) 420 (1908); *Hartman v. United States*, 168 Fed. (C. C. A. 6th) 30 (1909); *Ripper v. United States*, 178 Fed. (C. C. A. 8th) 24 (1910); *Lum Yan v. United States*, 193 Fed. (C. C. A. 9th) 970 (1912); *May v. United States*, 199 Fed. (C. C. A. 8th) 53 (1912); *Lyman v. United States*, 241 Fed. (C. C. A. 9th) 945 (1917); *Rice v. United States*, 251 Fed. (C. C. A. 1st) 778 (1918); *MacKnight v. United States*, 263 Fed. (C. C. A. 1st) 832 (1920); *Youngblood v. United States*, 266 Fed. (C. C. A. 8th) 795 (1920); but see *Flagg v. United States*, 233 Fed. 481 (C. C. A. 2nd) 481 (1916); *United States v. Sassone* (S. D. N. Y. 1920) N. Y. L. J. 3/15/20; and *Ex parte Jackson*, 263 Fed. 110 (1920).

⁴⁸ *Youngblood v. United States*, 266 Fed. (C. C. A. 8th) 795 (1920). *Lyman v. United States*, 241 Fed. (C. C. A. 9th) 945 (1917); *Lum Yan v. United States*, 193 Fed. (C. C. A. 9th) 970 (1912); but see *Flagg v. United States*, 233 Fed. (C. C. A. 2nd) 481 (1916); *United States v. Sassone*, (S. D. N. Y. 1920) (N. Y. L. J. 3/15/20); *Ex parte*

In the course of its opinion in the Adams case, the Court, while reaffirming the well-settled rule that the Fourth Amendment did not apply to the States,⁴⁹ expressed some doubt as to the effect of the Fourteenth Amendment.⁵⁰ In a case involving the privilege against self-incrimination this doubt was finally resolved in favor of the States.⁵¹ In the Adams case the Court also reaffirmed the right to issue search warrants not only for stolen property, but also for any property such as smuggled goods, illegally owned liquor, gambling paraphernalia, etc., which the state had a right to destroy.⁵² In this connection attention should be called to the many cases upholding the right of the police, upon making a lawful arrest without a search warrant, to search the person of the suspect and the room occupied by him, and to seize any instruments or evidence of crime thus discovered.⁵³

It was not for several years that a way was found, in the Federal Jackson, 263 Fed. 110 (1920). A departure from the general rule is to be found in a series of informal rulings by Judge Mayer in the Southern District of New York on April 28, 1920. Upon oral statements made on the call of the calendar of a very large number of prohibition cases that the informations in a large percentage of the cases were based on evidence obtained as the result of searches without any warrants, the court instructed the district attorney to discontinue the prosecutions in such cases.

⁴⁹ 192 U. S. 585, 594 (1904). See also *Bolln v. Nebraska*, 176 U. S. 83 (1900); *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445 (1904); *Jack v. Kansas*, 199 U. S. 372 (1905).

⁵⁰ 192 U. S. 585, 594 (1904). See also *Cons. Rendering Co. v. Vermont*, 207 U. S. 541 (1908).

⁵¹ *Twining v. State of New Jersey*, 211 U. S. 78 (1908).

⁵² 192 U. S. 585, 598 (1904). See also *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); *Public Clearing House v. Coyne*, 194 U. S. 497 (1904); *United States v. Jones*, 230 Fed. 262 (1916); *United States v. Welsh*, 247 Fed. 239 (1917); *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920); *Sailly v. Smith*, 11 Johns. (N. Y.) 500 (1814); 2 *BOUVIER'S LAW DIC.*, p. 969; *COOLEY, CONST. LIM.*, p. 432; 24 *HARV. L. REV.* 661; 13 *HARV. L. REV.* 302. See also *CHAFEE, FREEDOM OF SPEECH*, p. 301.

⁵³ See *Weeks v. United States*, 232 U. S. 383, 392 (1914); *United States v. Welsh*, 247 Fed. 239 (1917); *United States v. Wilson*, 163 Fed. 338 (1908); *United States v. Mills*, appeal dismissed 220 U. S. 549 (1911), 185 Fed. 318 (1911); *United States v. Hart*, 214 Fed. 655 (1914); *Smith v. Jerome*, 47 Misc. 22, 93 N. Y. Supp. 202 (1905); *Houghton v. Bachman*, 47 Barb. (N. Y.) 388 (1866); 24 *HARV. L. REV.* 661; *United States v. Murphy*, 264 Fed. 842 (1920); *Welsh v. United States*, 267 Fed. (C. C. A. 2nd) 819 (1920). See also *Matter of Dodge*, 191 App. Div. 948, 181 N. Y. Supp. 933 (1920) affirming without opinion an order denying a motion for the return of evidentiary papers taken from petitioner at the time of his arrest without warrant for alleged bookmaking (Memorandum of argument, N. Y. L. J. 4/17/20). See also 18 *L. R. A. (N. S.)* 253; *L. R. A.* 1916 C. 1017. But see *United States v. Mounday*, 208 Fed. 186 (1913); *Flagg v. United States*, 233 Fed. (C. C. A. 2nd) 481 (1916); and *Colyer v. Skeffington*, 265 Fed. 17, 44 (1920), disapproving wholesale seizures made at the time of arrests.

Courts at least, to circumvent the effect of the decision in the Adams case.⁵⁴ In 1908 for the first time, so far as recorded cases indicate, a motion was made before trial to compel the District Attorney to return papers alleged to have been unlawfully seized.⁵⁵ The practice was approved on the ground that the question raised was one of general principles not covered by the law of evidence, but the application was denied on the ground that there had been no unlawful seizure. The next reported instance of such a motion was successful,⁵⁶ and resulted in an order returning the books and papers on the authority of the Boyd case. It is interesting to note that the District Attorney refused to obey this order, was punished for contempt and appealed to the Supreme Court. The appeals were dismissed on the ground that no constitutional question was involved.⁵⁷ The Supreme Court stated that the lower Court had the power to return the seized papers not only because of the constitutional privilege but also because of the Court's inherent power to correct abuses of discretion in the cases of its own officers.⁵⁸ These cases definitely established that practice, which has since been very generally followed.⁵⁹

⁵⁴ But see the vain attempt made in *Smith v. Jerome*, 47 Misc. 22, 93 N. Y. Supp. 202 (1905) to accomplish this by injunction.

⁵⁵ *United States v. Wilson*, 163 Fed. 338 (1908).

⁵⁶ *United States v. Mills* (appeal dismissed 220 U. S. 549) (1911), 185 Fed. 318 (1911).

⁵⁷ *Wise v. Mills*, 220 U. S. 549 (1911); *Wise v. Henkel*, 220 U. S. 556 (1911).

⁵⁸ At pp. 555, 558.

⁵⁹ See *Weeks v. United States*, 232 U. S. 383 (1914); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920); *United States v. M'Hie*, 194 Fed. 894 (1912); *United States v. Mounday*, 208 Fed. 186 (1913); *United States v. Hart*, 214 Fed. 655 (1914); *United States v. Hee*, 219 Fed. 1019 (1915); *United States v. Jones*, 230 Fed. 262 (1916); *United States v. Abrams*, 230 Fed. 313 (1916); *United States v. Friedberg*, 233 Fed. 313 (1916); *United States v. Welsh*, 247 Fed. 239 (1917); *Veeder v. United States*, 252 Fed. (C. C. A. 7th) 414 (1918); *United States v. Gouled*, 253 Fed. 770 (1918); *In re Tri-State Coal & Coke Co.* 253 Fed. 605 (1918); *In re Rosenwasser Bros., Inc.*, 254 Fed. 171 (1918); *In re Marx*, 255 Fed. 344 (1918); *Fitter v. United States*, 258 Fed. (C. C. A. 2nd) 567 (1919); *Laughter v. United States*, 259 Fed. (C. C. A. 6th) 94 (1919); *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. (C. C. A. 2nd) 847 (1919); *United States v. Hill*, 263 Fed. 812 (1920); *United States v. Maresca*, 266 Fed. 713 (1920). *Welsh v. United States*, 267 Fed. (C. C. A. 2nd) 819 (1920); *United States v. Rykowski*, 267 Fed. 866 (1920); *United States v. Brasley*, 268 Fed. 59 (1920); *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920). See also 24 HARV. L. REV. 661. In the state courts this method does not seem to have been much used. But see *People v. Marxhausen*, 204 Mich. 559, 574, 171 N. W. 557 (1919), where the authorities are carefully considered and the correct rule is well stated.

From this the next step became inevitable — what would happen if such a motion were denied and the evidence used? The question was determined in *Weeks v. United States*⁶⁰ by a reversal of conviction on the ground that such denial constituted prejudicial error. Although the Adams case is distinguished partly on the ground that the search was made without a warrant, the reasoning of the Court would apply equally well where the warrant was defective:

“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”⁶¹

In *Flagg v. United States*⁶² the same result was reached where no motion was made before trial, the papers having been voluntarily returned after the desired information had been obtained from them. One of the judges regretted the rule on the ground that subordinates were thereby enabled to prevent convictions by making illegal seizures out of excess of zeal or corrupt intent.⁶³ It is submitted that the balance of public policy favors the doctrine of the *Weeks* case. Prosecutors can be counted on to restrain their subordinates when reversals follow raids, whereas if they are free to convict no matter how the evidence is obtained, illegal searches and seizures will multiply. In one case, however, the court refused to reverse although the papers used on the trial had been illegally seized and a motion for their return duly made on the sole ground that their value as evidence was merely cumulative.⁶⁴

A motion to dismiss an indictment or information on the ground that it was based upon evidence procured through illegal search seems never to have been successfully made in the Federal Courts,⁶⁵

⁶⁰ 232 U. S. 383 (1914). See 14 COL. L. REV. 338. Followed in *United States v. Hill*, 263 Fed. 812 (1920); *United States v. Keydoszius*, 267 Fed. 866 (1920).

⁶¹ 232 U. S. 383, 393 (1914).

⁶² 233 Fed. (C. C. A. 2nd) 481 (1916).

⁶³ *Ibid.*, 486.

⁶⁴ *Laughter v. United States*, 259 Fed. (C. C. A. 6th) 94, 99 (1919).

⁶⁵ See *United States v. Gouled*, 253 Fed. 242 (1918); *United States v. Welsh*, 247 Fed. 239 (1917), for attempts to accomplish this result which failed because the court held the search had not been illegal. See also *United States v. Silverthorne*, 265 Fed. 853 (1920), where the motion was denied because the property did not belong to the moving party and *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920), where a

although in a recent case leave to file an information was refused on the ground that the only evidence had been obtained by wrongful search,⁶⁶ and in another recent case a plea in abatement, based on an unlawful search from which the evidence presented to the Grand Jury had been indirectly obtained, was sustained with the suggestion that the facts relating thereto be presented before the trial of the main issue.⁶⁷

There can be no logical objection to such a motion where it appears that the indictment or information was based solely, or even in preponderant measure, upon such evidence. This was, in effect, decided some time ago where the privilege of self-incrimination was involved and the question arose upon demurrer to a plea in abatement.⁶⁸ In the recent case of *People v. Marxhausen*⁶⁹ the return of liquor illegally seized and the dismissal of a complaint for violation of the liquor law based upon the illegal seizure was affirmed in a well-considered opinion.

It follows, of course, that evidence so obtained should not be used before the Grand Jury any more than at the trial, and it has been so held where the papers or other property were ordered returned before indictment.⁷⁰ In *Silverthorne Lumber Company v. United States*⁷¹ the Supreme Court refused to punish for contempt a corporation and its officers that failed to obey a subpoena to produce before a Grand Jury considering indictments against those officers, papers of the corporation which had been illegally seized and returned on motion. The Court held that although the papers might have been produced by subpoena in the first place⁷² to permit their use after the illegal seizure would deprive the corporation

denial on similar grounds was upheld. But note the recent informal ruling by Judge Mayer in the Southern District of New York on April 28, 1920, instructing the district attorney to discontinue the prosecutions in a very large number of prohibition cases on this ground upon oral statement of counsel on the call of the calendar.

⁶⁶ *United States v. Quaritius*, 267 Fed. 227 (1920).

⁶⁷ *United States v. Silverthorne*, 265 Fed. 853, 859 (1920).

⁶⁸ *State v. Spence*, 173 Ind. 99, 89 N. E. 488 (1909).

⁶⁹ 204 Mich. 559, 574, 171 N. W. 557 (1919). For a discussion of the law relating to searches for liquor, see note to this case in 3 A. L. R. 1514. See also *United States ex rel. Soeder v. Crossen*, 264 Fed. 459 (1920).

⁷⁰ *United States v. Mounday*, 208 Fed. 186 (1913); *In re Marx*, 255 Fed. 344 (1918).

⁷¹ 251 U. S. 385 (1920); see 33 HARV. L. REV. 869; 20 COL. L. REV. 484; 29 YALE L. J. 553.

⁷² 251 U. S. 385, 393 (1920). See *Hale v. Henkel*, 201 U. S. 43, 74 (1906); *Wilson v. United States*, 221 U. S. 361, 382 (1911). See also *United States v. Louis & Nash*

of its rights under the Fourth Amendment. Thus the Supreme Court has given clear notice that it will give the fullest practical effect to the Constitutional guaranty:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used in the way proposed."⁷³

The question of a corporation's rights under the Fourth Amendment had been presented in a case arising out of the Tobacco Trust investigation. While the Supreme Court held that the corporation could not plead the privilege against self-incrimination,⁷⁴ it was assumed to have rights under the Fourth Amendment. The existence of such rights was later doubted by the Circuit Court of Appeals in the Second District⁷⁵ and finally made certain by the Supreme Court in the Silverthorne case.⁷⁶

The Hale case also presented the question of the privilege of the officer in whose custody the records of the corporation might be. An immunity statute prevented the officer from claiming any personal privilege⁷⁷ and it was decided that he could not claim the corporation's privilege.⁷⁸ In a subsequent case, however, the officer claimed the right to withhold corporate records under the Fourth and Fifth Amendments, on personal grounds, claiming that the records consisted of letters written by himself.⁷⁹ The Supreme

R. R., 236 U. S. 318 (1915); *Cons. Rendering Co. v. Vermont*, 207 U. S. 541 (1908); Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375 (1906).

⁷³ 251 U. S. 385, 392 (1920).

⁷⁴ *Hale v. Henkel*, 201 U. S. 43, 76 (1906). See also *Wilson v. United States*, 221 U. S. 361 (1911); Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375 (1906); Proskauer, "Corporate Privilege against Self Incrimination," 8 COL. L. REV. 445 (1908).

⁷⁵ *Linn v. United States*, 251 Fed. (C. C. A. 2nd), 476 (1918).

⁷⁶ *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 393 (1920).

⁷⁷ See in this connection *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *I. S. C. C. v. Baird*, 194 U. S. 25 (1904); *Jack v. Kansas*, 199 U. S. 372 (1905); WIGMORE, EVIDENCE (1905) p. 230 in Supplement.

⁷⁸ *Hale v. Henkel*, 201 U. S. 43, 75 (1906).

⁷⁹ *Wilson v. United States*, 221 U. S. 361 (1911). See also *Dreier v. United States*, 221 U. S. 394 (1911); *Linn v. United States*, 251 Fed. (C. C. A. 2nd), 476 (1918); *In re Rosenwasser Bros., Inc.*, 254 Fed. 171 (1918).

Court brushed both contentions aside, holding that a reasonable subpoena was not an unreasonable search and that the property of the corporation in no matter whose custody was subject to inspection by the state. Where the corporation had been dissolved the same result was reached.⁸⁰

In a very recent case it was held that the members of an unincorporated membership association had no standing to move for the return of papers seized under a defective warrant from offices of the association and, therefore, could not object to the use of such papers as evidence against them.⁸¹ The Court, in effect, treated the membership association as though it had been a corporation and also intimated that there was no redress for the seizure of property belonging to the individuals if taken from the possession of the association. This last ruling, it is submitted, is at variance with both the letter and the spirit of the Constitution, as it ignores the security given to the papers and effects as well as the houses of the people, and because it permits the Government to benefit by illegal searches so long as it is careful not to take property from the possession of its owners.

It has, similarly, been held that a defendant cannot complain of the seizure of books and papers neither his own, nor in his possession.⁸² It is also the well-settled rule that where the papers are public records the defendant's custody will not avail him against their seizure.⁸³ Where papers are taken out of the custody of one not their owner, it seems that such person can object if there has been no warrant, or if the warrant was directed to him,⁸⁴ but not if the warrant is directed to the owner.⁸⁵ If the defendant's property is lawfully out of his possession it makes no difference by what means it comes into the Government's hands as there has

⁸⁰ *Wheeler v. United States*, 226 U. S. 478 (1913).

⁸¹ *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920).

⁸² *Moy Wing Sun v. Prentiss*, 234 Fed. (C. C. A. 7th), 24 (1916); *Tsue Shee v. Backus*, 243 Fed. (C. C. A. 9th), 551 (1917); *United States v. Silverthorne*, 265 Fed. 853 (1920). The owner may, however, object. See *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530 (1895), and *Owens v. Way*, 141 Ga. 796, 82 S. E. 132 (1914).

⁸³ See *Hale v. Henkel*, 201 U. S. 43 (1906); *Dreier v. United States*, 221 U. S. 394 (1911). In *People v. Coombs*, 158 N. Y. 532, 53 N. E. 527 (1899), this rule was applied to papers fraudulently prepared to cover up the officer's crime, but not actually filed.

⁸⁴ *Veeder v. United States*, 252 Fed. (C. C. A. 7th), 414 (1918).

⁸⁵ See *Schenck v. United States*, 249 U. S. 47 (1919) and *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920).

been no compulsion exercised upon him.⁸⁶ But the privilege extends to letters in the mails.⁸⁷ The privilege extends to the office as well as the home.⁸⁸

On the other hand, to enable a person to claim the privilege, it is not necessary that he be a party to any pending criminal proceeding. He can object to the illegal seizure of his own property and resist a forcible production of it even if he is only called as a witness.⁸⁹

Nor must a person be a citizen to be entitled to the protection of the Fourth Amendment.⁹⁰ Accordingly, evidence obtained as the result of illegal search and seizure cannot be considered in determining the facts necessary to justify deportation of an alien.⁹¹ It seems that in such proceeding no preliminary motion need be made, at least where the manner of obtaining the evidence is disclosed by the Government in the course of the hearing.⁹² The following principles for the decision of deportation cases have recently been laid down by the Department of Labor:⁹³

⁸⁶ *Johnson v. United States*, 228 U. S. 457 (1913); *Perlman v. United States*, 247 U. S. 7 (1918). See also *Haywood v. United States*, 268 Fed. (C. C. A. 7th) 00 (1920).

⁸⁷ See *Ex parte Jackson*, 96 U. S. 727, 733-735 (1877). See BROOM, *CONST. LAW AND CASES*, 2 ed. (1885), pp. 612-613 for contrary English view.

⁸⁸ *Silverthorne v. United States*, 251 U. S. 385 (1920); *United States v. Mills*, 185 Fed. 318 (1911); *United States v. M'He*, 194 Fed. 894 (1912); *United States v. Jones*, 230 Fed. 262 (1916); *United States v. Abrams*, 230 Fed. 313 (1916); *Flagg v. United States*, 233 Fed. (C. C. A. 2d), 481 (1916); *United States v. Friedberg*, 233 Fed. 313 (1916); *United States v. Sassone*, N. Y. L. J. (S. D. N. Y.) 3/15/20 (1920); see also *Addenda*. A contrary ruling seems to have been made in a recent liquor case: *United States v. Lee*, N. Y. World (E. D. N. Y.) 5/15/20 (1920).

⁸⁹ *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Ballmann v. Fagin*, 200 U. S. 186 (1906); and see *Weeks v. United States*, 232 U. S. 383, 392 (1914). See also *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530 (1895), and *Owens v. Way*, 141 Ga. 796, 82 S. E. 132 (1914).

⁹⁰ *United States v. Wong Quong Wong*, 94 Fed. 832 (1899); *United States v. Sassone*, N. Y. L. J. (S. D. N. Y.) 3/15/20 (1920); *Ex parte Jackson*, 263 Fed. 110 (1920); *Colyer v. Skeffington*, 265 Fed. 17, 24, 27 (1920).

⁹¹ *United States v. Wong Quong Wong*, 94 Fed. 832 (1899); *Ex parte Jackson*, 263 Fed. 110 (1920); *Colyer v. Skeffington*, 265 Fed. 17 (1920). CHAFEE, *FREEDOM OF SPEECH*, p. 241 and note. Professor Chafee takes the position that there is no authority for any search warrants in deportation proceedings.

⁹² *Ex parte Jackson*, 263 Fed. 110 (1920). See also *Colyer v. Skeffington*, 265 Fed. 17 (1920). These cases illustrate the extent to which official lawlessness has been carried in the anti-Red agitation. The opinions of Judge Bourquin and Judge Anderson are notable vindications of the constitutional safeguards.

⁹³ *Matter of Thomas Truss* (Asst. Secy. of Labor Post, 4/6/20), *Congressional Record*, April 12, 1920, pp. 5985-5986.

"10. Statements of the accused alien, whether oral or in writing, made while he is in custody and without opportunity fairly afforded him from the beginning to be represented by counsel, and without clear warning that anything he says may be used against him will be disregarded pursuant to the principle *Re Jackson* (263 Fed. 110) and of *Silverthorne v. United States* (251 U. S. 385) as having been unlawfully obtained.

"11. Exhibits seized upon the premises or person of the accused alien without lawful process will be disregarded pursuant both to the principle and the precise decision in *Re Jackson* and *Silverthorne v. United States*."

Searches and seizures have for a variety of reasons been upheld, although under defective warrants, or none at all. It has already been seen that such searches might be made at the time of arrest.⁹⁴ Evidence so obtained can be used upon a prosecution for a crime other than the one for which the arrest was made.⁹⁵ Apparently a seizure made as the result of trickery is not open to attack,⁹⁶ although it is doubtful if a seizure made as the result of a claim of right by an officer in fact having no warrant would be upheld, as in such case the owner of the property acts under a compulsion, none the less effective because fictitious.⁹⁷ Seizure by private individuals does not affect the Government's rights,⁹⁸ and, similarly, seizure by state officials will not affect a prosecution in the United States Courts⁹⁹ unless there was such authorization in advance,¹⁰⁰ or ratification thereafter,¹⁰¹ as to make the individuals or the State officials in effect representatives of the Government.

⁹⁴ See note 53, *supra*.

⁹⁵ *United States v. Murphy*, 264 Fed. 842 (1920). In this case it was intimated that evidence obtained under a properly issued search warrant could be used on a trial for an offense different from the one set forth in the affidavit on which the warrant was obtained. But see *Addenda* for question certified to the Supreme Court which raises this point.

⁹⁶ *United States v. Maresca*, 266 Fed. 713 (1920). But see *Addenda* for question certified to the Supreme Court which raises this point.

⁹⁷ See *United States v. Abrams*, 230 Fed. 313 (1916).

⁹⁸ See *Bacon v. United States*, 97 Fed. (C. C. A. 8th), 35 (1899).

⁹⁹ *Weeks v. United States*, 232 U. S. 383, 398 (1914). See *Rice v. United States*, 251 Fed. (C. C. A. 1st), 778 (1918); *Youngblood v. United States*, 266 Fed. (C. C. A. 8th), 795 (1920).

¹⁰⁰ *United States v. Welsh*, 247 Fed. 239, 240 (1917).

¹⁰¹ *Flagg v. United States*, 233 Fed. (C. C. A. 2nd), 481, 483 (1916).

Illegality in the original seizure may moreover be waived,¹⁰² as by consenting to the impounding of the papers with the clerk,¹⁰³ and cannot be taken advantage of by a defendant who used the papers himself and against whom the papers were not used by the Government.¹⁰⁴

Furthermore, unless there has been a compulsory production of the property, its use violates no constitutional provision. So the deposit of exhibits in a patent suit justifies their use in a criminal proceeding,¹⁰⁵ and papers found in a trunk obtained by use of a baggage check taken from a prisoner at time of arrest may be used at the trial.¹⁰⁶ Similarly, if the papers have been voluntarily surrendered to the District Attorney or investigating officers no objection to their use can be made,¹⁰⁷ even though the District Attorney may have broken an agreement to return the papers.¹⁰⁸ But a delivery made as the result of promise of immunity or threat by officers is not voluntary.¹⁰⁹ Nor is it necessary for the owner to await the application of actual force, and no acquiescence will be inferred because the property is turned over when demanded by an officer determined to execute a search warrant.¹¹⁰

A compulsory surrender of letters being written by a prisoner made as the result of usual regulations in a prison¹¹¹ or of books as

¹⁰² See *United States v. Maresca*, 266 Fed. 713 (1920). The *dictum* in that case, that where papers have been improperly seized and ordered returned, the order should be so framed as to permit the district attorney to retain the papers under a claim of title arising out of a gift or waiver subsequent to the seizure, is open to serious criticism, as it tends to render the whole proceeding by motion an idle farce.

¹⁰³ *Farmer v. United States*, 223 Fed. (C. C. A. 2nd) 903 (1915).

¹⁰⁴ *Fitter v. United States*, 258 Fed. (C. C. A. 2nd) 567 (1919).

¹⁰⁵ *Perlman v. United States*, 247 U. S. 7 (1918).

¹⁰⁶ *United States v. Wilson*, 163 Fed. 338 (1908).

¹⁰⁷ *Linn v. United States*, 234 Fed. (C. C. A. 7th) 543 (1916); *United States v. Hart*, 214 Fed. 655 (1914); *United States v. Hart*, 216 Fed. 374 (1914). See also *United States v. Maresca*, 266 Fed. 713 (1920); *United States v. Barry*, 260 Fed. 291 (1919).

¹⁰⁸ *United States v. Hart*, 216 Fed. 374 (1914).

¹⁰⁹ *United States v. Abrams*, 230 Fed. 313 (1916), holding such seizure analogous to a confession improperly obtained. See *Bram v. United States*, 168 U. S. 532 (1897).

¹¹⁰ See *In re Tri-State Coal & Coke Co.*, 253 Fed. 605, 608 (1918), and *Fitter v. United States*, 258 Fed. (C. C. A. 2nd) 567 (1919); *United States v. Keydoszius*, 267 Fed. 866 (1920). See also *United States v. Brasley*, 268 Fed. 59 (1920) where a subpoena *duces tecum* was used.

¹¹¹ *Stroud v. United States*, 251 U. S. 15 (1919).

an incident to the administration of a bankrupt's estate¹¹² is not prohibited because not made as an incident to criminal prosecution,¹¹³ and such matter can, therefore, be used in a subsequent criminal proceeding. So various statutory regulations involving inspection of books and other records have been upheld as incidental to the State's power with respect to taxation, public welfare, etc.¹¹⁴

Two important questions remain undecided by the Supreme Court. The first is suggested by the Adams case: Will a seizure of property not covered by the search warrant be condemned? The second follows from the dictum in the Boyd case: Will a search warrant, otherwise valid, be condemned solely on the ground that it is for the purpose of seeking evidence? On the principles laid down in the cases and other authorities it would seem that the answer to both these questions should be affirmative. The precise language of the second part of the Fourth Amendment requiring that the property to be seized be particularly described, demands such answer to the first question. In some of the lower Federal Courts, such cases have accordingly been decided adversely to the Government.¹¹⁵ The second question has never been squarely presented, but numerous expressions of opinion would indicate that such a search for evidence would be illegal.¹¹⁶

¹¹² *Johnson v. United States*, 228 U. S. 457 (1913). But see *Blum v. State*, 94 Md. 375, 51 Atl. 26 (1902).

¹¹³ See also *Public Clearing House v. Coyne*, 194 U. S. 497 (1904).

¹¹⁴ See *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); *Public Clearing House v. Coyne*, 194 U. S. 497 (1904); *Co-Op. Building & Loan Assn. v. State*, 156 Ind. 463, 60 N. E. 146 (1901); *Washington Nat. Bk. v. Daily*, 166 Ind. 631, 77 N. E. 53 (1906); *People v. Henwood*, 123 Mich. 317, 82 N. W. 70 (1900); *People v. Schneider*, 139 Mich. 673, 103 N. W. 172 (1905); *State v. Stoffels*, 89 Minn. 205, 94 N. W. 675 (1903); *City of St. Joseph v. Levin*, 128 Mo. 588, 31 S. W. 101 (1895); *State v. Hanson*, 114 Minn. 136, 130 N. W. 79 (1911); *State v. Hand Brewing Co.*, 32 R. I. 56, 78 Atl. 499 (1911); *Sister Felicitas v. Hartridge*, 148 Ga. 832, 98 S. E. 538 (1919); *Com. v. Mecca Co-Op. Co.*, 60 Pa. Supr. Ct. 314 (1915); 24 HARV. L. REV. 661; but see *United States v. Louis. & Nash. R. R.*, 236 U. S. 318 (1915). See also 25 L. R. A. (N. S.) 818.

¹¹⁵ *United States v. M'He*, 194 Fed. 894 (1912); *In re Chin K. Shue*, 199 Fed. 282 (1912); *United States v. Friedberg*, 233 Fed. 313 (1916); *United States v. Hill*, 263 Fed. 812 (1920); and see *United States v. Mills* (appeal dismissed 220 U. S. 549 (1911)), 185 Fed. 318 (1911); *United States v. Mounday*, 208 Fed. 186 (1913); *Flagg v. United States*, 233 Fed. (C. C. A. 2nd) 481 (1916), disapproving wholesale seizure at time of arrest. See also *Rice v. United States*, 251 Fed. (C. C. A. 1st) 778 (1918) and *Colyer v. Skeffington*, 265 Fed. 17, 44 (1920). See CHAFEE, FREEDOM OF SPEECH, pp. 302-311, for recent raids where the scope of the warrants was exceeded by the executing officers.

¹¹⁶ *Entick v. Carrington*, 19 How. St. Tr., 1029, 1073 (1765); *Boyd v. United States*, 116 U. S. 616, 623 (1886); *Veeder v. United States* (Certiorari denied 246 U. S.

In this connection it is important to consider the so-called Espionage Act¹¹⁷ under which the use of search warrants in the Federal Courts has been greatly extended.¹¹⁸ Before the enactment of this law the use of such warrants had been restricted to revenue, counterfeiting and a few other classes of cases.¹¹⁹ It was at one time thought that no special statutory authority for the issuance of such warrants was necessary,¹²⁰ but the better opinion was otherwise.¹²¹

The Espionage Act provides that search warrants may be issued under one of three contingencies: (§ 1) "when the property was stolen or embezzled"; (§ 2) "when the property was used as the means of committing a felony";¹²² (§ 3) "when the property, or any paper, is possessed, controlled or used in violation of section 22."¹²³

It is therefore significant that Congress has not authorized a search for evidence, and in view of the circumstances under which the Act was passed, it is safe to assume that Congress did not believe that it had constitutional power to do so. It is also worthy of note that this Act is in effect a reproduction of the provisions long existing in the State of New York,¹²⁴ which have been declared an embodiment of the historical doctrine.¹²⁵

675 (1918)), 252 Fed. (C. C. A. 7th) 414, 418 (1918); *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. (C. C. A. 2nd) 847, 853 (1919); *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920); BLACK, CONST. LAW, 3 ed. (1910), p. 613; COOLEY, CONST. LIM., 7 ed., p. 431; see also *Robinson v. Richardson*, 13 Gray (Mass.), 454 (1859); *Lippman v. People*, 175 Ill. 101, 114, 51 N. E. 872 (1898). See *Addenda* for question certified to the Supreme Court which raises this point.

¹¹⁷ Act June 15, 1917, c. 30, Title XI, 40 STAT. AT L. 228.

¹¹⁸ Hough, "Law in Wartime," 31 HARV. L. REV. 692, 698 (1918).

¹¹⁹ See *United States v. Jones*, 230 Fed. 262 (1916).

¹²⁰ *United States v. M'Hee*, 194 Fed. 894, 898 (1912).

¹²¹ *United States v. Jones*, 230 Fed. 262 (1916); see Hough, "Law in Wartime," 31 HARV. L. REV. 692, 698 (1918), and *United States v. Maresca*, 266 Fed. 713 (1920). CHAFEE, FREEDOM OF SPEECH, p. 304.

¹²² But under the Prohibition Act search warrants may be issued for a property used in the commission of a misdemeanor. See *United States v. Friedman*, 267 Fed. 856 (1920), and *United States v. Metzger* (Eastern District, New York, 1920) not yet reported.

¹²³ Sec. 22, 40 STAT. AT L. 230, punishes possession of property or papers in aid of foreign governments and in violation of a penal statute or of United States rights under treaties or international law.

¹²⁴ Code, Crim. Proc. § 791 *et seq.*

¹²⁵ *People ex rel. Simpson v. Kempner*, 208 N. Y. 16, 101 N. E. 794 (1913); *United States v. Maresca*, 266 Fed. 713 (1920). See also *United States v. Rykowski*, 267 Fed. 866, 870 (1920).

The Espionage Act also makes clear the exact limitations upon the issuance of search warrants and in this respect merely conforms to the Constitution¹²⁶ and the previous decisions. After (§ 3) paraphrasing the Fourth Amendment with respect to probable cause and particularity of description¹²⁷ it provides (§ 5) that the affidavit upon which the warrant is to be granted must state "facts tending to establish the grounds of the application or probable cause for believing that they exist."

This provision should do away with search warrants granted on mere suspicion. Such proceedings have always been declared illegal as in conflict with the Constitution.¹²⁸ This rule has been well stated in the Circuit Court of Appeals for the 7th Circuit as follows:¹²⁹

"No search warrant shall be issued unless the judge has first been furnished with facts under oath — not suspicions, beliefs or surmises — but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. . . . If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury."

¹²⁶ See *Coastwise Lumber Co. v. United States*, 259 Fed. (C. C. A. 2nd) 847, 852 (1919), and *Colyer v. Skeffington*, 265 Fed. 17, 44, 45 (1920).

¹²⁷ With respect to the necessity for particularity, see *West v. Cabell*, 153 U. S. 78 (1894); *Weeks v. United States*, 232 U. S. 383, 393 (1914); *Hale v. Henkel*, 201 U. S. 43, 76 (1906); *United States v. Friedberg*, 233 Fed. 313 (1916); *Veeder v. United States* (Certiorari denied 246 U. S. 675), 252 Fed. (C. C. A. 7th) 414, 418 (1918); *In re Tri-State Coal & Coke Co.*, 253 Fed. 605 (1918); *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920); *United States v. Friedman*, 267 Fed. 856 (1920), and *United States v. Rykowski*, 267 Fed. 866 (1920); *Sandford v. Nichols*, 13 Mass. 286 (1816); *Johnson v. Comstock*, 14 Hun (N. Y.), 238 (1878). For the English rule, see *Jones v. German* (C. of A.) [1897] 1 Q. B. 374.

¹²⁸ *Rice v. Ames*, 180 U. S. 371 (1901); *United States v. Baumert*, 179 Fed. 735 (1910); *United States v. Premises in Butte, Mont.*, 246 Fed. 185 (1917); *Veeder v. United States* (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414 (1918); *In re Tri-State Coal & Coke Co.*, 253 Fed. 605 (1918); *In re Rosenwasser Bros., Inc.*, 254 Fed. 171 (1918); *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. (C. C. A. 2nd) 847 (1919); *United States v. Marésca*, 266 Fed. 713 (1920); see also COOLEY, CONST. LIM., 7 ed., p. 429; *United States v. Pitotto*, 267 Fed. 603 (1920); and *United States v. Rykowski*, 267 Fed. 866 (1920). CHAFEE, FREEDOM OF SPEECH, p. 304.

¹²⁹ *Veeder v. United States* (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414, 418 (1918).

It is, therefore, insufficient to allege mere belief as to the commission of the crime, or even facts stated on information and belief, unless the sources of the information are disclosed.¹³⁰ Nor is a statute constitutional which makes such expression of belief equivalent to proof of probable cause.¹³¹ It has, however, been held that the Court in passing upon the validity of the seizure need not confine itself to the affidavit upon which the warrant was issued, but can consider the complaint which has been made and which would be presumed to have been before the commissioner,¹³² and even any facts which may have been developed at the hearing before the commissioner, or otherwise between the issuance of the warrant and the determination by the Court.¹³³ These rulings do not seem to be sound in principle, but the second one is apparently based on sections 15 and 16 of the Espionage Act. It is submitted that they violate the requirements of the Constitution on the subject, especially if the seized property is relied upon to establish the existence of probable cause.

Warrants have been found sufficient in a number of cases¹³⁴ but despite the decisions and the plain language of the Espionage Act as to probable cause, many warrants appear to have been improperly granted.¹³⁵ The warrant may not be issued for private ends, but only in criminal, or quasi-criminal proceedings.¹³⁶

¹³⁰ *Rice v. Ames*, 180 U. S. 371 (1901); *United States v. Baumert*, 179 Fed. 735 (1910); *Ripper v. United States*, 178 Fed. (C. C. A. 8th) 24 (1910); *In re Rosenwasser Bros., Inc.*, 254 Fed. 171 (1918); *United States v. Michalski*, 265 Fed. 839 (1919); *Johnson v. Comstock*, 14 Hun (N. Y.), 238 (1878). See *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330 (1906). But see *Jones v. German* (C. of A.) [1897] 1 Q. B. 374 for the English view. See notes in 1 Ann. Cas. 650; 18 Ann. Cas. 817.

¹³¹ *Lippman v. People*, 175 Ill. 101, 51 N. E. 872 (1898). See 12 HARV L. REV. 505.

¹³² *In re Rosenwasser Bros., Inc.*, 254 Fed. 171 (1918).

¹³³ *United States v. Gouled*, 253 Fed. 770 (1918); *United States v. Maresca*, 266 Fed. 713 (1920). See also *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920).

¹³⁴ *Beavers v. Henkel*, 194 U. S. 73 (1904); *United States v. Gouled*, 253 Fed. 770 (1918); *In re Rosenwasser Bros., Inc.*, 254 Fed. 171 (1918); *United States v. Friedman*, 267 Fed. 856 (1920); *Jones v. German* (C. of A.) [1897] 1 Q. B. 374. See COOLEY, CONST. LIM., 7 ed., pp. 429-430. But see *Addenda*.

¹³⁵ *Veeder v. United States*, 252 Fed. (C. C. A. 7th) 414 (1918); *In re Tri-State Coal & Coke Co.*, 253 Fed. 605 (1918); *In re Marx*, 255 Fed. 344 (1918); *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. (C. C. A. 2nd) 847 (1919); *United States v. Maresca*, 266 Fed. 713 (1920); *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920); *United States v. Pitotto*, 267 Fed. 603 (1920); *United States v. Rykowski*, 267 Fed. 866 (1920). CHAFEE, FREEDOM OF SPEECH, pp. 302-311.

¹³⁶ *Robinson v. Richardson*, 13 Gray (Mass.), 454 (1859); *People ex rel. Simpson*

Although the Fourth Amendment does not prevent the production of books and papers on a trial,¹³⁷ it has been held, as a result of a dictum in the *Boyd* case, that a production compelled by subpoena *duces tecum* is subject to the same rules with respect to reasonableness as govern a search warrant. A subpoena was accordingly declared unreasonable because it called for the production of all contracts and correspondence with a large number of concerns over a long period of time.¹³⁸

As the executing officer has no discretion to omit any of the things specified in the warrant it should appear from the affidavit that the facts justify the seizure of all the property; otherwise the warrant should be quashed.¹³⁹ So improper execution of the warrant renders the whole proceeding defective — as where the proper officer was not present at the time,¹⁴⁰ or where the marshal exceeded the scope of the warrant.¹⁴¹

The Espionage Act (§§ 7-14) prescribes the various things to be done by the executing officer and also (§§ 15, 16) affords the owner an opportunity of contesting the seizure before the judge or commissioner who issued the warrant. Prior to the passage of the Espionage Act it had been held that the motion could be made only where the papers were in the custody of the Court, or at least

v. Kempner, 208 N. Y. 16, 101 N. E. 794 (1913); *Lippman v. People*, 175 Ill. 101, 51 N. E. 872 (1898). See also *Sanford v. Richardson*, 176 App. Div. 199, 161 N. Y. Supp. 1026 (1916); and *Matter of Ehrich v. Root*, 134 App. Div. 432, 119 N. Y. Supp. 395 (1909).

¹³⁷ *I. S. C. C. v. Brimson*, 154 U. S. 447 (1894); *In re Chapman*, 166 U. S. 661 (1897); *I. S. C. C. v. Baird*, 194 U. S. 25 (1904); *Hale v. Henkel*, 201 U. S. 43, 73 (1906); *Flint v. Stone Tracy Co.*, 220 U. S. 107, 174 (1911); *Matter of Mohawk Overall Co.*, 210 N. Y. 474, 104 N. E. 925 (1914). But see *In re Jefferson*, 96 Fed. 826 (1899), where a wife's testimony in bankruptcy was excluded. See also *United States v. Brasley*, 268 Fed. 59 (1920).

¹³⁸ *Hale v. Henkel*, 201 U. S. 43, 74, 76, 77 (1906). See also *Wilson v. United States*, 221 U. S. 361, 382 (1911); *United States v. Louis. & Nash. R. R.*, 236 U. S. 318 (1915); Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375 (1906). But see *Cons. Rendering Co. v. Vermont*, 207 U. S. 541, 554 (1908), and *United States v. Watson*, 266 Fed. 736 (1920), where similar subpoenas were declared not unreasonable. See also *Matter of Mohawk Overall Co.*, 210 N. Y. 474, 104 N. E. 925 (1914), and *Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667, 675 (1910).

¹³⁹ *Veeder v. United States* (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414, 418 (1918).

¹⁴⁰ *United States v. M'Hee*, 194 Fed. 894, 898 (1912).

¹⁴¹ See *United States v. Mills* (appeal dismissed 220 U. S. 549 (1911)), 185 Fed. 318 (1911); *United States v. Friedberg*, 233 Fed. 313 (1916).

only after a proceeding had been instituted, and therefore not to recover property seized by revenue officers and still held by them.¹⁴² It is submitted that section 16 of this Act authorizes the making of such motion, at least where a warrant had been issued, regardless of what branch of the Government was concerned in the seizure.

A curious question of practice has also arisen in this connection. In at least one case, the District Court has entertained a motion to review the seizure despite a previous hearing by the commissioner,¹⁴³ but in a recent case it was held that the commissioner was acting as a court of co-ordinate jurisdiction so that the District Court could not review his order.¹⁴⁴ But it has been held that no appeal lies to the Circuit Court of Appeals from an order of the District Court denying a motion for return, on the ground that the order is interlocutory and that it can only be reviewed on appeal from a judgment of conviction,¹⁴⁵ — except where the motion is made by one not a party to the proceeding.¹⁴⁶ The result of these rulings is that there is no way except after conviction by which a defendant can review an order made by the commissioner denying a motion to return seized property.

Where it is conceded that the seizure was illegal it is not proper to withhold the papers because it is claimed that they belong to the United States: they should be restored "to that possession from which they never should have been taken,"¹⁴⁷ although contraband property will not be returned.¹⁴⁸ It has also been decided that mere delay in making the motion, or informality in the papers is no ground for denial.¹⁴⁹ Nor should such motion be de-

¹⁴² *United States v. Hee*, 219 Fed. 1019 (1915); *In re Chin K. Shue*, 199 Fed. 282 (1912).

¹⁴³ *In re Tri-State Coal & Coke Co.*, 253 Fed. 605 (1918).

¹⁴⁴ *United States v. Maresca*, 266 Fed. 713 (1920).

¹⁴⁵ *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. (C. C. A. 2nd) 847 (1919), but see dissenting opinion urging that such motion is an independent proceeding.

¹⁴⁶ *Veeder v. United States* (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414 (1918). See *United States v. Maresca*, 266 Fed. 713 (1920); *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. (C. C. A. 2nd) 847 (1919).

¹⁴⁷ *In re Marx*, 255 Fed. 344 (1918).

¹⁴⁸ *United States v. Rykowski*, 267 Fed. 866 (1920) (liquor stills). See also *United States v. "The Spirit of '76"* (1917), Department of Justice, Bulletin No. 33 (moving picture).

¹⁴⁹ *Laughter v. United States*, 259 Fed. (C. C. A. 6th) 94 (1919). But see *Farmer v. United States*, 223 Fed. (C. C. A. 2nd) 903 (1915).

nied because the District Attorney has voluntarily returned the books and papers after he has obtained all the necessary information from them.¹⁵⁰ The Court should always direct the return not only of the papers seized, but also of any "copies, photographs or memoranda thereof, made since the same were taken."¹⁵¹

The remedy for illegal searches and seizures by motion is thus well established. Those who may object that this effective enforcement of the constitutional guaranty may impede the arm of the Government should consider well the opinion of Mr. Justice Davis in that case which represents the high-water mark of civil liberties, *Ex parte Milligan*:¹⁵²

"Those great and good men foresaw that troublesome times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world has taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."¹⁵³

Addenda. Since the above was originally written there has come to the writer's attention the fact that the Circuit Court of Appeals for the Second Circuit has certified to the Supreme Court in the case of *Gouled v. United States*, 264 Fed. 839 (1920), a number of questions bearing on the subject of this article. In that case certain papers were taken without a warrant as the result of artifice, another paper was taken under a warrant charging an offense other than the one for which the defendant was indicted and tried, and still other papers were taken under a warrant which in effect au-

¹⁵⁰ *Flagg v. United States*, 233 Fed. (C. C. A. 2nd) 481, 483 (1916).

¹⁵¹ *In re Tri-State Coal & Coke Co.*, 253 Fed. 605, 608 (1918); *United States v. Brasley*, 268 Fed. 59 (1920).

¹⁵² 4 Wall. (U. S.) 2 (1866). In that case a sentence of death imposed by a court martial and approved by President Lincoln, was set aside on the ground that the accused was entitled to trial in the regular criminal courts.

¹⁵³ *Ibid.*, 120, 121.

thorized a search for evidence. The approaching decision of the Supreme Court should, therefore, chart fully the important spaces left untouched by the *Boyd*, *Adams*, and *Weeks* cases.

The following are the questions certified:

"1st. Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the United States of a paper writing of evidential value only, belonging to one suspected of crime and from the house or office of such person, a violation of the Fourth Amendment?

"2nd. Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the Fifth Amendment?

"3rd. Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15th, 1917, from the house or office of the person so suspected, seized and taken in violation of the Fourth Amendment?

"4th. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the Fifth Amendment?

"5th. If in the affidavit for search warrant under Act of June 15th, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?

"6th. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted — if he then move before trial for the return of said papers and said motion is denied — is the Court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

The author sees no reason for doubting the soundness of the decisions in *United States v. Maresca*, 266 Fed. 713 (1920), on the first question, in *United States v. Murphy*, 264 Fed. 842 (1920), on the fifth question, and in *United States v. Hill*, 263 Fed. 812 (1920), on the sixth question. Under Wigmore's analysis and *Adams v. New York*, 192 U. S. 585 (1903), negative answers may be expected to the second and fourth questions — see *Haywood v. United*

States, 268 Fed. (C. C. A. 7th) 000 (1920). An affirmative answer may be expected to the important third question, qualified probably as indicated in *MacKnight v. United States*, 263 Fed. (C. C. A. 1st), 832 (1920), and in *Haywood v. United States*, 268 Fed. (C. C. A. 7th) (1920).

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EQUITABLE RELIEF AGAINST TORTS

AMONG the treatises on Equity recently published are the survey in one volume by Professor George L. Clark of the University of Missouri;¹ the fourth edition of Pomeroy's exhaustive work, in six volumes;² the fourteenth American edition of Story, by W. H. Lyon, Jr., in three volumes;³ and the third English edition of Story, by A. E. Randall, in one volume.⁴

The recent decisions on the scope of equity jurisdiction, specific performance, and trusts have already been presented in this series by others.⁵ The topics in Equity discussed in this article comprise injunctions against torts.

(1) *Waste, Trespass and Violations of Easements*

The position of a tenant for life without impeachment of waste is neatly brought out by *Gage v. Pigott*.⁶ Ornamental timber was cut down by the government under its power of eminent domain. It was held that the proceeds should be invested to follow the settlement, the income being paid to such a tenant for his life; although he could not cut down the trees himself, he was entitled to enjoy them during his tenancy, and consequently to benefit from the monetary substitute for the same period. If they had been tortiously felled by an outsider, the same result would follow.

The growing willingness of American courts to grant interlocu-

¹ E. W. Stephens Pub. Co., Columbia, Mo., 1919; reviewed in 33 HARV. L. REV. 122 (1919); 18 MICH. L. REV. 817; 15 ILL. L. REV. 132 (1920). See also his "Equitable Relief against Nuisances and Similar Wrongs in Missouri," 20 UNIV. MO. BULL. No. 32, Law Series, 17.

² Bancroft, Whitney Co., San Francisco; Lawyers Co-operative Pub. Co., Rochester (1919).

³ Little, Brown, & Co., Boston (1918); reviewed in 19 COL. L. REV. 88; 67 U. OF PA. L. REV. 210; 28 YALE L. J. 718; 3 MINN. L. REV. 437; 88 CENT. L. J. 347; 17 MICH. L. REV. 351; 6 VA. L. REV. 550; 15 ILL. L. REV. 132.

⁴ Sweet & Maxwell, Ltd., London; to be reviewed subsequently.

⁵ "Equity," Roscoe Pound, 33 HARV. L. REV. 420, 813, 929; "Trusts," A. W. Scott, *ib.* 688.

⁶ 53 Ir. L. T. R. 33 (1918); noted in 33 HARV. L. REV. 618 (1920).

tory mandatory injunctions is shown by *Keys v. Alligood*.⁷ A temporary injunction restraining the defendants from interfering with a road had been wilfully violated by them. After hearing, the defendants were ordered to restore the road to its original condition at once. On appeal the order was sustained. The court first observed that since the defendants could be punished for the contempt by fine or imprisonment, they could be allowed as an alternative to make reparation. The decision is then rested on the broader ground that the order was valid as a mandatory injunction, which may be issued in a proper case on preliminary hearing.

"Gross violations of rights may occur in the shortest possible time; and a few hours' wrongdoing may result in the creation of an intolerable nuisance or in the production of an injury which, if prolonged, might soon become irreparable. In such cases the interposition of the strong arm of the chancellor ought to be most swift; and if the immediate relief afforded could not, in a proper case, be restorative, as well as prohibitory, no adequate redress would, in many instances, be given."⁸

Although Lord Eldon is usually regarded as reactionary, his judicial attitude is frequently in advance of later American judges. His decision in *Lane v. Newdigate*,⁹ granting a preliminary injunction, mandatory in substance though prohibitory in form, was denounced by Judge Sharswood as "a precedent that ought not to be followed in this or any other court."¹⁰ Nevertheless, the recent case approves *Lane v. Newdigate*, but declares that the time has come to abandon its "roundabout mode."

"In these days, we . . . look rather to the substance than to the form of things, as being a more direct, simple, and effective way of dealing with the rights and remedies of litigants. . . . Why not call this process by its right name, instead of granting what is really mandatory, under the guise of preventive relief? When this is done, we are trying to deceive ourselves, for no good or practical reason, when we know what we are actually doing, or what the inevitable effect will be. It is simply adherence to an old form and custom of the court of equity which did not even gain the approval of some of its ablest chancellors. In modern times, since we try to call things by their true and appropriate titles, so

⁷ 178 N. C. 16, 100 S. E. 113 (1919). For the same position, see "Mandatory Injunctions," Jacob Klein, 12 HARV. L. REV. 95.

⁸ 178 N. C. 16, 18, 100 S. E. 113, 114 (1919).

⁹ 10 Vesey, 192 (1804).

¹⁰ Audenried v. Philadelphia, etc. R. R., 68 Pa. 370, 375 (1871).

we may be better understood, the decided trend of the courts, especially in this country, is towards a more sensible policy, as we have already shown by authority." ¹¹

Can an equity court which is asked to enjoin trespasses make a final adjudication of title, or must this be left to an action at law? In *Greeson v. Cannon*,¹² a defendant in possession of land claimed by the plaintiff was permanently enjoined from injurious acts, but the equity court held it had no power to add an order to get out. The plaintiff then brought an action of ejectment, in which the law court refused to try the question of title anew, holding that by virtue of the equity suit it was *res adjudicata* in the plaintiff's favor. Such an effect would, of course, not be given to a temporary injunction or even to a permanent injunction against trespasses on foreign land.¹³

The asportation of a chattel was enjoined in *Shrouder v. Sweat*.¹⁴ An automobile carrying liquor was seized by the sheriff, who instituted proceedings to have the car condemned and sold. An innocent mortgagee of the car had the sale restrained, until provision was made for the application of the proceeds of the sale to the lien of the mortgage. The frequency of such seizures makes it probable that this point will be often litigated in other states.¹⁵ On the other hand, the owner of a stranded steam yacht could not enjoin a lien creditor who was salving it without any legal right to do so. The plaintiff's hands were considered not to be clean, because he had failed to tender the amount due to the defendant.¹⁶

A recent New Jersey decision¹⁷ throws doubt on the reasoning of *Hart v. Leonard*,¹⁸ a leading case for the narrow view as to the jurisdiction of equity to protect easements. In that case Justice Dixon set forth nine classes of cases in which "courts of equity

¹¹ 178 N. C. 16, 20, 100 S. E. 113, 115 (1919).

¹² 217 S. W. (Ark.) 786 (1920); noted in 20 COL. L. REV. 622 (1920).

¹³ Some courts are unwilling to enjoin foreign trespasses because foreign title is involved. *Columbia Dredging Co. v. Morton*, 28 App. D. C. 288 (1907). *Contra*, *Alexander v. Tolleston Club*, 110 Ill. 65 (1884).

¹⁴ 148 Ga. 378, 96 S. E. 881 (1918).

¹⁵ See 30 YALE L. J. 91 (1920); 34 HARV. L. REV. 200.

¹⁶ *Louisiana Agricultural Corp. v. Pelican Oil Refining Co.*, 256 Fed. 822 (C. C. A. 5th, 1919).

¹⁷ *Renwick v. Hay*, 90 N. J. Eq. 148, 106 Atl. 547 (1919).

¹⁸ 42 N. J. Eq. 416, 7 Atl. 865 (1886); 1 AMES, CASES ON EQUITY JURISDICTION, 549.

may, by decree and injunction, protect and enforce legal rights in real estate." Inasmuch as the facts did not fall within any of the nine classes, he automatically refused relief. Vice-Chancellor Lane now comments in *Renwick v. Hay*,¹⁹ "I do not conceive that there may not be cases, cognizable in equity, which do not fall strictly within any one of the nine classes mentioned by Justice Dixon." It is to be hoped that the New Jersey Court of Errors and Appeals will also disown the defective reasoning of *Hart v. Leonard*, right as its result was because of the adequacy of the legal remedy. Justice Dixon was attempting to apply in law the logical method of elimination or exclusion, which always charmed us in plane geometry. If the line A B is unequal to C D, it must be so in either of two ways, greater or less. Then we prove it cannot be greater and it cannot be less. Therefore it is not unequal, and $AB = CD$. The difficulty is that this method is sound only when the classification is exhaustive. The list of excluded possibilities must include *all* the possibilities, and of this we can rarely be sure in less exact sciences than mathematics. We know that there are only two kinds of inequality, but Justice Dixon could not be sure that there were only nine kinds of equitable relief, especially when he had failed to go outside New Jersey to search for a tenth category. It is the same fallacy into which Darwin fell in attributing the parallel roads of Glen Roy to the action of the sea, because no other explanation he could think of was possible. Then Agassiz propounded his glacier-lake theory, which Darwin had neglected to consider. And, he adds, "My error has been a good lesson to me never to trust in science to the principle of exclusion."²⁰

This question of *Hunt v. Leonard* is very important, for it shows the danger in our system of law which has grown up from concrete cases rather than from abstract reasoning, of using precedents as principles *per se* and not as illustrations of a principle. Equity relieves against torts when the remedy at law is inadequate. It was inadequate in Dixon's nine classes, and may be equally so in a dozen new classes. Of course a different system of law, which is

¹⁹ 90 N. J. Eq. 110, 106 Atl. 547, 549 (1919).

²⁰ 1 LIFE AND LETTERS OF CHARLES DARWIN, 57 (ed. 1901). I have heard a thoughtful woman argue against gambling thus: There are four ways to obtain money, earning, finding, receiving a gift, stealing. Gambling is neither of the first three. Therefore, it is the fourth.

rooted in logic and not in experience, must be on the watch for altogether different dangers.

Another case of easements is *Wilkins v. Diven*.²¹ A had an easement to take water through an underground pipe from an excellent well on B's land. B found the well interfered with a proposed new house, so blocked it up and removed the pipe. A began to dig across B's land to repair and restore his well connection. He was obtaining city water, adequate for his needs except that the well would furnish cool, refreshing drinking water in summer. B sued to enjoin the trespass, and A on his side asked for a mandatory injunction to reestablish his easement. The court held that although A was entitled to substantial damages at law, the deprivation of the easement did not very seriously affect his enjoyment of his property, so that he was denied specific relief and forbidden to resort to self-help.

"Easements appurtenant to dominant estates are given greater significance in England than in America . . . and properly so, no doubt, since conditions tend to become settled and crystallized in long-established communities. With us, there is constant transition, growth, improvement. Our hamlets of yesterday become substantial towns to-day and will be great cities to-morrow. It would ill accord with our ever-advancing development and progress to tie us down too rigidly by giving undue significance to old ways and to old notions."²²

This careless attitude toward an admitted property right which meant much for human enjoyment is open to serious criticism. The court sanctioned private eminent domain and compelled A to sell out to a wilful wrongdoer. Although it thought B's destruction of the easement too slight a matter to enjoin, it was entirely willing to enjoin the much slighter temporary trespass by which A could have restored the well-pipe without, apparently, any serious injury to B's house.

This question, how far an injunction should be held not to be a matter of right, will recur under nuisances.

(2) Nuisances

Many of the decisions in equity on nuisances involve chiefly the question, is there a nuisance? Thus the following situations have

²¹ 187 Pac. (Kan.) 665 (1920); noted in 18 MICH. L. REV. 703 (1920).

²² 187 Pac. (Kan.) 665, 666 (1920).

lately been held tortious: a portable lunch-wagon licensed by the city and standing directly in front of the plaintiff's restaurant;²³ a public garage;²⁴ bowling alleys used noisily, with shower-baths visible from neighboring residences;²⁵ a sanitarium for colored people where the sick were exposed to view and automobiles were constantly engaged in carrying away the dead;²⁶ an undertaking establishment in a residential district.²⁷ How far purely mental discomfort constitutes a nuisance is doubtful. A hospital for tuberculosis of the joints, etc., is not a nuisance, although the neighbors had an unreasonable fear of contagion.²⁸ No depreciation of land-values was proved; even if it existed, the same result should follow. The law cannot stifle hospitals to protect hysterical neighbors from dangers which science declares unreal; there is an adequate remedy for the neighbors in the study of hygiene. Other situations held not to be nuisances are: cheap two-room shacks crowded together in a residential district;²⁹ the alteration of a house-wall from brick to wood, in violation of a fire-limit ordinance, causing increased danger of fire to the plaintiff's house adjoining;³⁰ the development of land for a colored residential neighborhood.³¹ All these cases show that depreciation of the pecuniary value of the plaintiff's property is not decisive. On the one hand a clear interference with his comfort may be enjoined without any proof of depreciation; on the other, many acts causing depreciation are not nuisances. Although equity in enjoining nuisances is protecting an interest of substance, that interest is not in the monetary value of the land, but in the opportunity to make beneficial use thereof as one of the incidents of ownership.

Although it is important to ascertain the nature of the tort of

²³ *Strong v. Sullivan*, 181 Pac. (Cal.) 59 (1919); annotated in 4 A. L. R. 59.

²⁴ *Hohl v. Modell*, 264 Pa. 516, 107 Atl. 885 (1919); noted in 68 U. OF PA. L. REV. 292, 18 MICH. L. REV. 234. Cf. *Myers v. Fortunato*, 108 Atl. (Del. Ch.) 678 (1919); noted in 4 MINN. L. REV. 540.

²⁵ *Magel v. Gruetli Benev. Soc.*, 218 S. W. (Mo.) 704 (1920).

²⁶ *Giles v. Rawlings*, 148 Ga. 575, 97 S. E. 521 (1918).

²⁷ *Goodrich v. Starrett*, 108 Wash. 437, 184 Pac. 220 (1919); noted in 18 MICH. L. REV. 246; *Osborn v. Shreveport*, 143 La. 932, 79 So. 542 (1918).

²⁸ *Frost v. King Edward VII, Welch, etc. Assn.*, [1918] 2 Ch. 180; noted in 17 MICH. L. REV. 428.

²⁹ *Worm v. Wood*, 223 S. W. (Tex. Civ. App.) 1016 (1920).

³⁰ *Landon v. Kwass*, 123 Va. 544, 96 S. E. 764 (1918).

³¹ *Diggs v. Morgan College*, 133 Md. 264, 105 Atl. 157 (1918).

nuisance in order to understand the basis of equity jurisdiction, still courts of equity in the cases reviewed above are not really dealing with any question of equity but with the law of torts, just as they determine the law of contracts, when they ask whether a promise has consideration before they specifically enforce it. We now pass to a genuine problem in equity.

If the continuance of an undoubted tort to property is assured, does an injunction issue automatically as a matter of right, or is it only a matter of grace? Will it be refused when it would inflict a hardship on the defendant and perhaps on the public, out of proportion to the benefit to the plaintiff? This problem is not confined to nuisances. *Wilkins v. Diven*³² raised it for easements. However, it occurs most frequently in nuisance cases, because the tort is usually continuous and not a wilful wrong, but incident to the operation of a lawful occupation which the courts dislike to hamper. The problem is so difficult that it requires a much fuller discussion than can be given here. A brief summary of the recent cases must suffice. Three situations must be distinguished. (1) The injury to the plaintiff is small *absolutely*. If an injunction would seriously burden the defendant, it will be denied.³³ (2) The injury to the plaintiff is large *absolutely*, but small *relatively* to the hardship of an injunction upon the defendant and perhaps those members of the public who work for him or buy from him; the defendant has no powers of eminent domain. Since the denial of a permanent injunction allows the defendant to take the plaintiff's valuable property right in the enjoyment of his land for private purposes for a speculative compensation assessed by a jury, some cases favor granting equitable relief.³⁴ Other cases deny relief on the ground that equity should not act oppressively and that equities should be balanced or compared.³⁵ Should this view be taken, it is much fairer to the plaintiff for equity to assess the damages and frame its decree so that the defendant will be enjoined unless the sum be promptly paid. This avoids the need of a second suit in the law court, and is especially desirable when damages would be

³² Note 21, *supra*.

³³ *Scott v. Glenwood*, 105 Kan. 603, 185 Pac. 731 (1919).

³⁴ *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 100 S. E. 207 (1919), citing *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374 (1892); see *Folmar Mercantile Co. v. Town of Luverne*, 83 So. (Ala.) 107 (1919), 3 JJ. dissenting.

³⁵ *Richard's Appeal*, 57 Pa. 105 (1868); 31 L. R. A. (N. S.) 881, note.

given at law only for injuries up to the date of the writ, so that repeated actions would be necessary.³⁶ (3) The situation is like the second group, except that the defendant is a public service company, municipality, or other body entitled to the power of eminent domain. The taking of the plaintiff's right of enjoyment of his land is now as legitimate as the physical occupation by the defendant of the land itself, so long as proper damages are paid. Therefore an injunction should be denied except to insure compensation as above. This eminent domain factor is frequently overlooked and cases in this group lumped in with group (2). Several recent cases deny equitable relief, but on various grounds.³⁷

During the war, several cases arose in which a wrongdoer was doing work for the government. The cases were divided, whether the injunction should be refused because the continuance of the wrong would increase the supply of munitions.³⁸

(3) *Public Nuisances (including Large Strikes)*

Equity finds it easy to enjoin public nuisances, partly because of their analogy to private nuisances and partly because the Chancellor is in some sense the representative of the sovereign as *parens patriae*, the guardian of the people's welfare. Nevertheless, the jurisdiction is peculiar. The Attorney General is not protecting what Dean Pound classifies as public interests; that is, the rights of the state as owner of property. There is no resemblance to an injunction against a nuisance near the State House. He is acting on behalf of the public at large to safeguard their comfort and health. He is protecting what Dean Pound calls social interests,³⁹ those of the community rather than of the government. Thus, equity at this point really goes beyond securing property rights.

³⁶ *Robb v. Rubel*, 107 Misc. 33, 176 N. Y. Supp. 462 (1919).

³⁷ *Folmar Mercantile Co. v. Town of Luverne*, *supra*; *Mayor, etc. of Baltimore v. Sackett*, 135 Md. 53, 107 Atl. 557 (1919); *Kinsman v. Utah Gas & Coke Co.*, 177 Pac. (Utah) 418 (1918).

³⁸ *Driver v. Smith*, 89 N. J. Eq. 339, 104 Atl. 717 (1918), *semble*, injunction of breach of contract should issue; *State Department of Health v. Chemical Co. of America*, 41 N. J. L. J. 163 (1918), public nuisance not enjoined. Other decisions, but not in war, which denied an injunction of torts indirectly beneficial to the United States government, are: *Marconi Wireless v. Simon*, 231 Fed. 1021 (C. C. A. 2d, 1916); *Foundation Co. v. Underpinning, etc. Co.*, 256 Fed. 374 (S. D. N. Y., 1919).

³⁹ "An Introduction to American Law," Dunster House Papers, No. 3, Cambridge, 1920, p. 4.

Some of the oldest cases in this field involve the rights of the community in tide-flowed lands,⁴⁰ and the precise nature of those rights has been the subject of dispute ever since.⁴¹ Can the state use the submerged land for any purpose it pleases; for instance, can it fill in a large tract in front of a beautiful seashore residence and build cheap shacks on the made land for the use of tenement-house denizens badly in need of salt air? Or is it restricted to purposes of navigation, and if so, what is navigation? In *Tiffany v. Town of Oyster Bay*,⁴² the plaintiff had filled in a large tract of land previously submerged, acting under a state grant which proved to be void, since the defendant had title under a colonial patent from Governor Andros. After refusing to let the plaintiff restore the land to its original position, the defendant began to build public bathhouses on the tract. The plaintiff obtained an injunction against the bathhouses, with an election in the town to have the filling removed at the plaintiff's expense. This decision is contrary to the English view, also held in some states, that the state has a *jus privatum* in tide-flowed lands, just as in escheated lands, so that any person making an unauthorized use of the flats commits not only a public nuisance, but a purpresture as well,⁴³ *i. e.*, an interference with the property of the state.

The question whether a place of amusement is a nuisance because it attracts disorderly crowds is raised by two cases. *Commonwealth v. Smith* held that outdoor games conducted on Sundays in a public park by permission of the commissioner would not be enjoined. The finding of the lower court that there was no nuisance was conclusive; and even though the games were perhaps illegal under a Sunday law of 1794, "it is well settled that a bill will not lie having for its sole purpose an injunction against the mere commission of a crime."⁴⁴ The public nuisance point is

⁴⁰ *Atty. Gen. v. Richards*, 2 Ans. 603 (1795).

⁴¹ "Tide-Flowed Lands and Riparian Rights in the United States," W. R. Tillin-ghast, 18 HARV. L. REV. 341, "The Power of the State to Grant Lands under Navigable Waters to the Abutting Upland Owner," 30 HARV. L. REV. 171; FREDERIC R. COUDERT, CERTAINTY AND JUSTICE, 205 ff. Mr. Coudert was counsel for the plaintiff in the *Tiffany* case.

⁴² 192 App. Div. 126, 182 N. Y. Supp. 738 (1920); one judge dissenting; reversing 104 Misc. 445, 172 N. Y. Supp. 356 (1918); noted in "Riparian Rights and Tide-Flowed Lands," 30 YALE L. J. 58.

⁴³ *Atty. Gen. v. Richards*, note 40, *supra*.

⁴⁴ 109 Atl. (Pa.) 786 (1920).

only incidental in the interesting case of *Star Opera Co. v. Hylan*.⁴⁵ The plaintiff began in the autumn of 1919 to give a series of operatic performances in German in New York City. Riotous hostile crowds surrounded the opera house at the opening performances and came into active collision with the large body of police called out by the city. The mayor then forbade further German operas. The court refused to prevent the enforcement of his order. The opinion relies somewhat on decisions holding it a nuisance to arouse disorderly opposition. The famous Salvation Army case⁴⁶ shows the unfairness of allowing a gang of toughs to make any innocent meeting unlawful by mobbing it. Still, if a gathering creates a situation which will obviously get beyond the control of the police if it continues, a dispersing order may be given and enforced. A proposed series of such meetings might well be considered a public nuisance and enjoined. In the principal case, however, even if there was no public nuisance at common law, the mayor had power to make regulations of public meetings in order to avoid serious disturbances and an undue concentration of the police night after night in one spot. The court might have refused to enjoin the operas; but it could not properly have enjoined the action of the city authorities.

Two Iowa cases show how difficult it is to apply the familiar principle that public nuisances give rise to private actions only by persons who suffer special damage, different from that of the public at large. An injunction against the obstruction of a public highway was granted when the plaintiff used it as one of his avenues of travel to the county seat and other market places, although there is no statement that other roads were much longer;⁴⁷ yet relief was denied to a man in the ice business who was about one-eighth of a mile from his source of supply at the river over the highway blocked by the defendant, in consequence of which the ice had to be hauled four miles.⁴⁸

The difficulty has often been solved by statutes allowing private persons to start proceedings against specified public nuisances.

⁴⁵ 109 Misc. 132, 178 N. Y. Supp. 179 (1919); noted in 18 MICH. L. REV. 245.

⁴⁶ *Beatty v. Gillbanks*, 9 Q. B. D. 308 (1882). See A. V. DICEY, *LAW OF THE CONSTITUTION*, 8 ed., Chapter VII.; Z. CHAFEE, JR., *FREEDOM OF SPEECH*, 183 ff.

⁴⁷ *Krueger v. Ramsey*, 175 N. W. (Ia.) 1 (1919).

⁴⁸ *Livingston v. Cunningham*, 175 N. W. (Ia.) 980 (1920); *Folmar Mercantile Co. v. Town of Luverne*, 83 So. (Ala.) 107 (1919), *accord*.

Thus California permits any citizen or consumer of water to maintain an action to enjoin a water company or municipality from supplying water without a permit from the state board of health. In *Frost v. Los Angeles*⁴⁹ relief was refused partly on constitutional grounds and also because the water, though unlicensed, was pure and sanitary. The court said that an injunction would merely protect a technical right without benefit to the plaintiff at the cost of the greatest imaginable inconvenience to the population of Los Angeles. The court in deciding that the water was wholesome assumed a function which the legislature had expressly vested in an administrative board of experts. A better way to avoid public inconvenience would have been to grant an injunction which was not to take effect if the city should apply to the board within a reasonable time for a permit and should obtain it. If the board refused the permit, the court should not consider the balance of convenience.

A crime may also be a public nuisance at common law or under a general nuisance statute.⁵⁰ If so, an equitable proceeding has some marked advantages over a prosecution. It protects the public without punitive consequences to the defendant for his past conduct. It operates very rapidly with less risk of miscarriage than a jury trial involves. Consequently the legislature has found it very desirable to create new kinds of public nuisances, so that various kinds of criminal or anti-social conduct may be enjoined at the suit of the state's attorney or even a private citizen. Such statutory nuisances include buildings used for prostitution;⁵¹ and places where intoxicating liquors are sold contrary to law, which has been construed to include automobiles. In an Iowa case,⁵² the court restrained the sheriff from returning the car to the boot-legger until a full hearing was had. Indeed, the Iowa law seems to make carrying liquor on one's person for purposes of sale

⁴⁹ 183 Pac. (Cal.) 342 (1919); noted in 8 CAL. L. REV. 127, and as to water regulations in 6 A. L. R. 475.

⁵⁰ *Hoover v. State ex rel. Selby*, 176 Pac. (Okl.) 889 (1918), disorderly public dance hall.

⁵¹ *Chase v. Proprietors of Revere House*, 232 Mass. 88, 122 N. E. 162 (1919); *Selowsky v. Superior Court*, 181 Pac. (Cal.) 652 (1919); "'Red Light' Injunction and Abatement Acts," 20 COL. L. REV. 605, collects the statutes and cases.

⁵² *State ex rel. Johnson v. Raph*, 184 Iowa, 28, 168 N. W. 259 (1918); see also note 15, *supra*.

subject to injunction.⁵³ It is obvious that the legislative power must have some limits, and cannot transfer every crime from the jury to the equity judge just by calling it a nuisance. On the other hand, it can extend the common-law boundary somewhat to include situations resembling common-law nuisances in nature. In other words, a court has to balance interests to decide whether a nuisance exists. Legislatures may also do this balancing, and may reach a different result from the courts, just as courts often differ among themselves whether certain border-line acts are nuisances. The statutes just described apply to such border-line acts and have been repeatedly held a valid extension of the traditional jurisdiction of equity.⁵⁴ Nevertheless, a recent New Jersey decision⁵⁵ holds a liquor nuisance statute unconstitutional, partly because of its inadequate title, but mainly on the ground that courts of equity have only the powers they possessed at the time of the state constitution, and that public nuisances were then abatable only in criminal courts. The court admits a few concrete exceptions, and after the fashion of *Hart v. Leonard*⁵⁶ it classifies the public nuisances which will be enjoined into businesses endangering property (such as a powder factory), purprestures of highways or navigation, nuisances dangerous to the health of the whole community, and *ultra vires* acts of corporations. The principal case, of course, falls outside these classes, but it could easily be brought within an additional class made from the non-statutory decisions enjoining disorderly houses, bull-fights, and prize-fights.⁵⁷ The court goes too far in saying:⁵⁸

"No instance can be found in the English reports, nor in the reports of this country, in states where the common law prevailed and still prevails, where a court of equity has ever taken cognizance of a case of a public nuisance founded purely on moral turpitude.

"It is clear that if the Legislature may bestow on the Court of Chancery jurisdiction to grant an injunction and abate a public nuisance of a

⁵³ *Eaton v. Meyer*, 176 N. W. (Ia.) 636 (1920).

⁵⁴ *Chase v. Proprietors of Revere House*, *supra*; 20 COL. L. REV. 605; *Littleton v. Fritz*, 65 Ia. 488, 22 N. W. 641 (1885).

⁵⁵ *Hedden v. Hand*, 90 N. J. Eq. 583, 107 Atl. 285 (1919); annotated in 5 A. L. R. 1474.

⁵⁶ Note 18, *supra*.

⁵⁷ 20 COL. L. REV. 606, n. 13; 5 POMEROY, EQ. JUR., 4 ed., § 1893; *Atty. Gen. v. Fitzsimmons*, 35 AM. L. REG. (N. S.) 100 (Ark., 1896); note 50, *supra*.

⁵⁸ 90 N. J. Eq. 583, 593, 107 Atl. 285, 290 (1919).

purely criminal nature, then there can be no valid argument against the power of the Legislature to confide the entire Criminal Code of this state to a court of equity, for enforcement. It is apparent that such a court would render nugatory the provisions of the Constitution, which guarantee the right of a presentment by a grand jury, and a trial by jury, to one accused of crime."

While the decision points out a real danger from these statutes, it errs in limiting them to the precise precedents cited, which do not represent the full range of non-statutory equitable jurisdiction over nuisances, instead of requiring that the statutes shall keep within the general principle which underlies that jurisdiction as a whole.

Somewhat analogous to the restraint of a public nuisance at the suit of a person especially aggrieved is the injunction obtained by a street railway against jitneys operating in violation of penal statutes and ordinances.⁵⁹ Although equitable jurisdiction was not conferred by the statutes, it may be based on the invasion of private property rights. In addition to the nuisance analogy, the plaintiff may be said to have an easement entitled to protection against others besides the servient party.⁶⁰ Moreover, franchises have long been safeguarded in equity, even though not exclusive, against any one who does not have authority from the state to compete.⁶¹

Strikes or their incidents have frequently been enjoined because of the threatened injury to private property. Such decisions depend so largely upon the principles of labor law that they fall outside the province of this article. During the war, however, courts of equity have sometimes taken jurisdiction of trade disputes on an entirely different ground of public interest, and these cases may conveniently be discussed in connection with public nuisances.

A lower New York court⁶² enjoined all strikes "for any cause whatever" in a business necessary to the prosecution of the war. A

⁵⁹ *Puget Sound, etc. Co. v. Grassmeyer*, 102 Wash. 482, 173 Pac. 504 (1918); noted in 28 YALE L. J. 485. For a similar case of competing telephone companies, see *Farmers, etc. Telephone Co. v. Boswell Telephone Co.*, 187 Ind. 371, 119 N. E. 513 (1918).

⁶⁰ See the authorities for this position in 28 YALE L. J. 485.

⁶¹ 1 AMES, CASES ON EQUITY JURISDICTION, 665, note.

⁶² *Rosenwasser v. Pepper*, 109 Misc. 457, 172 N. Y. Supp. 310 (1918), adversely criticized in 32 HARV. L. REV. 837.

United States court granted a strike injunction under similar circumstances; the jurisdiction was based on the governmental need of munitions, since there was no diversity of citizenship.⁶³ Another United States court⁶⁴ without any diversity of citizenship enjoined a vendor of coal from disobeying the order of a state fuel administrator, acting under the Lever Act,⁶⁵ to furnish coal to the plaintiff at a contract price considerably below the maximum fixed by the President. The court found no clause in the Lever Act conferring equitable jurisdiction, but said:⁶⁶

"Clearly it gives power to the President, through officers authorized to be and appointed by him, to so conserve and regulate the distribution of food and fuel in such way that greed and extortion should not run riot, and the ability of men, women, partnerships, and corporations to work for the successful ending of the country's conflict should not be either crippled or hindered. . . . The primary duty and obligation of federal courts are to construe and enforce the federal laws. For this purpose they were created.

"It cannot be assumed that, because Congress did not expressly so provide, federal courts can shirk the responsibility of enforcing the administrative orders of the fuel administrators acting legally and rightly within the terms and requirements of this act. Therefore it is not only permissible, but an absolute obligation upon this court, upon the appeal here made, to see to it that this order of the state fuel administrator is enforced."

The far-reaching assumptions of these cases are obvious. For instance, the last case involves the proposition that any administrative official may enforce his orders, not merely by the administrative or criminal processes specified in the law under which he acts, but by injunction.

Similar questions are raised by a much more important case, *United States v. Frank J. Hayes et al.*⁶⁷ The Attorney-General of

⁶³ *Wagner Electric Mfg. Co. v. District Lodge, No. 9, International Assn. of Machinists*, 252 Fed. 597 (E. D. Mo., 1918).

⁶⁴ *West Virginia Traction & Electric Co. v. Elm Grove Mining Co.*, 253 Fed. 772 (N. D. W. Va., 1918).

⁶⁵ *Infra*, note 68.

⁶⁶ 253 Fed. 772, 777 (1918).

⁶⁷ U. S. D. C. Ind., Nov. Term, 1919, In Equity, No. 312; Oct. 31, 1919; Nov. 8, 1919. The bill and temporary restraining order have been printed (Wash., 1919); and all the pleadings and decrees up to Dec. 3, 1919, are included in the printed Information for Criminal Contempt (in Harvard Law School Library). No report of

the United States obtained from a United States District Court a temporary restraining order against specified officers of the United Mine Workers of America and their unnamed associates, directing the defendants not to issue strike orders or distribute strike benefits to miners or mine workers in the bituminous coal fields of the United States. After a hearing, the order was continued as a temporary injunction *pendente lite*, with a mandatory provision for the recall of the strike within seventy-two hours. An order of the union officials for that object was subsequently approved by the court. No written opinion was filed.

For the purposes of this article, it may be assumed that the Lever Act ⁶⁸ to punish conspiracies to restrict the production and distribution of necessities in war-time was in force, and also the wage agreement between the coal operators and the union members, which had been approved by the government; that both the statute and the agreement were violated by the strike; that the miners could therefore have been sued by the operators and prosecuted by the government. The only question here is how a court of equity had power to grant relief at the suit of the United States.

The following grounds have been suggested:

1. Protection of federal property rights in the mails and the operation of the railroads under control of the Director-General. This is in my opinion the strongest argument in favor of the coal-strike injunction, and finds an analogy in the injunction against the Pullman strikers in 1894, which was sustained by the Supreme Court in the Debs case.⁶⁹ Nevertheless, the analogy is far from complete. It is one thing for the government to restrain the direct interference with the operation of mail trains through violence on the spot. But it is a very much wider exercise of federal authority to prevent indirect interference through the curtailment of the production of coal. Where is the jurisdiction to stop? Have the federal courts equitable jurisdiction over all the employees of persons who make contracts with the United States for the supply of essentials? Furthermore, if the action of the strikers is not to be considered too remote to be an injury to the property rights of

the decision has been published, and so far as can be ascertained, no opinion was filed by the court. The case is approved in 5 CORNELL L. Q. 184.

⁶⁸ Act Aug. 10, 1917, 40 STAT. AT L., ch. 53, § 9, p. 279; U. S. COMP. STAT. 1918, § 3115½ i, amended by Act, Oct. 22, 1919; 66th Cong., 1st Sess., ch. 80, 1919, p. 298.

⁶⁹ *Re Debs*, 158 U. S. 564 (1895).

the government, it must also constitute a tort to private persons. A manufacturer who has a contract for the delivery to him of coal would also have the right to obtain an injunction against striking miners. It seems very probable that the causation is here too remote to constitute a tort in the absence of legislation. In a converse case, where a failure of the railroad to furnish rolling stock led to the shutdown of a coal mine, the miners were held to have no cause of action against the railroad.⁷⁰ The argument that the strikers are causing the mines to break contracts with the United States and hence are liable under the principle of *Lumley v. Gye*,⁷¹ is open to similar difficulties, especially as the strike was not specifically directed against these contracts. Finally, if the injunction is based on a federal property right in the supply of coal, it should restrain the strike only to the extent that it prevents the delivery of coal to the railroad and not also compel the production of coal for private consumption.

2. Public Nuisance. Some language in the Debs case⁷² has led to the belief that the federal courts have jurisdiction to issue an injunction on this ground. Doubtless the federal interest in the mails threatened in 1894 was analogous to the interests infringed by public nuisances, so that it was easy to exercise equitable jurisdiction once a federal right had been established. The right must, however, be based on something besides the nuisance. There is no clause in the Constitution which gives the United States power to abate public nuisances unless they also infringe some federal right created by the Constitution. The health, comfort, and general welfare of citizens are in charge of the state governments and not of the United States. Or, to put the matter in another way, the injunction of public nuisances is based on the police power, and the federal government has no police power independent of its express powers. The Constitution did not see fit to entrust to the general government the control of conduct on the sole ground that in the opinion of Congress, or United States judges, such conduct threatened widespread injury to the country at large.

3. Interference with Interstate Commerce. This raises the same

⁷⁰ Ill. Cent. R. R. Co. v. Baker, 155 Ky. 512, 159 S. W. 1169 (1913).

⁷¹ 2 E. & B. 216 (1853).

⁷² 158 U. S. 564 (1895). See the comment on this case in W. HARRISON MOORE, ACT OF STATE IN ENGLISH LAW, 30.

question as the first ground, even if, as was stated by the Supreme Court in the Debs case, such commerce may be regulated by the courts as well as by Congress.

4. Specific performance of the wage agreement. Even if we overcome the objections to compulsory personal service, the government has no interest which would enable it to enforce this contract. It is not a party thereto, and is a beneficiary only in a remote sense.

5. Violation of the Sherman Act.⁷³ This ground is not alleged in the bill and is rejected by a note in the *Cornell Law Quarterly* supporting the decision.⁷⁴ The Clayton Act⁷⁵ would create very great difficulties.

6. Interference with the war. If we assume that the war was raging in November, 1919, then the coal-strike was a sufficient hindrance thereto for Congress to legislate against it. Such legislation might have conferred equitable jurisdiction on the courts in furtherance of the war power, by analogy with the statutory extension of equitable jurisdiction in the Sherman Act. Since, however, Congress did nothing of the sort, the supporters of the injunction on war grounds must rest on either of two contentions. (a) It may be argued that a United States court has power to enjoin any act which hinders the war, regardless of the absence of Congressional authorization. The sweeping character of this claim is its own refutation; and the Constitution vests the war power in Congress, not the courts. (b) It may be argued that if the defendant's conduct violates a war statute so as to cause widespread injury analogous to a public nuisance, then although this statute confers no equitable jurisdiction, nevertheless the illegal conduct may be restrained. Some such view probably lies behind the reliance on the Lever Act, discussed below. If it is sound, then the silence of Congress about equitable jurisdiction need not prevent mandatory injunctions to compel men to register under the Selective Service Act, and prohibitions against the distribution of books considered by the judges to violate the Espionage Act. The fact that Congress has provided very different methods for enforcing

⁷³ Act of July 2, 1890, 26 STAT. AT L. 209. See *State v. Employers of Labor*, 102 Neb. 768, 169 N. W. 717 (1918), under state anti-trust law.

⁷⁴ 5 CORNELL L. Q. 187.

⁷⁵ 38 STAT. AT L. 730.

these war statutes is a very serious objection to the assumption that they are also within the jurisdiction of equity, which Congress did not mention.

7. Violation of the Lever Act.⁷⁶ This is the main ground put forward in the bill and is accepted as sufficient by the *Cornell Law Quarterly*. Nevertheless, it seems to me wholly untenable. If there is one principle of equity which can be regarded as settled, it is that a crime will not be enjoined merely because it is a crime. Some other aspect of the defendant's conduct must bring the case within the established jurisdiction of chancery. The Lever Act declares violations thereof to be crimes subject to criminal penalties. Not a clause makes them a ground for equitable relief.

Consequently, the coal-strike injunction can be supported only if it was based upon the infringement of a definite federal right. The existence of such a right must remain conjectural in the absence of any written opinion from the United States District Court of Indiana. Over a century has elapsed since the greatest of chancellors declared, "I have no jurisdiction to prevent the commission of crimes."⁷⁷ A conservative lawyer of to-day may be permitted to share Lord Eldon's doubts, and express regret that Judge Albert B. Anderson felt unable to make public the reasons which led him to differ from the foremost English advocate of law and order, who even during the disturbance of the French Revolution refused in the absence of legislative authority to strengthen the power of the government by placing the Court of Chancery at the disposal of the criminal law.

Even though the court had jurisdiction to enjoin the coal strike, the question still remains whether that jurisdiction should have been exercised. Undoubtedly an emergency confronted the government, but if an injunction had been refused, there were alternative remedies through legislative or executive action. The

⁷⁶ See note 68, *supra*.

⁷⁷ *Gee v. Pritchard*, 2 Swans. 402 (1818). See *Cope v. Dist. Fair Assn.*, 99 Ill. 489 (1881). An early case is *Wakeman v. Smith*, Toth. 12 (1585).

The coal-strike injunction has served as a precedent for injunctions against violations of criminal syndicalism statutes, although the penalties provided by such statutes are (except in New Hampshire, Laws, 1919, c. 155) wholly criminal in character. I have not found any reported case, but have seen newspaper accounts of injunctions forbidding membership in the Industrial Workers of the World in Washington (*Boston Herald*, Jan. 4, 1920 and *New York Nation*, Jan. 3, 1920); Kansas (*New York Times*, June 24, 1920).

question deserves serious consideration, whether such types of action are not more expedient than an injunction in the case of a huge industrial dispute unaccompanied by violence. In favor of judicial proceedings is the fact that they guarantee a chance for both sides to be heard, whereas if Congress had handled the strike with legislation like the Adamson Law, or if the President had taken over the mines under his war powers, a hearing might have been denied. On the other hand, there is no obstacle to a hearing before Congress or the Executive which should be just as adequate and fair as that given by Judge Anderson, and such legislative or executive action has certain great advantages for the settlement of a huge industrial controversy which are not possessed by a court of equity. Such a court can stop the strike but it cannot remove the causes of the strike. There is a familiar equitable principle that a bill will be dismissed if the absence of necessary parties makes it impossible for the court to give a decree which will wind up the whole controversy in a just manner. A similar consideration might well have led to the dismissal of the government's coal strike bill on the ground that the main controversy between the operators and the miners ought not to be left hanging in the air after the incomplete remedy of an injunction, but could only be finally and justly settled by an investigation into the complex conditions at the mines and possibly a new wage agreement. Such an investigation could not be made by a court of equity. It could be made by the Executive. It was in fact eventually so made after the injunction. Consequently, since the court could not meet the real issue of the controversy, it might well have refused to have any half-way dealings with it in the absence of well-recognized grounds for judicial action, and might have left the government to make use at once of the executive powers which obviously must be employed sooner or later. Moreover, such action shifts a great and bitter dispute involving masses of people and wide economic ramifications from appointive judges who rarely have expert knowledge of such economic problems to the President, an elective official, clothed with powers which enable him to treat this problem like other war problems, drawing on the extensive assistance of experts and enforcing his decision by methods which are not available to courts. This shift relieves the Judiciary of a terrific strain which it is not

well fitted to bear. Under our constitutional system, the highly important task of adjusting conflicts between different portions of the system belongs to the courts. This task requires that the firmest confidence of the people in the correctness and fairness of judicial decisions shall be maintained. There is a genuine danger that this confidence will be shaken if the Attorney General calls on judges who are not equipped by long experience to solve difficult economic problems and who lack the powers necessary to solve them finally and obtains from them summary remedies affecting the industrial life of thousands. Perhaps eventually we shall establish Conciliation Courts fitted by training and experience and the possession of powers not now conferred on a United States District Court to settle great strikes to the satisfaction of all concerned. Until then, may it not be wise to entrust such controversies to Congress or the President who are at least as able to decide them as the courts, rather than cast a great burden on the Judiciary, which may weaken its accomplishment of its customary and invaluable work?

4. *The Extension of Equitable Jurisdiction beyond the Protection of Property Rights*

The first determined onslaught on the oft-repeated doctrine that equity protects only rights of property was made by Louis D. Brandeis and Samuel D. Warren in the pages of this REVIEW thirty years ago.⁷⁸ A quarter of a century afterwards an article by Dean Pound renewed the attack on a still broader front.⁷⁹ Each year brings increasing evidence that their views will eventually be accepted by courts and legislatures. The law courts from early times have protected interests of personality, for example, by actions of slander and libel. What rational principle forbids the application to such rights of the familiar rule that if there is a remedy at law which is inadequate, then equity gives relief, unless special considerations restrain the exercise of its jurisdiction?

The extension of equitable jurisdiction for the protection of human dignity and peace of mind has been made much easier through the ever widening meaning attached to the conception of property. The gulf between an acre of land and the right of privacy

⁷⁸ "The Right to Privacy," 4 HARV. L. REV. 193 (1890).

⁷⁹ "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640 (1916).

may have been too broad for equity to bridge, but its jurisdiction over property has now extended from land and chattels to far more intangible human interests. It protects not only contracts, but the opportunity to make contracts through access to an open market for the sale and purchase of goods and services.⁸⁰ Public nuisances have only a remote relation to property rights through the analogy with private nuisances, and we have just seen the modern tendency to create new types of public nuisances within the scope of equity jurisdiction. Equity has long safeguarded such state-recognized mental property as patents, copyrights, and trademarks. These and the recent effects upon them of business events like the growth of the moving-picture industry lie outside the scope of this article.⁸¹ Equity has also given more and more attention to similar mental creations which have not yet received any official guarantee of protection, — trade secrets,⁸² unpublished poems, and private letters.⁸³ Indeed, at this point equity occasionally escapes from the realm of genuine property altogether and protects letters of no literary value whatever. Since the only interest actually safeguarded here is the writer's desire that his words shall remain private,⁸⁴ it is only a step to keeping his features private also. Yet that step, in the few jurisdictions where it has been made, took equity one hundred years.

That the law of literary property, aside from its relation to the right of privacy, may still undergo important development, is shown by *International News Service v. Associated Press*.⁸⁵ The Associated Press complained that the defendant systematically took news from the bulletin-boards and early editions of the plaintiff's members and sold it to the defendant's customers.

⁸⁰ Cases on strikes, boycotts, etc., are omitted from this article with a few exceptions.

⁸¹ I AMES, CASES ON EQUITY JURISDICTION, Chap. IV, § V. For recent developments see, "The Subject Matter of Copyright," 68 U. OF PA. L. REV. 215 (1920); "Trademarks," 7 CAL. L. REV. 201 (1919).

⁸² "Basis of Jurisdiction for the Protection of Trade Secrets," 19 COL. L. REV. 233 (1919).

⁸³ AMES, *op. cit.*, 659.

⁸⁴ The leading case on letters, *Gee v. Pritchard*, 2 Swans. 402 (1818), protects letters of no value, though Lord Eldon covered over his progressive action by conservative language, saying that the plaintiff had a property right.

⁸⁵ 248 U. S. 215 (1918); noted in 32 HARV. L. REV. 566; 18 COL. L. REV. 257; 28 YALE L. J. 387; discussed in "Unfair Competition," Edwards S. Rogers, 17 MICH. L. REV. 490.

Those in distant cities frequently received the pirated items in time to publish them ahead of the local Associated Press newspapers. The Circuit Court of Appeals and the Supreme Court held that a preliminary injunction against this practice should have been granted. The difficulty lies in the well-established rule that literary property disappears on publication, unless protected by copyright. Nevertheless, it was held that news reports of facts, while not copyrightable, will be protected after publication. Justice Pitney, for the majority of five, rests his opinion partly on the prevention of unfair competition, partly on the existence of a valuable property interest in news, which necessarily cannot be kept secret like other kinds of literary property, and consequently remains "quasi property" with respect to competitors during a period after publication "while it is fresh." As against the public all rights in news lapse on publication.

"The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts — that he who has fairly paid the price should have the beneficial use of the property. . . . It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would, furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience." ⁸⁶

Justice Pitney recognized the difficulty of determining the period of "freshness" during which the property right survives. The Circuit Court of Appeals directed an injunction "until its commercial value as news to the complainant and all of its members has passed away." He suggested a possible modification for a fixed number of hours consistent with the reasonable protection of the plaintiff's newspapers each in its own area.

Justice Holmes (Justice McKenna concurring) held that there

⁸⁶ 248 U. S. 215, 240 (1918).

was no property in news, but that it was unfair competition for the defendant to palm off the plaintiff's product as its own, although the opposite falsehood is more usual. He thought that the defendant should be enjoined from use for a fixed number of hours after publication unless it gave express credit to the Associated Press.

Justice Brandeis dissented, finding no tort at all. The public interest in the rapid dissemination of news is so great that equity should not protect a monopoly therein, establishing a new private right which is admitted not to exist at law and for which there is no precedent, with the result of curtailing the free use of knowledge and ideas. Such a right should be created, if at all, by the legislature, which is better fitted than the courts to establish at the same time proper restrictions on this new right. For example, the statute might allow an action for damages but not an injunction, having regard to freedom of speech by analogy with libels; or it might impose obligations on the owner of news to sell it to all newspapers who were willing to pay a reasonable price. Courts are powerless to prescribe the proper administrative regulations and machinery which are essential to the public welfare if any monopoly in news is to be recognized by law.

It seems more natural to base the relief in this case upon injury to the plaintiff's property rights in the business of gathering news, than to create a property in the news itself, which is very peculiar and hard to explain.

Another decision on the distribution of news involves the scope of the right of privacy, which was recognized by the New York legislature, after its existence at common law had been denied.⁸⁷ The statute⁸⁸ allowed an injunction and damages to any person whose "name, portrait, or picture" was used without written consent "for advertising purposes, or for the purposes of trade." This had been held to apply to the portrayal of a famous wireless operator in a fictitious motion play.⁸⁹ In *Humiston v. Universal Film Mfg. Co.*,⁹⁰ however, relief was refused to a woman lawyer, who

⁸⁷ *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478 (1902). *Contra*, *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918); noted in 28 YALE L. J. 269.

⁸⁸ N. Y. Civil Rights Law, §§ 50, 51.

⁸⁹ *Binns v. Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108 (1913), L. R. A. 1915 C, 839, Ann. Cas. 1915 B., 1024.

⁹⁰ *Humiston v. Univ. Film Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752 (1919), reversing 101 Misc. 3, 167 N. Y. Supp. 98 (1917); noted in 33 HARV. L. REV. 711;

was photographed while engaged in the solution of the Ruth Cruger murder mystery, since the moving pictures here reproduced only the facts. Although the reproduction of the plaintiff's photograph in a news service film was literally within the statute, being clearly "for the purposes of trade," yet this particular form of exhibition, which had arisen since the statute, was held outside the intention of the legislature. The use of the plaintiff's name in a newspaper account of the murder would also be within the statute, yet obviously immune. A motion picture news service is only a new type of newspaper. It has been remarked that the ordinary newspapers are for those who cannot think, and this kind for those who cannot read. The case is interesting for its judicial limitation of a tort right created by a statute, after the manner of the Continental interpretation of codes; and also for the possibility that the new right of privacy is subject to a restriction analogous to fair comment in the law of defamation. A person who takes part in a public event may lose his right of privacy as to that event, and be obliged to submit to the dissemination of information to the public about his part therein, either by words or pictures.

We now consider cases in which equity has been asked to enjoin injuries to personality without statutory authorization. A woman was annoyed by a former attorney, who kept sending her abusive letters. Since they were apparently mailed before she made objection, an injunction was refused, but the court intimated that if the defendant continued after being requested to stop he might be restrained.⁹¹ If there is any tort at all here, in the absence of publication of the letters to third persons, the remedy at law is clearly inadequate. The same difficulty about the existence of a legal right arises in *Drake v. Drake*.⁹² The plaintiff's wife, who was separated from him, was said to have carried on a systematic campaign against him to make his life miserable, going to his office and charging him with immorality, abusing him when

also in *ibid.*, 735; 20 COL. L. REV. 100; 68 U. OF PA. L. REV. 284; 16 MICH. L. REV. 269, 18 MICH. L. REV. 437; 6 VA. L. REV. 376; 29 YALE L. J. 450. Cf. *Feeney v. Young*, 191 App. Div. 501, 181 N. Y. Supp. 481 (1920).

⁹¹ *Williams v. O'Shaughnessy*, 172 N. Y. Supp. (Misc.) 574, (1918); noted in 19 COL. L. REV. 163 (1919). For an illustration of the real injury which such letters may cause, see JEAN-CHRISTOPHE, ROMAIN ROLLAND, vol. VI, "Antoinette." The courts often strain the facts into publication to establish a remedy at law for libel.

⁹² 177 N. W. (Minn.) 624 (1920); noted in 4 MINN. L. REV. 538 (1920).

she met him on the street or in church, and causing societies to expel him. The court assumed that the "nagging" constituted "a series of personal torts," but refused to give relief, not for any want of equitable jurisdiction over such wrongs, but because tort suits between husband and wife should not be allowed to disturb "the tranquillity of family relations" and "the welfare of the home, that abiding place of domestic love and affection."

No such question of the existence of a legal tort arises in cases of false imprisonment, for which if long continued an action for damages is clearly inadequate. Equitable jurisdiction over such torts has, however, been denied for want of any property right in several cases under draft statutes.⁹³ In a recent decision⁹⁴ it was urged that the plaintiff, if unlawfully drafted, suffered an injury to property through the deprivation of the right to work. The court denied that such a right was property. This is wholly inconsistent with the numberless decisions holding the right to employ workmen is property, which equity will protect. The draft cases should rest on the adequacy of the remedy of *habeas corpus* or on the refusal of courts to exercise equitable jurisdiction when an action for damages will test the constitutionality or legality of the imprisonment without hampering the activities of a coördinate branch of the government in a national emergency. In the absence of such obstacles equitable jurisdiction has lately been exercised to prevent the deprivation of the right to work through false imprisonment. In *American Steel and Wire Company of New Jersey v. Davis*,⁹⁵ a corporation obtained an injunction against the Mayor and Chief of Police of Cleveland, who had begun to arrest wholesale without warrants all persons coming to the city to take employment in steel mills during the recent strike. It can hardly be contended that the prospective employer has a property right in such a case, but not the prospective employees.

A square decision that equity will protect rights of personality is *Stark v. Hamilton*.⁹⁶ The Supreme Court of Georgia had previ-

⁹³ *Angelus v. Sullivan*, 246 Fed. 54, 64 (C. C. A., 2d., 1917); *Kneedler v. Lane*, 3 Grant Cas. (Pa.) 523 (1863).

⁹⁴ *Bonifaci v. Thompson*, 252 Fed. 878 (1917); noted in 32 HARV. L. REV. 436 (1919).

⁹⁵ 261 Fed. 800 (N. D. Ohio, 1919).

⁹⁶ 149 Ga. 227, 99 S. E. 861 (1919); affirming 149 Ga. 44, 99 S. E. 40 (1919); noted in 33 HARV. L. REV. 314 (1919); 19 COL. L. REV. 413 (1919); 5 CORNELL L. QUART. 177 (1920); 18 MICH. L. REV. 335; 29 YALE L. J. 344.

ously recognized the right of privacy, in reliance upon the article in this REVIEW by Messrs. Brandeis and Warren,⁹⁷ and in this case cited the article by Dean Pound.⁹⁸ A man had debauched a minor girl and induced her to abandon her parental abode and live with him in a state of adultery. The father had him enjoined from associating with the girl and from communicating with her in any way, either by writing, telephoning, telegraphing, or through the aid and agency of any other person. This case goes even further than *Ex parte Warfield*,⁹⁹ which held that equity had jurisdiction, but did not involve the propriety of exercising the jurisdiction. That question was now directly raised by the affirmance of the injunction issued by the lower court. The case, like *Ex parte Warfield*, rests in part upon a statute, which allows to equity to restrain "a threatened or existing tort," but a less liberal court would have limited this to torts previously within equitable jurisdiction. The decision might have found an incidental property right in the father's interest in his daughter's services, but refuses to hang on such a property "peg."

"It is difficult to understand why injunctive protection of a mere property right should be placed above similar protection from the continual humiliation of the father and the reputation of the family. In some instances the former may be adequately compensated in damages, but the latter is irreparable; for no mere money consideration could restore the good name and reputation of the family, or palliate the humiliation of the father for the continual debauching of his daughter."¹⁰⁰

One may approve this recognition of equitable jurisdiction over interests of personality, and at the same time doubt the wisdom and effectiveness of judicial interference with "the way of a man with a maid."

Although equity may take jurisdiction of the father's right to his daughter's services, it has refused in a recent Mississippi case¹⁰¹ to enforce the reciprocal duty of the father to support his children. In that case the children asked the court to determine the amount

⁹⁷ Note 78, *supra*; *Pavesich v. N. E. Ins. Co.*, 122 Ga. 190, 50 S. E. 68 (1904).

⁹⁸ Note 79, *supra*.

⁹⁹ 40 Tex. Crim. 413, 50 S. W. 933 (1899), on *habeas corpus* to nullify contempt proceedings for violation of an injunction obtained by a husband against a defendant who had alienated his wife's affections.

¹⁰⁰ 149 Ga. 227, 231, 99 S. E. 861 (1919).

¹⁰¹ *Rawlings v. Rawlings*, 83 So. (Miss.) 146 (1919); noted in 18 MICH. L. REV. 342.

necessary for their monthly support and make it a lien upon the real estate of the defendant. The majority held that the father's obligation does not run to the child, but only to the state and to outsiders who furnish necessities to the child. For example, the Mississippi statute compelled a delinquent parent to pay the county eight dollars a month, an amount obviously inadequate. Although logically equity seems as well able to handle this problem as the long-established jurisdiction of compelling a husband to pay alimony to his wife (whether divorced or not), the historical basis is lacking in the principal case. The majority insist that the children must either have their father prosecuted and thus obtain their eight dollars or persuade their mother to get a divorce, with its attendant advantages of equitable relief. Otherwise, it refuses to enlarge its historical jurisdiction and provide them with adequate support.¹⁰²

"The repose of families and best interests of society forbid' any such action. If the chancellor can fix in advance the amount of support each dissatisfied child must receive, then is parental authority superseded by judicial fiat, parental discipline swept away by self-assertion and disobedience on the part of children, and the integrity of the home, the corner stone of society, is undermined."

Two dissenting judges excoriate this caution:¹⁰³

"I cannot concur in the holding that the repose of society would be adversely affected by maintaining the suit in the present case. Any society that can consent to see children neglected by able parents, and whose repose would not be more disturbed by seeing children starved, maimed, and brutally handled, than it would by seeing the law make the parent fulfil his duties and obligations to his child, at the suit of the child, ought not to be tolerated at all. . . . If there be such a society in existence, it ought to be kicked off the earth, and forced to do its reposing in the abysmal depths of Gehenna, where children do not go."¹⁰⁴

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HARVARD LAW SCHOOL.

¹⁰² 83 So. 146, 148 (1920).

¹⁰³ *Ibid.*, 157, 158.

¹⁰⁴ The following recent cases on expulsions from clubs, labor unions, etc., are important in connection with equitable jurisdiction to protect interests of personality: *Young v. Ladies' Imperial Club, Ltd.*, [1920] 1 K. B. 81; noted in 36 L. QUART. REV. 328; *Burn v. National Amalgamated Labourers' Union*, [1920] 2 Ch. 364; noted in 30 YALE L. J. 202; *Weinberger v. Inglis*, [1919] A. C. 606; *Rueb v. Rehder*, 24 N. M. 534,

174 Pac. 992 (1918); noted in 1 A. L. R. 423; *Simpson v. Grand International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 98 S. E. 580 (1919); noted in 33 HARV. L. REV. 298, "Legal Status of Voluntary Associations"; *Furmanski v. Iwanowski*, 265 Pa. 1, 108 Atl. 27 (1919); *Baltimore Lodge 405, International Assn. of Machinists v. Grand Lodge of International Assn. of Machinists*, 134 Md. 355, 106 Atl. 692 (1919); *Universal Lodge, No. 14, Free & Accepted Masons of City of Annapolis v. Valentine*, 134 Md. 505, 107 Atl. 531 (1919); *Knights of Pythias, etc. v. Grand Lodge, etc.*, 258 Fed. 275 (D. C. App. 1919); *Gilmore v. Palmer*, 109 Misc. 552, 179 N. Y. Supp. 1 (1919); *O'Connor v. Morrin*, 109 Misc. 379, 179 N. Y. Supp. 599 (1919); *Bricklayers', etc. Union v. Bowen*, 183 N. Y. Supp. 855 (1920); *Love v. Grand International Division of Brotherhood of Locomotive Engineers*, 139 Ark. 375, 215 S. W. 602 (1919); *Walters v. Pittsburgh*, 201 Mich. 379, 167 N. W. 834 (1918); noted in 28 YALE L. J. 201.

The following cases on political rights should also be consulted: *Wayne v. Venable*, 260 Fed. 64 (C. C. A. 8, 1919); noted in 20 COL. L. REV. 94; *Barkley v. Pool*, 102 Neb. 799, 169 N. W. 730 (1918); *Weinland v. Fulton*, 99 Ohio St. 10, 121 N. E. 816 (1918); noted in 32 HARV. L. REV. 859; *Wilson v. Blaine*, 262 Pa. 367, 105 Atl. 555 (1918); *Payne v. Emmerson*, 290 Ill. 490, 125 N. E. 329 (1919); noted in 29 YALE L. J. 655, 694; *Spies v. Byers*, 287 Ill. 627, 122 N. E. 841 (1919); *Hamilton v. Davis*, 217 S. W. (Tex. Civ. App.) 431 (1920); *Haupt v. Schmidt*, 122 N. E. (Ind.) 343 (1919); noted in 28 YALE L. J. 838.

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CASES IN EQUITY THAT BECOME MOOT ON APPEAL. — Suits in Equity that are important to-day may cease to possess actuality next week. Because of slow appellate procedure within the courts and a change of circumstances outside, a live issue may become an apparently moot one before an appeal can be heard. Recently, for example,¹ certain mine-owners in North Dakota sought to enjoin the governor's operation of their mines by troops; the injunction was refused and plaintiff appealed. Eight months later when the Circuit Court of Appeals heard the case, the mines had been restored to the owners.² What, then, was to be done with the case? The court followed the weight of authority, and held there was no question on the merits calling for a decision.³

This view⁴ seems at first too plausible for argument or discussion.

¹ Dakota Coal Co. v. Fraser, Adjutant General, 267 Fed. (C. C. A.) 130 (1920). See RECENT CASES, p. 433, *infra*.

² Courts either take judicial notice of the fact of the change or ascertain it from affidavits or other evidence. See Jones v. Montague, 194 U. S. 147, 153 (1904); Turner v. Markham, 156 Cal. 68, 103 Pac. 319 (1909); Vollman v. I. W. W., 79 Wash. 192, 140 Pac. 337 (1914).

³ The procedure here is to be noted. Dismissal of the appeal may bar certain of appellant's rights in the future, — as for damages, by affirming the judgment. Gulf Ry. Co. v. Dennis, 224 U. S. 503 (1912). A clear and correct form of decree is: "Order is reversed and cause remanded to the court below with directions to dismiss the petition without costs to either party, and without prejudice to the rights of the complainants." See United States v. Alaska Steamship Co., 40 Sup. Ct. 448, 449 (1920). The court in Davis v. Boyer, 122 Ia. 132, 97 N. W. 1002 (1904) failed to notice the question and affirmed the judgment. Cf. Dinsmore v. Southern Express Co., 183 U. S. 115 (1901).

⁴ Mills v. Green, 159 U. S. 651 (1895); Jones v. Montague, *supra*; Security Mutual Life Ins. Co. v. Prewitt, 200 U. S. 446; Travelers Insurance Co. v. Same, 200 U. S.

But one's certainty is shaken when it is found that not only are the reasons for the rule somewhat hazy, but also that the rule has been denied in England and hedged in by exceptions in this country. In a leading English case,⁵ an injunction was granted in the lower court; on appeal it had ceased to be vital whether defendant was enjoined or not. Yet the court passed on the merits, on the ground that defendant had a right to have it settled on appeal whether there had been a ground of complaint against him. In this country the ground given for the English decision has been overlooked, and the reasoning that has led to an opposite result is vague. It is of course everywhere recognized that a case will not be heard on the merits, merely to determine costs.⁶ But the phrases, "ineffectual relief"⁷ and "nothing on which the judgment of the court may operate,"⁸ merely travel in a circle. More definitely it has frequently been stated⁹ that an actual controversy is necessary. Inasmuch as no case in the federal courts has ever mentioned the Federal Constitution in this connection, it seems there is no definite constitutional mandate against a decision on the merits.¹⁰ Underlying all the

450 (1906); *Richardson v. McChesney*, 218 U. S. 487 (1910); *United States v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 239 U. S. 466 (1916); *Commercial Cable Co. v. Burleson*, 250 U. S. 360 (1919); *Davis v. Boyer*, *supra*; *Sebastian County v. Hocott*, 217 S. W. (Ark.) 258 (1919); *Smith v. Warrenfeltz*, 116 Md. 116, 81 Atl. 275 (1911); *Sasser v. Harriss*, 178 N. C. 322, 100 S. E. 338 (1919); *Ireland v. Sherman County*, 75 Ore. 241, 146 Pac. 969 (1915); *Winston v. Ladner*, 264 Pa. 548, 108 Atl. 22 (1919); *McCarty v. Natural Carbonic Gas Co.*, 122 App. Div. 257, 106 N. Y. Supp. 811 (1907). The change may be due not to extraneous circumstances but to change of statutes or judicial decision. *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170 (1895); *Burgess v. Crumpton*, 93 S. C. 562, 77 S. E. 356 (1913). Or to acts of the parties. *Singer Mfg. Co. v. Wright*, 141 U. S. 696 (1891); *Lewis Publ. Co. v. Wyman*, 228 U. S. 610 (1913); *Wright v. Los Angeles*, 163 Cal. 328, 125 Pac. 353 (1912). *Cf. Tucker v. Howard*, 128 Mass. 361 (1880); *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226 (1910).

⁵ *Inchbald v. Robinson*, 4 Ch. App. 388 (1869). Another English case though involving interpretation of a statute in a suit by way of information reasons similarly from the danger of stigma on the defendant. *Oaten v. Auty*, [1919] 2 K. B. 278. Whether the English rule would be the same if the injunction were not granted below is somewhat doubtful. *Cf. Inchbald v. Robinson*, *supra*, 396.

⁶ *Matter of Croker v. Sturgis*, 175 N. Y. 158, 67 N. E. 307 (1903); *Wingert v. Bank of Hagerstown*, 223 U. S. 670 (1912).

⁷ See *Mills v. Green*, *supra*, 653.

⁸ See *Kimball v. Kimball*, 174 U. S. 158, 163 (1899).

⁹ See *Richardson v. McChesney*, *supra*, 492; *South Spring Hill Co. v. Amador Medean Gold Mining Co.*, 145 U. S. 300, 301 (1892); *Denver v. Brown*, 47 Colo. 513, 514, 108 Pac. 971 (1910).

¹⁰ See U. S. CONSTITUTION, Art. III, Sec. 2 (1): "The judicial power shall extend to all cases, in law and equity, arising etc. . . . to controversies" etc. That there has been a case or controversy at some time in the proceedings would seem to be enough. See, however, BLACK, *HANDBOOK OF AMERICAN CONST. LAW*, 3 ed., 82. The U. S. Supreme Court has always been careful not to decide suits that seemed to it academic. *Lord v. Veazie*, 8 How. (U. S.) 251 (1850) (fictitious suit); *United States v. Evans*, 213 U. S. 297 (1909) (interpretation of a criminal statute); *Muskrat v. United States*, 219 U. S. 346 (1911) (statute providing for a test case). Fictitious suits must be distinguished from so-called amicable suits where there is a real dispute but where the procedure and issue are facilitated by agreement. *Ex parte Steele*, 162 Fed. 694 (1908). Such cases suggest analogously the question of Advisory Opinions. See THAYER, *LEGAL ESSAYS*, 42; 2 *STORY ON THE CONSTITUTION*, 5 ed., 387-8; H. A. Dubuque, "The Duty of Judges as Constitutional Advisers," 24 AM. L. REV. 369. And of Declaratory Judgments. See E. M. Borchard, "Constitutionality of the Declaratory Judgment," 30 YALE L. J. 161.

decisions, however, is the perhaps laudable fear that courts will waste valuable time in rendering opinions that will serve no practical purpose except the satisfaction of one litigant's will to win.¹¹

But there are several exceptions to the American rule. Some courts will entertain appeals on election statutes because of the "public interest" even though the parties' rights can no longer be affected.¹² North Dakota will decide any moot question if sufficient public interest be involved.¹³ Somewhat the same motive constrained a federal court to disregard all valid precedents and make such a decision in an Espionage Act case.¹⁴ Finally the Supreme Court has consciously evolved two exceptions to its own rule of "hands off." In *United States v. Trans-Missouri Freight Ass'n*,¹⁵ an injunction was sought against an illegal combination which by the time the case was heard on appeal had been dissolved by the defendants. In *So. Pacific Terminal Co. v. Young*,¹⁶ the validity of an order against a preference under the Interstate Commerce Act was involved; the order, which was for two years only, had expired before the court's decision. But in both cases a decision was made on the merits: in the first, because of practical danger from the mere voluntary cessation of wrong by the defendants; in the second, because of the continuing nature of the wrong. Each seems to reach a correct result, and other cases are in accord.¹⁷ Subsequently, however, the court failed to follow its own leadership and refused to consider an anti-trust suit,¹⁸ where the combination was temporarily non-existent because of the war; and the distinction the court drew between voluntary and involuntary cessation seems insufficient. Thus, once the flat rule of never considering such cases is departed from, anomalies are apparently inevitable.

But these decisions make at least one thing clear. No dogmatic principle can be asserted. Any rule of procedure, as general in nature as this, should tend to be elastic. Courts should not peremptorily refuse to decide on the merits, but should balance conveniences — the danger

¹¹ *Searcy v. Fayette Home Telephone Co.*, 143 Ky. 811, 137 S. W. 777 (1911); *State ex rel. Jones v. Miller*, 221 S. W. (Mo.) 88 (1920).

¹² *Matter of Madden*, 148 N. Y. 136, 42 N. E. 534 (1895); *Matter of Fairchild*, 151 N. Y. 359, 45 N. E. 943 (1897); *O'Laughlin v. Carlson*, 30 N. D. 213, 152 N. W. 675 (1915). See also in accord *Barrs v. Peacock*, 65 Fla. 12, 15, 61 So. 118 (1913); *Keller v. Rewers*, 127 N. E. (Ind.) 149 (1920).

¹³ *State v. Stutsman*, 24 N. D. 68, 139 N. W. 83 (1912).

¹⁴ *Masses Publishing Co. v. Patten*, 246 Fed. 24 (1917), 244 Fed. 535 (1917). The plaintiff sought to enjoin the postmaster of New York City from excluding an issue of the "Masses" from the mails. An injunction was granted but later stayed. In the interim all the copies were sent out by express. 245 Fed. 102 (1917). Yet the Circuit Court of Appeals decided on the merits. That this decision, moreover, was one of the important precedents in the interpretation of the Espionage Act, see Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 960-965.

¹⁵ 166 U. S. 290 (1897). The decision of the case was perhaps made easier because of the nature of the bill, — to restrain such or any like action.

¹⁶ 219 U. S. 498 (1911).

¹⁷ *Close v. Southern Maryland Agricultural Ass'n*, 108 Atl. (Md.) 209 (1919); *Boise City Irrigation Co. v. Clark*, 131 Fed. 415 (1904).

¹⁸ *United States v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, *supra*. See also in accord, *United States v. American-Asiatic Steamship Co.*, 242 U. S. 537 (1917).

of poor presentation, the value of the court's time on one side, and on the other the danger of having almost identical litigation brought up again in the near future. On such considerations, the decision in *Dakota Coal Co. v. Fraser* is undoubtedly correct; but if it appeared that the same situation were likely to be repeated soon, there should be nothing to prevent the court's passing on the propriety of granting the injunction. The real problem, however, is not whether to pass on the merits after circumstances have changed; the problem is how to get the appeal to the upper court before those circumstances have changed.¹⁹ Unless appeals are to be abolished altogether,²⁰ it must be recognized that in a great number of cases a delayed appeal, especially on an interlocutory injunction, is as good as no appeal at all.²¹ The question of moot appeals in equity leads to the roots of procedural reform.

THE CONSTITUTIONALITY OF BUILDING LINES FOR AESTHETIC PURPOSES. — How far will the courts go in recognizing the validity of building lines imposed without compensation? An answer to the question is unavoidable in view of the popular demand for building restrictions, zoning systems, and civic improvements in general.

It is clear that the building line deprives the owner of a property right,¹ but it is equally clear that if the restriction can be brought within a proper exercise of the police power, compensation is unnecessary.² However nebulous this police power may be, it may fairly be said to extend to the protection of the public health, morals, and safety, and to the promotion of the general welfare.³ It is true that if property is taken under the right of eminent domain, compensation is a constitu-

¹⁹ See PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE PREPARED FOR THE NATIONAL ECONOMIC LEAGUE, 28; Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 REPORTS OF AMERICAN BAR ASS'N, Part I, 395, 409-411; C. W. Eliot, "The Popular Dissatisfaction with the Administration of Justice in the United States," 45 CHIC. LEG. NEWS, 207; R. H. SMITH, JUSTICE AND THE POOR, 2 ed., 19.

²⁰ See WORKS, JURIDICAL REFORM, 86, for such a proposal. See 33 HARV. L. REV. 326, for comment thereon by Roscoe Pound, and alternative suggestions as to the remedies for slow appeals. See also Roscoe Pound, "Bibliography of Procedural Reform," 11 ILL. L. REV. 451.

²¹ For examples of slow appeals see *New Orleans Flour Inspectors v. Glover*, *supra*; *Keller v. Rwers*, *supra*. The Federal Judicial Code makes an attempt to accelerate appeals. See JUD. CODE, § 129; BARNES, FEDERAL CODE (1919), § 894.

¹ For a discussion of what is a taking or deprivation of property, see *Old Colony & Fall River R. Co. v. Inhabitants of Plymouth*, 14 Gray (Mass.), 155 (1859); *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166 (1871); *Eton v. B. C. & M. R. R.*, 51 N. H. 504 (1872). For a discussion of the nature of property rights, see Everett V. Abbot, "The Police Power and the Right to Compensation," 3 HARV. L. REV. 189. See NOTE, "Actionable Injuries in Street Regulations," 33 HARV. L. REV. 451, 452.

² *Mugler v. Kansas*, 123 U. S. 623 (1887); *C. B. & Q. Ry. Co. v. People*, 200 U. S. 561 (1906). See 1 LEWIS, EMINENT DOMAIN, 2 ed., § 6.

³ *Beer Co. v. Mass.*, 97 U. S. 25 (1877); *Crowley v. Christensen*, 137 U. S. 86 (1890); *C. B. & Q. Ry. Co. v. People*, *supra*. It is of course true that the use of the term, "police power" has been attended by an unfortunate confusion of meaning. Its meaning oftentimes raises simply a question of the true limits of legislative power in general. See THAYER, LEGAL ESSAYS, p. 27, note 1.

tional prerequisite.⁴ But the police power and eminent domain are distinguishable, in that while the effect of the police power is to restrict a property right because it is harmful, that of eminent domain is to appropriate a property right because it is useful.⁵ Since then the object of the building line is to restrict a detrimental use of a part of the land, it is at least in form a result that may be achieved by the police power.

Under this police power, obnoxious business uses of property may be prohibited,⁶ other businesses, though not nuisances *per se*, may be excluded from certain districts,⁷ business and residential districts may be altogether segregated,⁸ and the height of buildings may be limited.⁹ So building lines, in so far as they prevent the spread of fire and conduce to the health of the public, seem clearly within the scope of the police power. A recent case reaching this result is therefore unquestionably correct.¹⁰ But in the decision there were intimations that aesthetic considerations were important. It becomes pertinent therefore to inquire whether such considerations alone will justify the imposing of building lines.¹¹

Though it is recognized that provisions incidentally aesthetic will not vitiate otherwise valid restrictions,¹² no court, it seems, has yet gone so far as to sustain legislation whose sole object is to promote the aesthetic.¹³ Bill board legislation has been sustained on grounds of fire prevention, safety of pedestrians, and the like,¹⁴ and sometimes, it must be admitted, on grounds somewhat forced,¹⁵ but the courts have squarely refused to adopt the aesthetic consideration as alone sufficient.¹⁶ So legislation primarily aesthetic in purpose, which has sought to exclude retail stores

⁴ *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893).

⁵ *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 86 (1851); *Mugler v. Kansas*, *supra*; See 1 LEWIS, EMINENT DOMAIN, 2 ed., § 6; see PRENTICE, POLICE POWER, p. 5.

⁶ *Watertown v. Mayo*, 109 Mass. 315 (1872); *The Manhattan Manuf. and Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251 (1872).

⁷ *Hadacheck v. Sebastian*, 239 U. S. 394 (1915); *People v. Village of Oak Park*, 266 Ill. 365, 107 N. E. 636 (1915); *Salt Lake City v. Western Foundry Works*, 187 Pac. (Utah) 820 (1920); *Myers v. Fortunato*, 110 Atl. (Del.) 847 (1920).

⁸ *Opinion of the Justices*, 127 N. E. (Mass.) 525 (1920).

⁹ *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745 (1907), *aff'd* in 214 U. S. 91 (1909); *Cochran v. Preston*, 108 Md. 220, 70 Atl. 113 (1908); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313, 128 N. E. 209 (1920). See 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed. § 696.

¹⁰ *Town of Windsor v. Whitney*, 111 Atl. (Conn.) 354 (1920). See RECENT CASES, p. 434, *infra*.

¹¹ For a discussion of this general subject, see Wilbur Larremore, "Public Aesthetics," 20 HARV. L. REV. 35; COMMENTS, "Exercise of the Police Power for Aesthetic Purposes," 30 YALE L. J. 171.

¹² *Cusack Co. v. City of Chicago*, 242 U. S. 526 (1917).

¹³ See 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed. § 695.

¹⁴ *In re Wilshire*, 103 Fed. (Cir. Ct. S. D. Cal.) 620 (1900); *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673 (1900); *Gilmartin v. Standish-Barnes Co.* 40 R. I. 219, 100 Atl. 394 (1917).

¹⁵ See, for instance, *St. Louis Poster Adv. Co. v. City of St. Louis*, 249 U. S. 269 (1919).

¹⁶ *City of Passaic v. Paterson Bill Posting Co.*, 72 N. J. L. 285, 62 Atl. 267 (1905); *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348, 74 N. E. 601 (1905); *People v. Murphy*, 195 N. Y. 126, 88 N. E. 17 (1909); *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N. E. 920 (1911). But see FREUND, POLICE POWER, § 182. *Churchill v. Tait*, 32 Phil. 580 (1915), *contra*.

from residential districts,¹⁷ to promote the architectural symmetry of neighboring buildings,¹⁸ or to impose building restriction to preserve fine views¹⁹ has uniformly been held unconstitutional. And building line schemes whose only object was the aesthetic have also been held unconstitutional.²⁰

Now granting that the police power is a dynamic thing, it is submitted nevertheless that the results reached by the courts are correct. To the great mass of people irregular building lines or glaring bill boards are matters of trivial annoyance. Except to the small minority, the unsightly view is but a slight irritation as compared with noisome smells²¹ or nerve-wracking noises,²² which have fallen under the taboo of the police power. It is true that disregard of a building line may lessen the value of the neighboring property, but so may the well-meant but freakish design of an adjacent house; and at any rate restrictions for the benefit of the neighbor's property savor dangerously of private eminent domain.

But though an unaesthetic use of property may not be such a public annoyance as to warrant its restriction by the police power, it does not follow that there is not a sufficient public use to justify a taking by eminent domain. The very fact that the police power is exercised without compensation necessitates its more rigid limitation.²³ So, though the police power has never been exercised for aesthetic purposes alone, the same cannot be said of eminent domain. In the well-known case of *Attorney General v. Williams*,²⁴ a statute was sustained as valid which by eminent domain limited building heights to enhance the beauty of Copley Square. And a New York case²⁵ has held that the land included within the building lines is really a part of the street, and is subject to an easement of light and air in favor of the public. Thus the individual receives compensation for the property right of which he is deprived, but the public at the same time gets what it wants.

¹⁷ *People v. City of Chicago*, 261 Ill. 16, 103 N. E. 609 (1913); *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828 (1913); *cf. Calvo v. City of New Orleans*, 136 La. 480; 67 So. 338 (1915).

¹⁸ *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665 (1902); *State, ex rel. Sale v. Stahlman*, 81 W. Va. 335, 94 S. E. 497 (1917); *cf. Ingraham v. Brooks*, 111 Atl. (Conn) 209 (1920).

¹⁹ *Quintini v. Mayor of City of Bay St. Louis*, 64 Miss. 483, 1 So. 625 (1887); *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278, 22 Atl. 561 (1891).

²⁰ *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861 (1893); *Fruth v. Board of Affairs of the City of Charleston*, 75 W. Va. 456, 84 S. E. 105 (1915); *City of Buffalo v. Kellner*, 90 Misc. 407, 153 N. Y. S. 472 (1915).

²¹ *The Manhattan Manuf. & Fertilizing Co. v. Van Keuren, supra.*

²² *State v. White*, 64 N. H. 48, 5 Atl. 828 (1886); *Ex parte Foote*, 70 Ark. 12, 65 S. W. 706 (1901).

²³ See Opinion of the Justices, 127 N. E. (Mass.) 525, 528 (1920). See FREUND, *POLICE POWER*, § 514.

²⁴ 174 Mass. 476, 55 N. E. 77 (1899). *Cf.* also the following cases in which property was taken for an aesthetic purpose, *Parker v. Commonwealth*, 178 Mass. 199, 59 N. E. 634 (1901), (restricting height of buildings near state capitol); *Higginson v. Inhabitants of Nahant*, 11 Allen 530 (1866); and *Petition of Mt. Washington Road Co.*, 35 N. H. 134 (1857), (building of roads for purely scenic purposes).

²⁵ *In re City of New York*, 57 App. Div. 166, 68 N. Y. S. 196 (1901); *cf. People v. Calder*, 89 App. Div. 503, 85 N. Y. S. 1015 (1903); *Northrup v. City of Waterbury*, 81 Conn. 305, 70 Atl. 1024 (1908); *Benedict v. Pettes*, 85 Conn. 537, 84 Atl. 332 (1912).

Cf. also *State v. Houghton*, 176 N. W. (Minn.) 158 (1920), in which a statute was sustained, which restricted by eminent domain the building of apartment houses in certain districts of the city.

Now of course no qualities of finality ought to be attributed to such a solution. Obviously as civilization advances, the public aesthetic sense will become more and more compelling. But for the present, it is believed that restrictions only with compensation will best strike a balance of convenience between the social interest in the individual's freedom of self-assertion, and the social interest in an attractive and well-ordered community.

DATE AT WHICH RATE OF EXCHANGE SHOULD BE APPLIED. — Whenever money is due in a foreign country, whether on a note, or as damages for a breach of contract, it becomes necessary to determine its equivalent in domestic currency.¹ There was a tendency on the part of early decisions to disregard commercial rates of exchange, and make the computation on the basis of the nominal par value of the two currencies,² determining this, for example, by the weight of gold in the standard coin of each country. Fortunately, the law increasingly adapted itself to the custom of trade, and it became established that commercial rates of exchange would be followed.³ But the courts had their attention centered on upholding commercial exchange as against conversion at the nominal par, rather than on the question of the precise date at which the rate should be taken. In general, England adopted the date of breach,⁴ and the United States that of judgment,⁵ though it often is not apparent, in the early decisions, which date the court regarded as decisive.⁶

To-day, however, attention is centered on this latter point, for the rate of exchange may double in the months between breach and judgment, as it did in *Di Ferdinando v. Simon, Smits & Co.*⁷ After some vacillation,⁸ England has now definitely adopted the date of breach, whether contracts or negotiable instruments⁹ are involved, and regard-

¹ This necessity is practically inherent in our judicial system. See SEDGWICK ON DAMAGES, 9 ed., § 274.

² *Martin v. Franklin*, 4 J. R. (N. Y.) 124 (1809); *Adams v. Cordis*, 8 Pick. (Mass.) 260 (1829); *Chumasero v. Gilbert*, 24 Ill. 651 (1860).

³ *Scott v. Bevan*, 2 B. & Ad. 78 (1831); *Marburg v. Marburg*, 26 Md. 8 (1866).

⁴ *Scott v. Bevan*, *supra*. See note 6, *infra*.

⁵ *Marburg v. Marburg*, *supra*. *Hawes v. Woolcock*, 26 Wis. 629 (1870). Similarly Canada adopted the date of judgment. *Crawford v. Beard*, 14 U. C. C. P. 87 (1864). For the problem in international arbitration, see *The Pious Fund of the Californias*, Hague Arbitration Cases, Oct. 14, 1902. (J. B. SCOTT, HAGUE COURT REPORTS, 1; G. G. WILSON, HAGUE CASES, 1.)

⁶ An interesting example of this is *Scott v. Bevan*, *supra*. It is always cited as a leading case, but sometimes on one side, sometimes on the other. Thus the Divisional Court treated it as a decisive authority for the date of judgment in *Cohn v. Boulken*, 36 T. L. R. 767 [1920 K. B.]. Two weeks later the Court of Appeals, in another case, considered it carefully, and pronounced it to be a clear authority for the date of breach. *Di Ferdinando v. Simon, Smits & Co.*, [1920] 3 K. B. 409.

⁷ [1920] 3 K. B. 409. See RECENT CASES, p. 435, *infra*.

⁸ See *Kirsch v. Allen, Harding & Co.*, [1919] W. N. 301 (King's Bench). This case was never followed, and has now been overruled by the Court of Appeals in *Di Ferdinando v. Simon, Smits & Co.*, *supra*.

⁹ At present there is, as to bills of exchange, an authority *contra* in *Cohn v. Boulken*, *supra*. But that decision was directly based on an interpretation of *Scott v. Bevan* now declared erroneous by the Court of Appeals. See note 6, *supra*.

less of which party is benefited thereby.¹⁰ The American decisions point in the same direction.¹¹

On theory, this seems the preferable result. The English Court of Appeals analyzes the situation as follows: (1) The general rule, apart from any question as to rate of exchange, is that the plaintiff is entitled to have his damages assessed as at the date of the breach; (2) the court has only jurisdiction to award damages in English money; (3) the judge must therefore express these damages in English money; (4) in order to do so he must take the rate of exchange prevailing at the time of the breach.¹² This accords, also, with business practice. The plaintiff, as soon as the breach occurred, had to cover himself by fresh purchases of goods or money. These would be made at the rate of exchange then prevailing.¹³ Whether the rate thereafter fluctuated is another matter, and one with which the court need not concern itself.

A strong case, nevertheless, is made out by the advocates of the date of judgment.¹⁴ On their theory, the plaintiff should recover in damages exactly the same amount which he would be entitled to recover in a suit in the foreign country; and there the fluctuations in the rate of exchange are necessarily immaterial. Thus if the plaintiff were entitled to one thousand pounds in 1919, an English court could give him only one thousand pounds in 1920, regardless of the value of the pound in New York. But the English court would profess to give damages as they accrued in 1919, and it seems unnecessary that the American court should be bound by English limitations on the accurate determination of these damages. It is true that a court will not consider fluctuations in the purchasing power of its own currency, for that currency is itself the measuring rod for values, and the court has no extrinsic standard by which to judge it. But if this same court has before it a foreign contract, payable in foreign currency, it can regard that currency as objectively as if the contract called for payment in so many bushels of corn, instead of in so many francs. If the contract called for corn, the court would take the value of the given amount of corn as it stood at the time of the breach, regardless of subsequent fluctuations. Foreign currency should be handled on the same basis, if we are really to give damages as they accrued on the date of breach.¹⁵

¹⁰ The adoption of the date of breach benefited the plaintiff in *Di Ferdinando v. Simon, Smits & Co.*, *supra*. The defendant was benefited in: *Barry v. van den Hurk*, [1920] 2 K. B. 709; *Lebaupin v. Crispin*, [1920] 2 K. B. 714.

¹¹ *Simonoff v. Granite City National Bank*, 279 Ill. 248, 116 N. E. 636 (1917); *Pavenstedt v. New York Life Ins. Co.*, 203 N. Y. 91, 96 N. E. 104 (1911); *Gross v. Mendell*, 171 App. Div. 237, 157 N. Y. S. 357. See 29 HARV. L. REV. 873. See also *Rasst v. Morris*, 108 Atl. 787, 790 (Md.) (1919).

¹² *Di Ferdinando v. Simon, Smits & Co.*, *supra*.

¹³ See *The Volturmo*, [1920] P. 447.

¹⁴ See STORY, CONFLICT OF LAWS, § 310. The cases generally use the expression "date of judgment" to cover either that date, or the date when suit was brought, overlooking the distinction between the two. The strongest case against the date of breach would seem to arise when that breach occurred in the foreign country, but this point is not taken by the courts. Examples of adherence to the date of breach even though that breach occurred abroad, are: *Gross v. Mendell*, *supra*; *Barry v. van den Hurk*, *supra*.

¹⁵ See *Manners v. Pearson & Son*, [1898] 1 Ch. 581, 593. The statement of the law in the dissenting opinion of Vaughan Williams, L. J., was adopted by the court in *Di Ferdinando v. Simon, Smits & Co.*, *supra*.

The present rule of computing the exchange at the date of breach seems a correct solution of this long disputed point.

HOW FAR MAY LEGISLATURES REGULATE JUDICIAL PROCEDURE. — Judicial reformers who advocate the regulation of judicial procedure and practice by the courts rather than by the legislatures¹ have found a staunch ally in the Supreme Court of Indiana. The rules of that court required the briefs of counsel to contain concise statements of the errors and exceptions relied upon. The State Legislature enacted a provision which abrogated this rule.² The court held that act unconstitutional.³

A legislature has great latitude in determining the rules of procedure of those courts that owe their existence directly to the legislature.⁴ It is not logical to conclude therefrom that a legislature has such wide power over a court that owes its being to that instrument responsible for the legislature itself.⁵ Federal and state constitutions generally establish courts with jurisdiction in law and equity. The scope of that jurisdiction over judicial procedure must be determined in the light of the common law and the history of the courts anterior to and at the time of the adoption of the constitution.⁶ History reveals that, at least as far back as the days of Richard II, rules of procedure had been adopted by the judges.⁷ But the judges did not exclusively control their procedure, for we find Parliament⁸ also regulating the procedure of the courts. This system of dual control over procedure existed when our Constitution adopted the theory of the separation of powers.⁹ Indeed the Supreme Court of the United States¹⁰ has recently recognized the inherent right of the courts to regulate judicial procedure, at least in the absence of contrary legislation. Yet neither the federal nor the state constitutions expressly provided for a mode of adjudicating the conflict that might ensue between the two departments on a question of judicial procedure.

¹ See Roscoe Pound, "Regulation of Judicial Procedure by Rules of Court," 10 ILL. L. REV. 163; Elihu Root, Address in the REPORT OF NEW YORK STATE BAR ASSOCIATION, xxxiv, 87.

² See 1917 IND. ACTS, c. 143, § 3. See IND. CONSTITUTION, Art. III, § 1, and Art. VII, § 1.

³ Epstein v. State, 128 N. E. 353 (1920). See RECENT CASES, p. 434, *infra*.

⁴ See UNITED STATES CONSTITUTION, Art. III, § 1. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." See also PA. CONSTITUTION, Art. V, § 1; Wilbur Larremore, "Regulation of Contempt of Court," 13 HARV. L. REV. 615, 619; WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, 1270.

⁵ See WIS. CONSTITUTION, Art. VII, § 2. See ILL. CONSTITUTION, Art. III, "The powers of the government of this State are divided into three distinct departments, — legislative, executive, and judicial; and no person or collection of persons, being one of these Departments, shall exercise any power properly belonging to either one of the others."

⁶ See State v. Harmon, 31 Oh. St. 250, 258 (1877).

⁷ See TIDD'S PRACTICE, 8 ed., xxxvii-l; Preface to TIDD'S PRACTICE, 3 ed., ix, x. See also Pound, *supra*, 171.

⁸ See TIDD'S PRACTICE, 8 ed., xxiii-xxxvi.

⁹ See Roscoe Pound, Address in the OHIO STATE BAR ASSOCIATION, xxxvi, 34.

¹⁰ See *In re Peterson*, U. S. Sup. Ct., October Term, 1919, No. 28.

Fortunately, these conflicts in general were infrequent because of the deference of the courts. But an early revolt against this legislative control came in California.¹¹ The legislature required the courts to give their decisions "in writing with the reasons therefor." Justice Field said,¹² "If the Legislature can require the reasons of our decisions in writing, it can prescribe the paper upon which they shall be written and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to the power if its exercise in any particular be admitted?" Encouraged by this decision, a court¹³ refused to comply with a legislative enactment requiring the judges to write head notes to their opinions.

A noteworthy dispute soon arose on the question of determining the qualifications for admission to the bar. Some state legislatures assumed to themselves the right to determine that matter. Whereupon the courts¹⁴ emphatically pronounced such legislation to be an undisguised invasion of judicial power and refused to admit those men to practice who failed to comply with the court's requirements for admission. Attorneys are officers of the court.¹⁵ Who shall be an officer of the court is an essentially judicial question precisely as the selection of the Speaker of the House is a legislative matter.¹⁶ Deprive the court of the power to determine admission and you deprive it of the power to determine grounds for disbarment. The latter power has always inhered in the courts.¹⁷

Similarly the judiciary¹⁸ has resisted legislation abridging the court's power to enforce its decrees through contempt process. The constitutional creation of a court calls into being the inherent power of the court to effectuate its own acts by contempt process.¹⁹ It is indispensable to protect the court and the administration of justice. Courts are not to be relegated to "puppetdom."

It is apparent from these cases that, in our system of dual control over procedure, judicial regulation is not coextensive with legislative regulation. Any other result would be at variance with the genius of our

¹¹ *Houston v. Williams*, 13 Cal. 24 (1859). See *Vaughn v. Harp*, 49 Ark. 160, 4 S. W. 751 (1886).

¹² See *Houston v. Williams*, *supra*, 25.

¹³ *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513 (1889).

¹⁴ *In re Shorter*, No. 12, 811 Fed. Cas. (1865); *In re Mosness*, 39 Wis. 509 (1876); *Petition of Splane*, 123 Pa. St. 527, 16 Atl. 481 (1889); *In re Day*, 181 Ill. 73, 54 N. E. 646 (1899). See also *ex parte Secombe*, 19 How. (U. S.) 9, 13 (1856).

¹⁵ See *ex parte Garland*, 4 Wall. (U. S.) 333, 378 (1866). See WEEKS, ATTORNEYS AT LAW, 140, 142.

¹⁶ *State v. Noble*, 118 Ind. 350, 21 N. E. 244 (1889). Of course a constitution may grant the executive the power to appoint federal officials. See UNITED STATES CONSTITUTION, Art. II, Sec. 2, § 2.

¹⁷ *Penobscot County Bar v. Kimball*, 64 Me. 140 (1875). See WEEKS, ATTORNEYS AT LAW, 140.

¹⁸ *Little v. State*, 90 Ind. 338 (1883); *Hale v. State*, 55 Oh. St. 210, 45 N. E. 199 (1896); *Carter v. Virginia*, 96 Va. 791, 32 S. E. 780 (1899); *Chic. B. & Q. Ry. Co. v. Gildersleeve*, 219 Mo. 170, 118 S. W. 86 (1908); *State v. Morrill*, 16 Ark. 384 (1855) (allowed slight regulation). See also *ex parte Robinson*, 19 Wall. (U. S.) 505, 510 (1873). *In re Shortridge*, 99 Cal. 526, 34 Pac. 227 (1893). See 2 CAMPBELL'S LIVES OF CHIEF JUSTICES, 297; THOMPSON, TRIALS, 2 ed., § 125; Wilbur Larremore, *supra*.

¹⁹ *Cf. McCulloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819). See SMITH, ACTIONS AT LAW, 10 ed., 21.

constitutions and the separation of powers. To say, as Justice Field implies, that the legislative regulation of judicial procedure is dependent for its effectiveness upon the acquiescence of the courts would belie the historical facts. Equally vulnerable is the statement that the courts may regulate their procedure only by permission of legislatures. The orbits of legislative and judicial regulation of procedure are distinct and they must be determined primarily by historical criteria. Clearly the courts may disregard any legislative interference with what they have habitually regulated from earliest days. In that category are such matters as admission to the bar, disbarment, and the details of procedure of which the principal case is an illustration. Logically the legislature, then, should have the right to regulate those matters of procedure which it habitually regulated. But the doctrine of the separation of powers imposes restrictions upon this legislative right. The judiciary is an independent coordinate department. Consequently, the legislature would stray from its orbit were it to provide for anything which either abridged the general power of the courts to administer justice or which substantially hampered the court in its functions.²⁰ Regulation of the court's power over contempt would be an illustration of the former class. Legislative limitation of the time²¹ given to counsel for argument may well be regarded as an illustration of the latter class.

CONSTITUTIONALITY OF THE NEW YORK EMERGENCY HOUSING LAWS.—The general cessation of building operations during the recent war has inevitably resulted in an acute shortage of housing accommodations, especially in the larger cities.¹ In several foreign countries it has been found necessary to take legislative action to prevent profiteering landlords from taking advantage of this situation.² The first legislation of this kind in the United States was the Ball Rent Law,³ regulating rents in the District of Columbia, which has recently been declared unconstitutional.⁴ The most important housing legislation, however, has been that of the state of New York, which was enacted to avert a threatened

²⁰ *Dorsey v. Dorsey*, 37 Md. 64 (1872) (held that it was incompetent for the legislature to authorize the courts to reopen and rehear cases previously decided); *Burt v. Williams*, 24 Ark. 91 (1863) (granting of a continuance pending case was the exercise of judicial authority and a legislative act assuming to do this was void); *De Chastellux v. Fairchild*, 15 Pa. St. 18 (1850) (legislative enactment compelling courts to grant a new trial is null).

²¹ *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452, 69 N. E. 816 (1904); *Reagan v. St. Louis Transit Co.*, 180 Mo. 117, 79 S. W. 435 (1904). See THOMPSON, TRIALS, § 924.

¹ See Edward L. Schaub, "Regulation of Rentals during the War Period," 28 JOURN. POL. ECON. 1.

² Such action has been taken in England. See INCREASE OF RENT AND MORTGAGE INTEREST ACT, 5 & 6 GEO. V, c. 97, amended by 9 GEO. V, c. 7. In Newfoundland, see TENANTS' ACT of June 5, 1919, c. 10. And in New Zealand, see LANDLORD AND TENANT ACT, 10 GEO. V, No. 32, 1904. As to similar statutes in continental Europe, see Edward L. Schaub, "Regulation of Rentals during the War Period," *supra*.

³ See 41 STAT. AT L. 298.

⁴ *Hirsch v. Block*, 267 Fed. (D. C.) 614 (1920). The decision went on the grounds that the statute deprived the landlords of property without due process of law, and that it took away the right to trial by jury. The chief justice dissented.

housing crisis in New York City.⁵ In brief, the New York legislation now in force provides that unreasonable rents cannot be recovered by legal action,⁶ and suspends entirely all remedies whereby a landlord may recover possession of his property,⁷ except in certain specified cases.⁸ The legislation applies only to buildings occupied for dwelling purposes, and is to remain in force until October 1, 1922. It has been upheld as constitutional by the Federal District Court for the Southern District of New York⁹ and by the Appellate Division for the Second Department.¹⁰ The Appellate Division for the First Department, however, has held the legislation invalid, so far as it deprives landlords of all remedies for recovering possession of their property.¹¹

Four principal constitutional objections may be made to the laws: first, that they deny to the landlords the equal protection of the laws;¹² second, that they deprive the landlords of property without due process of law;¹³ third, that they interfere with freedom of contract;¹⁴ fourth, that they impair the obligation of contracts.¹⁵

The first objection seems untenable. It is well settled that the state legislatures may make classifications of persons for the purpose of dealing differently with each class without violating any constitutional

⁵ The situation first became acute last spring. See REPORT OF THE HOUSING COMMITTEE OF THE RECONSTRUCTION COMMISSION OF THE STATE OF NEW YORK of Mar. 22, 1920, 2-3 10-11. To meet the situation the legislature in April passed laws which prevented the recovery by legal action of unreasonable rents and authorized the granting of stays of execution in dispossess proceedings and actions of ejectment. See 1920 N. Y. LAWS, c. 130-139. These laws were to remain in force until October 1, 1920. It was hoped that the laws would no longer be necessary by that time, but this hope proved to be a vain one. See REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON HOUSING, of Sept. 20, 1920, 5-6. Hence further legislation was necessary to avert a serious situation when the April laws ceased to be in force. See 1920 N. Y. LAWS, c. 942-953. This legislation became effective September 22, 1920.

⁶ See 1920 N. Y. LAWS, c. 944, amending c. 136 of the April laws.

⁷ See 1920 N. Y. LAWS, c. 942 (suspending summary dispossess proceedings for nonpayment of rent), 945 (suspending similar proceedings to evict tenants holding over after the expiration of their terms) and 947 (suspending the action of ejectment).

⁸ These are (a) where the tenant is objectionable, (b) where the landlord, being a natural person, desires the premises for his own personal use, (c) where the landlord desires to construct a new building on the site of the old one, (d) where the building has been sold to a coöperative apartment company.

⁹ *Brown Holding Co. v. Feldman*, N. Y. Law Journal, Dec. 20, 1920.

¹⁰ *People ex rel. Rayland Realty Co. v. Fagan*, N. Y. Law Journal, Dec. 9, 1920. One justice dissented, and two concurred in the result only, on a procedural ground.

¹¹ *Gutttag v. Shatzkin*, N. Y. Law Journal, Dec. 28, 1920. One justice dissented. The same court has held constitutional the provision of the laws which prevents the recovery of unreasonable rents. *Levy Leasing Co. v. Siegel*, N. Y. Law Journal, Dec. 30, 1920.

¹² See U. S. CONSTITUTION, Fourteenth Amendment, "... nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws."

¹³ See U. S. CONSTITUTION, Fourteenth Amendment, "... nor shall state deprive any person of life, liberty, or property, without due process of law." See also N. Y. CONSTITUTION, Art. I, Sec. 6, "No person ... shall be deprived of life, liberty or property without due process of law."

¹⁴ Freedom of contract is protected by the Fourteenth Amendment. *Lochner v. New York*, 198 U. S. 45 (1905).

¹⁵ See U. S. CONSTITUTION, Art. I, Sec. 10, "No state shall ... pass any ... law impairing the obligation of contracts."

guarantee, provided only that such classification is reasonable.¹⁶ The classification made by the New York laws seems reasonable; certainly it is not so outrageous as to be unconstitutional.¹⁷

The second and third objections to the laws are based upon the Fourteenth Amendment and the analogous provision in the constitution of the state.¹⁸ It has been recognized, however, since the decision in the *Slaughter-House Cases*,¹⁹ that the requirement of due process does not limit the police power of the states.²⁰ Although the precise scope of the police power has never been exactly defined,²¹ a wide discretion has been left to the state legislatures, and if the legislative power is "put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion to be greatly and immediately necessary to the public welfare,"²² the courts will be very slow to declare such action unconstitutional. Thus, laws regulating hours of labor in mines,²³ compelling banks to contribute to a guarantee fund,²⁴ prohibiting the use of trading stamps,²⁵ regulating insurance rates,²⁶ or providing for the regulating of prices of the necessities of life,²⁷ have been upheld. The New York housing legislation seems no more radical, and so would appear to be within the scope of the police power.²⁸ Hence unless it is arbitrary and has no reasonable tendency to attain the end sought, it is constitutional.²⁹ Neither objection applies here. It should be noted that the laws ensure to the landlord prompt payment of a reasonable compensation for the use of his property.³⁰ On the whole, it would seem, then, that this legislation is not a denial of due process.

¹⁶ *Hayes v. Missouri*, 120 U. S. 68 (1886); *Budd v. New York*, 143 U. S. 517 (1891); *Lindley v. National Carbonic Gas Co.*, 220 U. S. 61 (1911); *Rast v. Van Deman & Lewis*, 240 U. S. 342 (1916).

¹⁷ A given legislative classification will not be declared unconstitutional unless under no possible state of facts could it be a reasonable one. *St. Louis Co. v. Illinois*, 185 U. S. 203 (1902); *Wilson v. New*, 243 U. S. 332 (1917). And classifications similar to that here in question have been sustained. See *Welsh v. Swasey*, 214 U. S. 91 (1909); *Cusack & Co. v. Chicago*, 242 U. S. 526 (1916). *Bailey v. People*, 190 Ill. 28, 60 N. E. 98 (1901), *contra*.

¹⁸ See notes 13 and 14, *supra*.

¹⁹ 16 Wall. (U. S.) 36 (1873).

²⁰ *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129 (1874); *Mugler v. Kansas*, 123 U. S. 623 (1887); *Lawton v. Steele*, 152 U. S. 133 (1894); *Camfield v. United States*, 167 U. S. 518 (1897); *Noble State Bank v. Haskell*, 219 U. S. 104 (1911); *Jeffery Mfg. Co. v. Blagg*, 235 U. S. 571 (1915).

²¹ See George W. Wickersham, "The Police Power — A Product of the Rule of Reason," 27 HARV. L. REV. 297.

²² *Holmes, J.*, in *Noble State Bank v. Haskell*, *supra*, 111. See also *Chicago Ry. v. Drainage Commissioners*, 200 U. S. 561, 592 (1905).

²³ *Holden v. Hardy*, 169 U. S. 366 (1898).

²⁴ *Noble State Bank v. Haskell*, *supra*.

²⁵ *Rast v. Van Deman & Lewis*, *supra*; *Tanner v. Little*, 240 U. S. 369 (1916).

²⁶ *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389 (1914).

²⁷ *American Coal Mining Co. v. Special Commission*, U. S. Dist. Court for the Dist. of Indiana, decided Sept. 16, 1920 (not yet reported). The apparently contrary decision in *Holter Hardware Co. v. Boyle*, 263 Fed. 134 (1920), is distinguishable on the ground that the statute there involved regulated prices of all commodities. Even on that basis, however, it is open to criticism. See 33 HARV. L. REV. 838.

²⁸ The legislation might well be upheld on the ground that it was necessary to protect the public health and the public morals. See 9 DEPT. OF HEALTH BULLETIN, N. Y. CITY, N. S., No. 42; REPORT OF THE HOUSING COMMITTEE OF THE RECONSTRUCTION COMMISSION OF THE STATE OF NEW YORK, of Mar. 22, 1920, 15.

²⁹ *Lawton v. Steele*, *supra*; *Chicago Ry. v. Drainage Commissioners*, *supra*.

³⁰ See 1920 N. Y. LAWS, c. 942, 944, 945, 947.

A fourth question remains, however. Do the laws impair the obligation of contracts? It is clear that so far as they apply to leases made subsequent to their enactment, they are not objectionable on this ground.³¹ As the provision that no rent can be recovered unless it is reasonable is not retroactive,³² it is clearly valid. A different question arises as to the provisions that suspend all remedies for the recovery of possession from tenants holding over after the expiration of their terms, as applied to leases made prior to the enactment of the laws.

The ordinary lease contains a covenant by the tenant "quietly to quit and deliver up possession of the premises" at the end of his term.³³ The New York laws deprive the landlord of all power to enforce this covenant for a period of two years.³⁴ It is well settled that a total deprivation³⁵ or a material impairment of the effectiveness of the legal remedy for the breach of a contract impairs the obligation of the contract.³⁶ It is difficult to see how a complete suspension of all remedy for two years can fail to be a material impairment.³⁷

It seems, then, that the New York housing laws, as applied to prior leases, impair the obligation of contracts. Can they be sustained under the police power? There is some language in the reports which would seem to indicate that the contract clause is subject to such an implied exception.³⁸ The cases, however, fail to support this conclusion.³⁹

³¹ See *Ogden v. Saunders*, 12 Wheat. (U. S.) 213 (1827); *Denny v. Bennett*, 128 U. S. 489 (1888).

³² 78th Street & Broadway Co. v. Rosenbaum, 111 Misc. (N. Y.) 577 (1920); *Paterno Investing Co. v. Katz*, 112 Misc. (N. Y.) 242 (1920). Both cases involve c. 136 of the April laws, but as the wording of c. 944 is identical on this point, the same construction should govern.

³³ See OLIVER, PRACTICAL CONVEYANCING, 4 ed., 229; 2 MCADAM, LANDLORD AND TENANT, 4 ed., 1660.

³⁴ See note 7, *supra*. The landlord cannot maintain a bill in equity for specific performance of the covenant to quit the premises. *Brandt & Co. v. Weil*, N. Y. Law Journal, Nov. 1, 1920. And to allow an action for damages for the breach of the covenant would be contrary to the policy of the emergency housing laws.

³⁵ *White v. Hart*, 13 Wall. (U. S.) 646 (1872).

³⁶ *Green v. Biddle*, 8 Wheat. (U. S.) 1 (1823); *Brown v. Kinzie*, 1 How. (U. S.) 311 (1843); *Hawthorne v. Calef*, 2 Wall. (U. S.) 10 (1865); *Gunn v. Barry*, 15 Wall. (U. S.) 610 (1873). But a reasonable alteration of the remedy, which does not materially impair it, is constitutional. *Hawkins v. Barney*, 5 Pet. (U. S.) 451 (1831) (change in the statute of limitations); *Penniman's Case*, 103 U. S. 714 (1881) (abolition of imprisonment for debt).

³⁷ Statutes suspending all actions against persons absent in the military service of the United States in time of war have been upheld. *Edmonson v. Ferguson*, 11 Mo. 344 (1846); *Breitenbach v. Bush*, 44 Pa. St. 313 (1862); *Hoffman v. Charlestown Five Cent Savings Bank*, 231 Mass. 324, 121 N. E. 15 (1918). But such statutes are very different from those under consideration here, as they were passed by Congress under the war power, and were necessary to protect the interests of absent defendants.

³⁸ See *Legal Tender Cases*, 12 Wall. (U. S.) 457, 551 (1870); *Manigault v. Springs*, 199 U. S. 473, 480 (1905); *Hudson Co. v. McCarter*, 209 U. S. 349, 357 (1908); *Atlantic Transportation Co. v. Goldsboro*, 232 U. S. 548, 556 (1913).

³⁹ It must be admitted that the view that the contract clause is subject to the police power is apparently supported by the case of *Manigault v. Springs*, *supra*. It is believed, however, that this case in reality stands on a different ground. There plaintiff and defendant were riparian owners on a certain creek. Defendant built a dam which overflowed plaintiff's land. Plaintiff protested, but later agreed to allow the dam to remain for a certain period, if defendant would agree to keep the creek open permanently thereafter. The dam was removed, and the contract to keep the creek open carried out for several years, when the state legislature by special act

Where a law apparently impairing the obligation of a contract has been upheld under the police power, the contract alleged to have been impaired seems to have been either that of a state purporting to bargain away part of the sovereign power,⁴⁰ or that of a public utility, in derogation of its common law duty to render a reasonable service to all.⁴¹ It is well settled that a state has no power to bargain away its sovereignty, and any attempt to do so will be void.⁴² Similarly a special contract of a public utility made in derogation of its fundamental legal duty to render a reasonable service at reasonable rates is invalid or at least voidable.⁴³ Where, however, the contract in question is an ordinary private contract, valid when made, it would seem to be going counter to the plain words of the Constitution to hold that a state, even in the exercise of the police power, could impair it.

It may be true that a general law which incidentally impairs the obligation of private contracts is not invalid for that reason;⁴⁴ otherwise it would be possible for private individuals to tie the hands of the government by contracting among themselves. But legislation enacted for the purpose of impairing contract obligations stands on a very different footing. Unless the contract clause of the Constitution is to be swallowed up in the capacious and ever-expanding maw of the police power, such legislation cannot be upheld. It is submitted that the distinction to be drawn is between an incidental impairment through the operation of a general law valid under the police power, and a direct attack on the contract itself. Tested by this criterion, the New York housing laws, so far as they operate to deprive landlords of all power to enforce covenants to quit in leases made prior to the enactment of the laws, are unconstitutional.

EFFECT OF COVENANT OF WARRANTY UPON THE DESTRUCTIBILITY OF CONTINGENT REMAINDERS BY MERGER. — The ease with which contingent remainders could be destroyed at common law, and the grantor's intent thereby defeated, has led England and many states in this country

authorized the defendant to build a dam across the creek to drain certain swampy lands, requiring that he pay compensation to anyone injured by the building of the dam. Plaintiff sought an injunction against the building of the dam. *Held*, that the injunction be denied. It will be noted that the dam was to be built for a public purpose and that the act authorizing it required the payment of compensation for all damages resulting from its construction. The case seems to have been in substance one of the exercise of the power of eminent domain to extinguish the plaintiff's contract right. That this may be done is clear. *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507 (1848).

⁴⁰ *Cf. Stone v. Mississippi*, 101 U. S. 814 (1880); *Douglas v. Kentucky*, 168 U. S. 488 (1897); *Atlantic Transportation Co. v. Goldsboro*, *supra*.

⁴¹ *Cf. Chicago Ry. v. Nebraska*, 170 U. S. 57 (1898); *Louisville Ry. v. Mottley*, 219 U. S. 467 (1910); *Texas Ry. v. Miller*, 221 U. S. 408 (1911); *Union Dry Goods Co. v. Georgia Public Service Co.*, 248 U. S. 372 (1919); *Producers' Transportation Co. v. Railroad Commission*, 251 U. S. 228 (1920).

⁴² See *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 629 (1819); *Boyd v. Alabama*, 94 U. S. 645, 650 (1876); *Stone v. Mississippi*, *supra*, 817.

⁴³ See 32 HARV. L. REV. 74; 33 *id.*, 97.

⁴⁴ See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 833. See also *Beer Co. v. Massachusetts*, 97 U. S. 25, 32 (1877); *Manigault v. Springs*, *supra*, 480.

to enact statutes¹ preventing their destruction. Illinois has no such statute, but in a recent case² the Illinois Supreme Court supplies the deficiency in an interesting manner. The facts, somewhat simplified, may be stated thus: A, by warranty deed, created a life estate in B, contingent remainder in fee in B's descendants who should survive him, reversion in fee in A. B's estate was purchased by X on execution sale, and A's estate was similarly purchased by Y. Y conveyed the reversion to X, the expressed intention³ of both parties being that the life estate should merge in the reversion, and the contingent remainder be destroyed. The court held that, in view of the covenant of warranty in the original deed, the contingent remainder was not destroyed.

At common law the termination of the particular estate on which a contingent remainder depended, before the happening of the contingency, destroyed the remainder. Thus, one means of defeating such remainders was by merger of the particular estate in the next succeeding vested estate. This destroyed the former, and with it the contingent remainder.⁴ The result has been reached by the Illinois court in many cases.⁵ The only element in the principal case to distinguish it from this line of decisions is the covenant of warranty.⁶ Is this enough to take the case out of the general rule?

The meaning and effect of a covenant of warranty, as applied to vested estates, are pretty well defined. Such a covenant in Illinois is practically equivalent to a covenant for quiet enjoyment.⁷ It is an engagement that the covenantee's possession shall not be disturbed by one with a paramount title, that the covenantor and his heirs shall not claim the estate, and that the covenantor shall not interfere with the covenantee's possession and enjoyment.⁸ If the covenantor has not title to

¹ See Real Property Act, 8 & 9 VICT., c. 106, § 8; Contingent Remainders Act, 40 & 41 VICT., c. 33. For a list of statutory provisions in the United States, see 2 WASHBURN, REAL PROPERTY, 6 ed., note, 554-7. See also KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2 ed., § 106.

² *Biber v. Martin*, 128 N. E. (Ill.) 518 (1920). See RECENT CASES, p. 435, *infra*.

³ Therefore the rule of some jurisdictions, that intent to prevent merger will do so, does not apply. *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978 (1906); See 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 788. See *contra*, 3 PRESTON, CONVEYANCING, 3 ed., 43 *et seq.*

⁴ *Purefoy v. Rogers*, 2 Saund. 380 (1671); see 1 FEARNE, CONTINGENT REMAINDERS, 10 ed., 340. There are two exceptions to this rule: where both estates are limited in the same instrument, see *Purefoy v. Rogers*, *supra*, 387 a; see 1 FEARNE, CONTINGENT REMAINDERS, 10 ed., 345-6; and where the devisee of the particular estate takes the reversion as heir at the same time, see *Gray v. Shinn*, 293 Ill. 573, 127 N. E. 755 (1920); see 1 FEARNE, CONTINGENT REMAINDERS, 10 ed., 343-4. In these cases the vested estates will open up and let in the contingent remainder when it vests. The reason for the exceptions is that otherwise the contingent remainders would never come into existence at all; and the courts refuse to ignore the creator's intent to this extent. But if the tenant of the vested estates transfers both to a third person, the remainder will be destroyed. *Bennett v. Morris*, 5 Rawle (Pa.) 9 (1835); *Messer v. Baldwin*, 262 Ill. 48, 104 N. E. 195 (1914).

⁵ *Bond v. Moore*, 236 Ill. 576, 86 N. E. 386 (1908); *Lewin v. Bell*, 285 Ill. 227, 120 N. E. 633 (1918).

⁶ We may assume for purposes of argument the right of the contingent remainderman to avail himself of the covenant.

⁷ *Bostwick v. Williams*, 36 Ill. 65 (1864); *Caldwell v. Kirkpatrick*, 6 Ala. 60 (1844).

⁸ For a full discussion of the effect of a covenant of warranty see RAWLE, COVENANTS FOR TITLE, 5 ed., c. 8. See also *King v. Kilbride*, 58 Conn. 109, 116, 19 Atl. 519,

the land at the time of the conveyance and covenant, he and those holding under him are estopped to set up any after-acquired title against the covenantee, and such title passes to the covenantee by operation of law.⁹

No case has been found of a contingent remainderman attempting to avail himself of a covenant for title in the deed creating his interest.¹⁰ Assuming that the contingent remainderman can't take advantage of the covenant, there seems to be no reason for holding that the covenant means more than that the covenantee shall be protected in the enjoyment of his contingent remainder with all its legal attributes; there is no reason for saying that the covenant gives to the remainder an attribute of indestructibility which it does not ordinarily possess. The grantor has not covenanted that the grantees of vested estates shall not combine them so as to destroy the contingent remainder by merger. He has not covenanted for the continuance of the contingent remainder beyond its natural life.

The result reached by the court in the principal case is not wholly indefensible. There are cases in which merger does not destroy contingent remainders because to do so would render the intent of the creator wholly void.¹¹ Since destruction is not the invariable consequence of merger, it is understandable that the court should seek so to interpret the covenant of warranty as to estop the creator's grantees to assert that the remainder is destroyed. But, though understandable, the result seems wrong. The end is desirable, but the way to it is through legislation.

RECENT CASES

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — AGENT NOT LIABLE FOR NEGLIGENCE IN FORMATION OF CONTRACT WHERE CONTRACT IS ILLEGAL. — The defendant, as agent of the plaintiff, took out, in accordance with the principal's instructions, an insurance policy which was of a type declared illegal by statute. When a loss occurred, the insurance company refused to pay, on the sole ground that the defendant had not fully disclosed the risk — the insurance company expressly asserting that they would have paid but for this non-disclosure despite the illegality. The defendant is now sued for breach of duty in not disclosing the risk; his defense is that the policy itself is illegal. *Held*, that the plaintiff cannot recover. *Cheshire and Co. v. Vaughan Bros. and Co.*, [1920] 3 K. B. 240.

It has been held that a principal has no remedy against his agent for failure to enter into a void contract. *Cohen v. Kittell*, 22 Q. B. D. 680. See STORY,

520 (1889); *Beebe v. Swartout*, 8 Ill. 162, 179-184 (1846); *Levitzy v. Canning*, 33 Cal. 299 (1867).

⁹ *Kimball v. Schoff*, 40 N. H. 190 (1860); *White v. Patten*, 24 Pick. (Mass.) 324 (1837); see RAWLE, COVENANTS FOR TITLE, 5 ed., § 248. Though a grantor conveys an estate by deed with covenant of warranty, he may nevertheless disseise his grantee and acquire a valid title by adverse possession. *Stearns v. Hendersass*, 9 Cush. (Mass.) 497 (1852).

¹⁰ The indestructibility of contingent remainders has long been felt desirable. It has been accomplished in the past by trusts to preserve contingent remainders. *Smith d. Dormer v. Packhurst*, 3 Atk. 135 (1742); see WILLIAMS, REAL PROPERTY, 22 ed., 378-9. That no report has been found of any use of the simple method of this case, argues against its validity.

¹¹ See note 4, *supra*.

AGENCY, 7 ed., § 222. The same principles would preclude recovery in the present case — where, instead of *failure* to enter into a contract, there was such negligence in the formation of it that the promisor had a defense aside from that of illegality. It was argued that, on the facts, clearly no question of illegality would have arisen, if the agent had not been negligent. But the same public interest, because of which a recovery is denied on the illegal contract itself, forbids a recovery here. As the contract should not have been made in the first instance, no court will inquire whether or not it would have been performed. To be sure, most courts permit a recovery by the principal of the proceeds of an illegal transaction in the hands of his agent. *Baldwin v. Potter*, 46 Vt. 402; *Yale Jewelry Co. v. Joyner*, 159 N. C. 644, 75 S. E. 993; *Tenant v. Elliott*, 1 B. & P. 3. The soundness of these cases is open to question. See 3 WILLISTON, CONTRACTS, § 1786. However, these cases are not to be relied upon in support of the plaintiff in the present case. In the former cases, the agent will profit to the extent of the funds in his hands, if a breach of the fiduciary relation is permitted, a consideration in no wise applicable to the principal case.

ALIENS — RIGHT OF CITIZEN OF UNITED STATES ENGAGED IN IRISH REBELLION TO BE TREATED AS AN ALIEN FRIEND. — Plaintiff, formerly an Irishman, became a naturalized American citizen. He returned to Ireland and engaged in rebellious activities against the Crown. When arrested, money found on his person was seized by the authorities. Upon release he sues for its recovery. *Held*, that the plaintiff can recover. *Pedlar v. Johnstone*, [1920] 2 I. R. 450.

The common law is clear that an alien friend has all the rights of a subject in respect to his personal property and that therefore such property may not be seized because of his alienage. See *Calvin's Case*, 7 Coke, 17a; *Porter v. Freudenberg*, [1915] 1 K. B. 857, 869. See also 1 BL. COMM. 372. But when an alien domiciled in a friendly country is engaged in rebellion against the government of the country in which he is located, he forfeits almost all of his right to the diplomatic protection of his own country. See *Dennison v. Mexico*, 3 Moore Arb. 2766; Proclamation of President Taylor, 3 MOORE, INT. LAW DIG. 787; Theodore S. Woolsey in (1910) PROCEEDINGS OF AM. SOC. OF INT. LAW, 99. His nation will, however, protect him from treatment contrary to civilized usage. See *Dolan v. Mexico*, 3 Moore Arb. 2767; *Nolan v. United States*, 4 Moore Arb. 3302. But as there is no such evidence of ill usage the plaintiff in the present case has forfeited his right to be treated as a citizen of the United States, and therefore cannot rely on the protection given to alien friends. The court would have been justified in refusing to recognize that he has greater rights than an alien enemy.

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — MOOT CASES IN EQUITY. — The plaintiff, a mine-owner, sued to enjoin the adjutant general and governor of North Dakota from carrying into effect a proclamation by the governor that coal mines should be operated by soldiers during a strike. The court below entered an order denying a temporary injunction, and the plaintiff appealed. By the time the case was heard on appeal, the mines had been returned to the plaintiff. *Held*, that no decision be made on the merits, but that the case be remanded with directions to vacate the order without prejudice to either party. *Dakota Coal Co. v. Fraser, Adjutant General*, 267 Fed. 130 (C. C. A.).

For a discussion of this case, see NOTES, p. 416, *supra*.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ESTABLISHMENT OF BUILDING LINES FOR AESTHETIC PURPOSES. — A state statute empowered a

town to appoint a commission for establishing building lines. (1917 CONN. SP. LAWS, p. 827.) No compensation for the abutting owner was provided. The defendants disregarded a building line so established. *Held*, that the statute is constitutional. *Town of Windsor v. Whitney*, 111 Atl. 354 (Conn.).

For a discussion of the principles involved in this case, see NOTES, p. 419, *supra*.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTE PLACING LIABILITY UPON OWNER OF AUTOMOBILE FOR INJURIES CAUSED BY NEGLIGENT OPERATION BY IMMEDIATE MEMBERS OF FAMILY. — The plaintiff sued for damages for injuries sustained through the negligent operation of defendant's automobile by his minor son. A statute provided that the owner of any automobile shall be liable for any injury caused by its negligent operation with the express or implied consent or knowledge of the owner. And that in event of its being driven at the time of the injury by an immediate member of the owner's family, his knowledge or consent shall be conclusively presumed. (1915, MICH. PUB. ACTS, No. 302, § 29.) The defendant offered evidence that the automobile was being driven without his knowledge and contrary to his express orders. The trial court excluded the evidence. *Held*, by an evenly divided court, that the statute is constitutional. *Hawkins v. Ermatinger*, 179 N. W. 249 (Mich.).

Powers to effectuate legitimate purposes of government, not delegated to the United States, reside in the states. Included is the so-called "police power," necessary to secure the health, safety, and welfare of their inhabitants. Any exercise of this power by a statute reasonably designed to accomplish its purpose, in a way not outrageous, is constitutional. For a judicial standard of reasonable appropriateness in the circumstances is really all that is required by the due process clause and similar language in state constitutions. It is clear that in Michigan, the home of the automobile industry, with one automobile in 1919 to every twelve inhabitants, adequate protection requires strict motor traffic regulation. And it is equally obvious that the statute in this case has a decided tendency to effect this result. The division of the court can only be explained by a unanimous decision in 1913 which declared unconstitutional a statute placing liability upon the owner for any injury caused by the negligent operation of his automobile, except where it had been previously stolen. *Daugherty v. Thomas*, 174 Mich. 371, 140 N. W. 615. Inasmuch as that statute was just as obviously constitutional as this one, we note with approval the rapidly improving attitude of the Michigan Supreme Court.

CONSTITUTIONAL LAW — POWER OF LEGISLATURE — CONTROL OF JUDICIAL PROCEDURE BY LEGISLATURES. — The rules of the Supreme Court of Indiana required the briefs of counsel to contain a concise statement of so much of the record as presented every error and exception relied upon. The State Legislature abolished this rule. *Held*, that the act was void. *Epstein v. State*, 128 N. E. 353 (Ind.).

For a discussion of this case, see NOTES, p. 424, *supra*.

CONSTITUTIONAL LAW — STATE AND FEDERAL JURISDICTION — POWER OF A STATE TO SUBJECT FEDERAL AGENCIES TO STATE POLICE REGULATIONS. — A Maryland statute made it a crime to operate a motor vehicle in Maryland without obtaining a license by submitting to examination as to competency to drive and by paying a fee of three dollars. An employee of the United States Post Office was convicted and fined for operating a government mail truck without having obtained such a license. *Held*, that the judgment be reversed. *Johnson v. Maryland*, U. S. Sup. Ct., October Term, 1920, No. 289.

Under the American constitutional system, the exclusive power to make ordinary police regulations rests in the individual states. *United States v. Dewitt*, 9 Wall. (U. S.) 41; *Barbier v. Connolly*, 113 U. S. 27. The licensing of operators of motor vehicles using its highways is a proper exercise of police power by a state. *Hendrick v. Maryland*, 235 U. S. 610; *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080. On the other hand the Constitution expressly gives Congress the power "to establish Post Offices and Post roads." CONSTITUTION, Art. I, § 8. And Congress has authorized the Postmaster to provide for the carrying of mail over state roads and highways. U. S. REV. STAT., § 3065; 1918 COMP. STAT., § 7458. Hence the principal case presents the problem of a conflict between state and federal authority. It has long been settled that a state cannot tax the instrumentalities of the federal government. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316. On the same principle it seems clear that a state cannot enforce against federal agencies a police regulation which in any degree impedes or clogs the functioning of the federal government. *Ohio v. Thomas*, 173 U. S. 276; *State v. Burton*, 41 R. I. 303, 103 Atl. 962. The majority of the court properly decided that the Maryland statute did impede the federal government. Cf. *Commonwealth v. Closson*, 229 Mass. 329, 118 N. E. 653.

COVENANTS OF TITLE — COVENANT OF WARRANTY — EFFECT IN PREVENTING DESTRUCTION OF CONTINGENT REMAINDER BY MERGER. — A, by deed containing a covenant of warranty, created a life estate in B, contingent remainder in fee in B's descendants who should survive him, reversion in fee in A. X purchased B's estate. Y purchased A's estate and conveyed it to X with intent to destroy the contingent remainder. X conveyed an undivided one-fifth interest to Z. In a suit for partition between X and Z, the children of B, who is still living, intervene, and claim that the contingent remainder was not destroyed. *Held*, that the remainder was not destroyed. *Biwer v. Martin*, 128 N. E. 518 (Ill.).

For a discussion of the principles involved in this case see NOTES, p. 431, *supra*.

DAMAGES — MEASURE OF DAMAGES — FOREIGN CURRENCY — DATE AT WHICH RATE OF EXCHANGE SHOULD BE APPLIED. — A contract was made for the purchase of English goods, delivery and payment to be made in Italy. At the date of the breach the rate of exchange was 31 lire to the pound. Judgment was rendered a year later, by which time the rate was 62 lire to the pound. *Held*, that damages will be computed at the rate of exchange prevailing at the time of the breach. *Di Ferdinando v. Simon, Smits & Co.*, [1920] 3 K. B. 409.

For the discussion of the principles involved in this case see NOTES, p. 422, *supra*.

DIVORCE — DEFENSES — POSSIBILITY OF CONDONATION OF DESERTION. — In October 1917, the plaintiff's husband deserted her. Later he returned and sought to resume the marital relation but she refused to do so until he proved his good intentions by behaving properly for three months, during which period she allowed him to live in her house. After a short time, the husband seriously misconducted himself, and the wife drove him from her house. He was subsequently guilty of adultery; and in November 1919, the wife sued for a divorce under a statute which required adultery and desertion for two years as a ground for divorce. (20-21 VICTORIA, c. 85, § 27.) *Held*, that the marriage be dissolved. *Moran v. Moran*, 52 D. L. R. 339.

The court departs from authority in allowing the desertion to relate back to 1917, but the result is desirable. Since divorce for desertion is allowed only after desertion has continued for the statutory period, courts say it is improper

to speak of condonation until the cause of action has accrued, as before that a return merely terminates the act. *Luper v. Luper*, 61 Ore. 418, 96 Pac. 1099; *La Flamme v. La Flamme*, 210 Mass. 156, 96 N. E. 62. Thus courts have refused to join two periods of desertion. *Burk v. Burk*, 21 W. Va. 445; *Ogilvie v. Ogilvie*, 37 Ore. 171, 61 Pac. 627. But this overlooks the fact that any absence with intent to desert constitutes a marital offense. Moreover, even if termination is the preferable nomenclature in such cases, the termination should be conditional and a breach of the condition should revive the former desertion. In ordinary marital offenses condonation is conditional on future good conduct, and breach of condition revives the former offense. *Sharp v. Sharp*, 116 Ill. 509; *Johnson v. Johnson*, 4 Paige, 460, 470. To reach a just result with the law as it is generally stated many exceptions have been made. See *Lindsay v. Lindsay*, 226 Ill. 309, 80 N. E. 876. It seems preferable to have a plain rule that the termination may be conditional rather than to multiply exceptions to the rule that only the complete offense can be condoned.

INFANTS — CONTRACTS AND CONVEYANCES — RIGHT TO AVOID CONTRACT WITHOUT RETURNING CONSIDERATION. — An infant purchased goods, not necessities, from an adult and paid part of the purchase price. Having disposed of the goods, he sues to recover the cash paid. *Held*, that the infant recover. *Carpenter v. McGuckian*, 110 Atl. 402 (R. I.).

Upon disaffirming a contract an infant must give up any of the consideration that he has in specie, for the rescission of the contract destroys his right to that property. *MacGreal v. Taylor*, 167 U. S. 688; *Gannon v. Manning*, 42 App. D. C. 206. When under a fair contract he has received benefits which cannot be returned, some cases deny him a recovery of the consideration given. *Johnson v. Northwestern etc. Insurance Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992; *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275. But the weight of authority, especially in modern cases, is that the infant may disaffirm and recover back the consideration given though he cannot return the consideration received. *Gonackey v. General etc. Corporation*, 6 Ga. App. 381, 65 S. E. 53; *Blake v. Harding*, 180 Pac. (Utah) 172; *Bombardier v. Goodrich*, 110 Atl. (Vt.) 11. This principle was correctly applied in this case. It follows necessarily from the policy of the law in protecting infants, where the infant has wasted or squandered the consideration. But where he has exchanged it for other property which he now holds, the other party should be allowed to follow his consideration into this other property. *MacGreal v. Taylor*, *supra*. The infant must not be allowed to use his shield as a sword. At the same time it must be remembered that a man may injure himself by running against a shield.

INSURANCE — DEFENSES OF INSURER — SUICIDE OF INSURED. — By the policy in the first case the insurer was not liable if the insured committed suicide within two years after date of issue. The second policy was incontestable after one year. More than two years after issuance of the first and more than one year after issuance of the second policy, the insured committed suicide. *Held*, that the companies are liable on both policies. *Northwestern Mutual Life Insurance Co. v. Johnson*, U. S. Sup. Ct., No. 70, October Term, 1920. *National Life Insurance Co. v. Miller, Adm.*, U. S. Sup. Ct., No. 71, October Term, 1920.

There has been a marked conflict of authority regarding suicide as a defense to policies not expressly excluding its risk during their duration. See 9 HARV. L. REV. 360. The *Ritter* case marked highwater in authority permitting the defense of suicide. *Ritter v. Mutual Life Insurance Co.*, 169 U. S. 139. At the same time, an incontestable clause in the policy commonly precluded the defense of suicide. *Supreme Court of Honor v. Updegraff*, 68 Kan. 474, 75 Pac. 477; *Mutual Life Insurance Co. v. Lovejoy*, 201 Ala. 337, 78 So. 299. A like

result was reached, even despite another clause excepting suicide as a risk. *Mutual Reserve Fund Life Ass'n v. Payne*, 32 S. W. 1063 (Tex. Civ. App.); *Royal Circle v. Achterrath*, 204 Ill. 549, 68 N. E. 492. It was felt that the *Ritter* case had committed the Supreme Court to a contrary view. RICHARDS, LAW OF INSURANCE, 3 ed., § 382. But that court has been by degrees approaching modern tendencies already noted. See 21 HARV. L. REV. 530. It upheld the Missouri statute excluding suicide as a defense. *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489. And in the principal cases, where suicide was neither contemplated by the applicant nor expressly excluded, it recognizes it as a risk. Also the Supreme Court now leaves the several states free to decide whether, on grounds of public policy, suicide exempts the insurer from liability. The *Ritter* case promulgated a set rule that a silent policy implied an exception for suicide. The principal cases are more consonant with the doctrine that federal courts should give effect to such views, not clearly wrong, as states adopt.

INTOXICATING LIQUORS — EIGHTEENTH AMENDMENT — INTERPRETATION OF THE VOLSTEAD ACT. — Prior to the effective date of the Volstead Act, the appellant was lessee of a room in a warehouse, and had stored intoxicating liquor therein. By a bill alleging that he was in exclusive possession and control of this liquor and that he intended it only for personal use, he sought to enjoin the warehouse company from delivering it to government agents. A motion to dismiss the bill was sustained. *Held*, that this was error. *Street v. Lincoln Safe Deposit Company*, U. S. Sup. Ct., October Term, 1920, No. 278.

The plaintiff sought to force the defendant, a collector of internal revenue, to deliver to the plaintiff for personal use in his home a barrel of whisky belonging to him and stored by him, before the effective date of the Volstead Act, in a bonded government warehouse. *Held*, that a motion to dismiss be granted. *Corneli v. Moore*, U. S. Dist. Ct. of Mo., 11 Dec. 1920.

The Volstead Act forbids possession of liquor except as authorized. See 41 STAT. AT L. 305 *et seq.*, Title II, § 3. It expressly authorizes possession in a home for use therein. See *Id.*, § 33. The Supreme Court decides that it impliedly authorizes possession for this same purpose though the liquor possessed be located outside the home. The District Court decides that even if the plaintiff's right to a permit to transport this liquor is settled by the *Street* case, yet the defendant need not deliver unless the plaintiff shows such a permit. Unfortunately the decision is also based upon provisions of the War Time Prohibition Act. See 40 STAT. AT L. 1046. Neither case answers the important question: does the Act impliedly authorize A to possess for B liquor owned by B and intended for use in his home? The courts can hardly go to this length without opening the way to many serious violations of the Volstead Act. It may adopt the view of Justice McReynolds that provisions calling for confiscation of lawfully acquired liquor are unconstitutional. See *Street v. Lincoln Safe Deposit Company*, *supra*. Considering the strong public policy declared by the Eighteenth Amendment such a result is highly improbable.

LANDLORD AND TENANT — TENANCY FROM YEAR TO YEAR — DOES OPTION TO PURCHASE CONTINUE WHEN TENANT FOR TERM HOLDS OVER. — The plaintiff a tenant for a term held over and after the expiration of his lease sought to exercise an option to purchase contained in the lease. *Held*, that he could not do so. *Bradbury v. Grumble*, 55 L. J., 296.

The principal case is decided on the theory that as an option to purchase is not a covenant regulating the relation of landlord and tenant it will not be imported into the tenancy which arises when a tenant for a term holds over. It is usually said that the terms of the former lease continue as far as they are applicable to and consistent with the new tenancy. See 2 TIFFANY, LANDLORD

AND TENANT § 210C; *King v. Wilson*, 98 Va. 259, 35 S. E. 727; *Dougal v. McCarthy*, [1893] L. R. 1 Q. B. 736. And whether a term is applicable is a question of fact for the jury. *Oakley v. Monck*, [1866] L. R. 1 Ex. 159; *Mayor of Thetford v. Tyler*, 8 Q. B. 95. In an analogous situation consistency with the tenancy from year to year is the test. Where a tenant enters under an agreement for a lease, which is never executed, and pays an annual rent, a tenancy from year to year arises. Into this tenancy the terms of the intended lease, as far as they are applicable, are imported. *Thomson v. Amey*, 12 A. & E. 476. It would seem that the test should be the same in both these situations as the tenancy from year to year is, in each case, created by operation of law. REDMAN, LANDLORD AND TENANT, 6 ed., 12. The principal case stands alone in failing to use the consistency test. The result also appears wrong; for in answer to the question of fact it would seem that an option to purchase is consistent with a tenancy from year to year. *D'Arras v. Keyser*, 26 Pa. 249.

LEGACIES AND DEVISES — ADEMPMENT — DEVISE OF RENT CHARGE: EFFECT OF TESTATOR'S PURCHASE OF THE FEE. — A will contained a devise of a rent charge. Later the testator bought in the fee, the conveyance expressly stating that there was a merger. *Held*, that there was an ademption of the rent charge. *In re Bick*, [1920] 1 Ch. 488.

Ademption occurs whenever the specific thing has ceased to belong to the testator. *In re Bridle*, 4 C. P. D. 336. And the application of this doctrine does not depend upon the intention of the testator. *May v. Sherrard*, 115 Va. 617, 79 S. E. 1026; *Stanley v. Potter*, 2 Cox 180. Although the principle is usually strictly applied, a mere change in the form of the *res* is held not to involve ademption. *In re Clifford*, [1912] 1 Ch. 29; *Spinney v. Eaton*, 111 Me. 1, 87 Atl. 378; *Clough v. Clough*, 3 Myl. & K. 296. The present case is one of a class of cases where the change, although it does not result in a surrender of the *res*, is more than formal. Thus, on purchase of the fee, a leasehold held by the purchaser merges therein and a specific legacy of such a leasehold is adeemed. *Emuss v. Smith*, 2 De G. & S. 722; *Capel v. Girdler*, 9 Ves. Jr. 509. Similarly, a bequest of a sublease is adeemed by taking an assignment of the original lease. See *Porter v. Smith*, 16 Sim. 251. In the converse case it has been held that a devise of a specific tract of land is not adeemed *in toto* by a subsequent lease. *Brady v. Brady*, 78 Md. 461, 28 Atl. 515.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — AMOUNT OF COMPENSATION: TIPS RECEIVED IN COURSE OF EMPLOYMENT. — Claimant was a truck driver, engaged in delivering meat. Without the knowledge of his employer, he assisted his employer's customers in hanging up meat after delivery, and received tips for these services. *Held*, that the tips should not be considered in fixing the amount of compensation. *Begendorf v. Swift & Co.*, 183 N. Y. Supp. 917.

Workmen's Compensation Acts provide for compensation based on the "earnings" or "wages" of the employee. See 6 EDW. 7, c. 58, sched. 1, § 2; 1913 NEW YORK LAWS, c. 816, §§ 3 (9), 14. But such "earnings" or "wages" include more than the actual money paid by the employer. That tips may be taken into account in some cases is indisputable. *Penn v. Spiers & Pond, Ltd.*, [1908] 1 K. B. 766 (waiter); *Bryant v. Pullman Co.*, 188 App. Div. 311, 177 N. Y. Supp. 488, *aff'd* 228 N. Y. 579, 127 N. E. 909 (porter); *Sloat v. Rochester Taxicab Co.*, 177 App. Div. 57, 163 N. Y. Supp. 904, *aff'd* 221 N. Y. 491, 116 N. E. 1076 (taxicab driver). *Capen v. Terminal Hotel Co.*, 1 Cal. Industr. Acc. Comm., pt. 2, 562 (bell-boy). The principal case, however, is distinguishable, and the decision seems correct. The problem is one of statutory construction, to determine under what circumstances tips are a part of "earnings" or "wages" within the meaning of the statutes. The line may properly be

drawn between cases where the expectation of receiving gratuities is, expressly or impliedly, part of the consideration for the contract of employment and the employee receives correspondingly less from the employer, and cases where the receipt of gratuities is not contemplated by the parties to the contract. See *Reynolds v. Smith*, 1 Cal. Industr. Acc. Comm., pt. 2, 35; *contra*, *Knott v. Tingle, Jacobs & Co.*, 4 Butterworth W. C. C. 55.

MUNICIPAL CORPORATIONS — DEBTS AND CONTRACTS — LIABILITY FOR SERVICES PERFORMED UNDER VOID CONTRACT. — The board of election commissioners of the defendant city contracted with the plaintiff for the purchase of one thousand voting machines. The plaintiff delivered two hundred which the board accepted and paid for. Three hundred more were then accepted. Thereupon the board was restrained in a taxpayer's suit from accepting any more machines. The plaintiff sued for the contract price. A statute provided that no contract should be made without a prior appropriation therefor (1917 ILL. REV. STAT., c. 24, § 91). No appropriation had been made. *Held*, that the plaintiff cannot recover. *Empire Voting Mach. Co. v. Chicago*, 267 Fed. 162 (C. C. A.).

Statutes like that in the principal case are generally considered mandatory. *Roberts v. Fargo*, 10 N. D. 230, 237, 86 N. W. 726, 729. It follows that contracts made in violation thereof are void. *Green v. Everett*, 179 Mass. 147, 60 N. E. 490; *Hurley v. Trenton*, 66 N. J. L. 538, 49 Atl. 518, *aff'd*, 67 N. J. L. 350, 51 Atl. 1109. But where the plaintiff has fully performed, recovery of at least the fair value of materials or services rendered is sometimes allowed. Various grounds are assigned as the basis of this recovery: estoppel, ratification, quasi-contract, general considerations of justice. See *Argenti v. San Francisco*, 16 Cal. 255, 274; *Conyers v. Kirk*, 78 Ga. 480, 3 S. E. 442; *Ward v. Forest Grove*, 20 Or. 355, 25 Pac. 1020; *Miles v. Holt County*, 86 Neb. 238, 125 N. W. 527; see 3 McQUILLAN, MUNICIPAL CORPORATIONS, § 1181. Apart from serious technical objections to all of these grounds, allowing recovery qualifies and often almost vitiates the statutory command, so it is denied by the weight of authority. *Indianapolis v. Wann*, 144 Ind. 175, 42 N. E. 901; *Gutta-Percha Manufacturing Co. v. Ogalalla*, 40 Neb. 775, 59 N. W. 513. The minority view can perhaps be explained by a failure to distinguish between mandatory and merely directory provisions. Violation of the latter is usually held to make the contract voidable only; in such a case even if the contract is avoided compensation for the executed consideration is properly granted. *Wentink v. Passaic*, 66 N. J. L. 65, 48 Atl. 609; see 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 793. The practical hardship of denying any pecuniary remedy when the contract is void is mitigated by allowing the plaintiff to regain in specie what he has given, where, as in the principal case, that is physically possible. *Chapman v. Douglas*, 107 U. S. 348; see *La France Engine Co. v. Syracuse*, 33 Misc. 516, 519, 68 N. Y. Supp. 894, 897.

* **MUNICIPAL CORPORATIONS — GOVERNMENTAL POWERS AND FUNCTIONS — RIGHT TO AUTHORIZE NUISANCES IN CITY STREETS.** — The city of Buffalo authorized the erection, by a private company, of twenty-five news-stands on the city streets. The Supreme Court issued a peremptory writ of mandamus to the city council directing an order for their removal. *Held*, that the writ be sustained. *People ex rel. Hofeller v. Buck*, 193 App. Div. 262, 184 N. Y. Supp. 210.

Any unauthorized encroachment upon a street or highway constitutes a nuisance *per se*, and may be abated, even though it does not actually operate as an obstruction to travel. *State v. Berdett*, 73 Ind. 185; *Lacey v. Oskaloosa*, 143 Ia. 704, 121 N. W. 542. See 2 ELLIOTT, ROADS AND STREETS, 3 ed., § 828. In the absence of legislative authority, a municipality has no right to authorize

the creation of a nuisance in its streets. *People v. Harris*, 203 Ill. 272, 67 N. E. 785; *Commonwealth v. Morrison*, 197 Mass. 199, 83 N. E. 415. There is some contrary authority which seems to allow the authorization of street obstructions which are public conveniences. *Wallace v. Canandaigua*, 117 N. Y. Supp. 912; *Savage v. Salem*, 23 Ore. 381, 31 Pac. 832. But these decisions are not consonant with the settled rule which requires strict construction of charters and statutes as to municipal powers. See 1 MCQUILLIN, MUNICIPAL CORPORATIONS, § 353. Sounder principles have led to the denial of the right to authorize such public conveniences as hitching posts, a band stand, a voting booth, and an electric lighting plant. *Lacey v. Oskaloosa*, *supra*; *Atterbury v. West*, 139 Mo. App. 180, 122 S. W. 1106; *Haberlil v. Boston*, 190 Mass. 358, 76 N. E. 907; *McIlhinny v. Trenton*, 148 Mich. 380, 111 N. W. 1083. On the same grounds, the right to authorize the erection of lunch, fruit, and news stands has been specifically denied. *Costello v. State*, 108 Ala. 45, 18 So. 820; *Pagames v. Chicago*, 111 Ill. App. 590. See *People ex rel. Pumpyansky v. Keating*, 168 N. Y. 390, 61 N. E. 637.

RULE AGAINST PERPETUITIES — OPTION TO PURCHASE FEE — VALIDITY IN EQUITY AND AT LAW. — A contract provided, *inter alia*, that the V. M. Co., would at any time within 25 years at the option of H or his assigns convey a certain plot of land upon the payment of a fixed sum. The assignee of H, the plaintiff corporation, chose to exercise the option, but the defendant corporation, successor to the V. M. Co., refused to convey. The plaintiff seeks alternatively specific performance in equity, or damages at law for breach of contract. *Held*, that no relief can be granted. *Eastman Marble Co. v. Vermont Marble Co.*, 128 N. E. 177 (Mass.).

The option is, by the better view, unenforceable in equity. *London & South Western R. Co. v. Gomm*, 20 Ch. D. 562; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352. *Contra*, *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442. Upon the question whether the contract is void at law so that damages cannot be recovered, the court is confessedly at variance with the only other direct authority upon the precise point. See *Working Corp. v. Heather*, [1906] 2 Ch. 532. Tending to support the English result are the decisions that the rule against perpetuities does not apply to contracts but merely to limitations upon property. *Walsh v. Sec. of State for India*, 10 H. L. C. 367. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 329-330 c. On the other hand, it is argued, as in the principal case, that there is a general policy against restraints upon alienation, of which the rule against perpetuities is merely one manifestation. And it is contended that any contract infringing this policy is entirely analogous to a contract against public morals. See 20 HARV. L. REV. 240; 51 SOL. J. R. 648; 51 *id.*, 669. The force of this argument must be conceded. Yet it is questionable whether the policy is strong enough to justify an extension of a property rule to the law of contracts. Moreover, arguments based upon a general policy are bound to interfere with the certainty in application of fixed rules, which is desirable in property law.

STATUTE OF FRAUDS — PROMISE TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER — CONSIDERATION MOVING DIRECTLY TO THE PROMISSOR. — The defendant was the owner of a house upon which the plaintiff had a lien for wages due from a contractor. The defendant orally promised the plaintiff that if the latter did not enforce the lien, he would pay the plaintiff the wages due. *Held*, that the promise was not within the Statute of Frauds. *Bova v. Scorpio*, 110 Atl. 417 (R. I.).

The principal case is one in which most courts would hold that the surrender of security to a new promisor by the creditor prevents the promise from falling within the Statute of Frauds. *Johnson v. Huffaker*, 99 Kan. 466, 162 Pac. 1150;

Landis v. Royer, 59 Pa. 95. These cases have formed the basis of a wider rule in some jurisdictions that excepts from the operation of the statute oral promises to pay the debt of another, if the new consideration is beneficial to the promisor and desired by him for some business reason. *Washington Printing Co. v. Osner*, 99 Wash. 537, 169 Pac. 988. See 1 WILLISTON, CONTRACTS, § 472. In either form, the doctrine is the result of judicial legislation. See *Davis v. Patrick*, 141 U. S. 479, 488. It has been pointed out that the question is solely whether it is intended to make the obligation primary or secondary. See *McCord v. Edward Hines Lumber Co.*, 124 Wis. 509, 513, 102 N. W. 334, 335. See 4 HARV. L. REV. 290. And with equal force, the criticism has been made that the fact of consideration goes merely to the question of whether there is a contract and not whether there is a satisfaction of the statute. See 1 WILLISTON, CONTRACTS, § 472. Whatever the criticisms, this exception to the statute is too well fixed to be dislodged. It has been well held, however, that it be strictly confined to cases where the new promisor receives a consideration that moves directly and tangibly to himself. *Richardson Press v. Albright*, 224 N. Y. 497, 121 N. E. 362; *Curtis v. Brown*, 5 Cush. 488.

TAXATION — INHERITANCE TAX — DEDUCTION OF FEDERAL TAX BEFORE COMPUTING STATE TAX. — An estate was appraised according to the Pennsylvania Transfer Tax Act which provides that "no deduction whatsoever shall be allowed for or on account of any taxes paid on such estate to the Government of the United States . . ." (1919 PA. P. L. 521.) Held, that this provision is void as imposing a tax on that which is not subject to the jurisdiction. *Smith's Estate*, 77 Leg. Intell. 776 (Pa.).

Under state statutes with no specific provision as to the deduction of other inheritance taxes New York and Wisconsin do not deduct the federal estate tax before computing the state tax. *Matter of Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19, aff'd, 222 N. Y. 540, 118 N. E. 1078; *Week's Estate*, 169 Wis. 316, 172 N. W. 732. Under similar statutes the other states allow the deduction. *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286; *State v. Probate Court*, 139 Minn. 210, 166 N. W. 125. The difference is one of statutory construction. By the majority view the state statute is said to tax only the right of the beneficiaries to receive, and so to exclude the amount of the federal tax which cannot pass to them. *Corbin v. Townsend*, 92 Conn. 501, 103 Atl. 647; *Roebbing's Estate*, 89 N. J. Eq. 163, 104 Atl. 295. This reasoning is too plausible. It equally requires the deduction of the state tax, an obviously absurd result. The real reason is to avoid the injustice and inequalities of duplicate taxation, but these do not arise under a federal statute applying throughout the country. Whatever the reasons for the different meanings given to similar statutes, all these cases do turn on the construction of an ambiguous statute. There is no intimation anywhere that a clear statutory provision either way would not be valid. The only question is one of state policy in fixing the amount of its tax; no question of jurisdiction can arise. *Blackstone v. Miller*, 188 U. S. 189. The Pennsylvania legislature attempted to fix the policy of that state by inserting a clause like that in the federal statute prohibiting deductions for other taxes. 1919 PA. P. L. 521; 40 U. S. STAT. AT L. 1096. Both taxes being on the transfer, which takes place at death, attach at the same instant. See *Knowlton v. Moore*, 178 U. S. 41, 56. The principal case, therefore, seems wholly unsupportable.

TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — CAUSING BREACH OF CONTRACT — WHEN NOT ACTIONABLE. — The plaintiff desired to attend the opening night at a theater of which defendant was manager. Knowing himself to be *persona non grata*, to whom a ticket would not be sold, he obtained one through a friend, who purchased without revealing

for whom it was intended. Defendant, acting within the scope of his authority, refused the plaintiff admission to the theater on presentation of this ticket. The plaintiff sues him in tort for maliciously procuring the theater company to break its contract with the plaintiff. *Held*, that the defendant is not liable. *Said v. Butt* [1920] 3 K. B. 497.

The doctrine that a person who intentionally causes a man to break his contract with another, whereby damage results, is liable in an action of tort, is generally established. *Lumley v. Gye*, 2 E. & B. 216; *Angle v. Chicago, etc. Ry. Co.*, 151 U. S. 1. See 31 HARV. L. REV. 1017. The principal case discusses a novel application of this doctrine to facts involving an agent as defendant. See *Said v. Butt*, *supra*, 503. There is language in cases wide enough at first blush, to permit such application. See *Quinn v. Leatham*, [1901] A. C. 495, 510; *So. Wales Miners' Fed. v. Glamorgan Coal Co.*, [1905] A. C. 239, 250. And agency is commonly no defense in a tort action. *Carragher v. Allen*, 112 Iowa, 168; *Berghoff v. McDonald*, 87 Ind. 549. But the substantial liability here is not tort. Clearly the plaintiff is attempting to turn contract into tort to get increased damages out of the possible injury to his personality. See *Woolcott v. Shubert*, 154 N. Y. Supp. 643, 169 App. Div. 194. Should we hold the defendant, acting within the scope of his authority, for the alleged tort, we should also be compelled to hold the principal for the tort of breaking his own contract. This absurd result reveals the soundness of the court's decision. See 1 MECHEM, LAW OF AGENCY, 2 ed., § 1482.

TORTS — JOINT WRONGDOERS — RELEASE OF ONE AS BAR TO ACTION AGAINST ANOTHER. — The plaintiff, an employee of a mining company, was injured in the course of his employment by an explosion caused by a defective fuse supplied by the defendant company. For a reasonable consideration he gave a release to his employer for all claims arising out of the accident. Plaintiff now sues the defendant company alleging that the accident was due solely to its negligence. Defendant sets up the release to the mining company in bar. *Held*, that the plaintiff cannot recover. *Kirkland v. Ensign-Bickford Co.*, 267 Fed. 472.

The liability of two or more persons jointly concerned in committing a tort is joint and several. *Matthews v. Delaware L. & W. R. Co.*, 56 N. J. L. 34, 27 Atl. 919; *Coleman v. Bennett*, 111 Tenn. 705, 69 S. W. 734. See 1 COOLEY, TORTS, 3 ed., 224. By the oft-stated rule the release of one such tort-feasor releases all. *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243. The idea apparently is that the release destroys the obligation itself. See 1 WILLISTON, CONTRACTS, §§ 334, 338 a. It is submitted that the true test should be whether the injured party has had reasonable satisfaction. See *Cleveland v. Bangor*, 87 Me. 259, 264, 32 Atl. 892, 894; *Wheat v. Carter*, 106 Atl. (N. H.) 602. See also 26 HARV. L. REV. 658. In situations closely analogous to that in discussion this has frequently come to be the test laid down by the courts. Thus the release of one not in fact liable is not generally a bar to action against the tort-feasor unless reasonable satisfaction has been received. *Kentucky & I. B. Co. v. Hall*, 125 Ind. 220, 25 N. E. 219; *Thomas v. Central R. Co.*, 194 Pa. St. 511, 45 Atl. 344. See *Carpenter v. W. H. McElwain Co.*, 78 N. H. 118, 122, 97 Atl. 560, 562. Similarly an unsatisfied judgment against one tort-feasor usually does not prevent the plaintiff from suing the others. *Squire v. Ordemann*, 194 N. Y. 394, 87 N. E. 435; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1. The principal case, though summarily applying the rule that a release of one joint tort-feasor must be a bar, may be justified under the suggested test of reasonable satisfaction.

TRIAL — PROVINCE OF COURT AND JURY — COERCION OF JURY. — In a criminal prosecution for doing business as a pawnbroker without a license, the

facts were not disputed and proved the guilt of the accused. After failing to agree on a verdict the jury were recalled, and charged by the court that "a failure to bring in a verdict in this case can only arise from a wilful and flagrant disregard of the evidence and the law as I have given it to you and a violation of your obligation as jurors." The court added that while it could not tell them in so many words to find the defendant guilty, what it said amounted to that. *Held*, that the conviction be affirmed. *Horning v. Dist. of Columbia*, U. S. Sup. Ct., October Term, 1920, No. 77.

It is well settled in the federal courts that the court cannot direct a verdict of guilty in a criminal trial, even though the facts are not in dispute. *United States v. Taylor*, 11 Fed. 470; *Blair v. U. S.*, 241 Fed. 217. See 2 THOMPSON, TRIALS, 2 ed., § 2149. The presiding judge may, if he chooses, comment on the evidence. *Rucker v. Wheeler*, 127 U. S. 85; *Lovejoy v. U. S.*, 128 U. S. 171. But the jury must be left free to accept or reject the opinion of the court. *Konda v. U. S.*, 166 Fed. 91; *Oppenheim v. U. S.*, 241 Fed. 625; *Allison v. U. S.*, 160 U. S. 203. The comments of the presiding judge in this case were not directed to the facts, which were not in dispute, but to the refusal of the jury to apply the law. The language was clearly coercive in its nature, and the verdict was not the free decision of the jury. *Cf. Parker v. State*, 130 Ark. 234, 197 S. W. 283. The decision of the Supreme Court, therefore, reaches the questionable result of allowing a presiding judge indirectly to compel a verdict of guilty. If the decision is justified on the ground that the prisoner was clearly guilty and the error was purely formal, it seems that a directed verdict on similar facts would likewise be merely formal error and should not be ground of reversal. *Cf. People v. Neumann*, 85 Mich. 98, 48 N. W. 290; *People v. Neal*, 143 Mich. 271, 106 N. W. 857.

WITNESSES—CORROBORATION OF WITNESSES—ACCOMPLICES—TESTIMONY OF WOMEN TRANSPORTED IN VIOLATION OF THE WHITE SLAVE TRAFFIC ACT.—The defendant aided prostitutes in procuring men and transported the party to another state. He was convicted under the White Slave Traffic Act on the testimony of three women and two men, all members of the party. (36 STAT. AT L. 825; 1916 COMP. STAT., §§ 8812-8819.) The trial judge refused charges as to accomplices' testimony. *Held*, that a new trial be granted. *Freed v. United States*, 266 Fed. 1012 (D. C.).

The unsatisfactory character of accomplice testimony has long been recognized. See 1 HALE, PLEAS OF THE CROWN, 305; *Rex v. Rudd*, 1 Cowp. 331, 336. And judges early began to discourage convictions on the uncorroborated testimony of accomplices. *Rex v. Smith*, 1 Leach, 4 ed., 479. This general principle of practice became a rule of law in many states by a statute requiring corroboration. See 3 WIGMORE, EVIDENCE, § 2056. In these states a refusal so to charge the jury is of course error. *State v. Odell*, 8 Ore. 31. But in the absence of a statute, as in the principal case, such a charge rests in the discretion of the trial judge. *Commonwealth v. Wilson*, 152 Mass. 12, 25 N. E. 16. See *Caminetti v. United States*, 242 U. S. 470, 495. *Contra, Ray v. State*, 1 G. Greene (Ia.), 316. So a refusal of the charge, even as to the men, who were clearly accomplices, was not error. *Cheatham v. State*, 67 Miss. 335, 7 So. 204. See *State v. Haney*, 2 Dev. & Bat. (N. C.) 390, 397. But even if such a refusal were error, it should not have been held prejudicial in this case. The men's testimony was adequately corroborated by that of the women. And the women's testimony required no corroboration, because they were not accomplices. *Diggs v. United States*, 220 Fed. 545; *Hays v. United States*, 231 Fed. 106. A member of that class which a statute is designed to protect is no party to the offense though actively concerned in the violation of the statute. *Queen v. Tyrrell*, [1894] 1 Q. B. 710. See *United States v. Holte*, 236 U. S. 140, 145, 147; 24 HARV. L. REV. 61. This technical principle has been ex-

tended to evade the other technicalities of self-incrimination and corroboration. See *Commonwealth v. Willard*, 22 Pick. (Mass.) 476; *Trinkle v. State*, 59 Tex. Crim. 257, 127 S. W. 1060. It should not be disregarded for the sake of giving an obviously guilty defendant a new trial.

BOOK REVIEWS

SHIPPERS AND CARRIERS OF INTERSTATE AND INTRASTATE FREIGHT. By Edgar Watkins, LL.B., of the Atlanta Bar. Atlanta, Ga.: The Harrison Company. 1920. 2 vols. pp. 1778.

These two handy, well-printed volumes present in convenient form and from the practical point of view the law of interstate shipping. They include a brief résumé of the case law of this particular phase of interstate commerce, together with a helpful discussion of the procedure before the Interstate Commerce Commission and that applicable in enforcing its orders and findings before the courts; an annotation of the acts regulating interstate commerce as amended by the Transportation Act of 1920; copies of various other federal statutes in so far as they affect interstate carriage of goods; and the conference rulings of the Interstate Commerce Commission.

A great deal of this material can be obtained at nominal expense from the government printing office, or from the commission, but there is value in its collection and correlation by an experienced practitioner in this field for the use of those traffic officials, railway counsel, and practicing lawyers who must have quickly available a survey of the whole subject.

The annotations to the acts regulating commerce cover a deal of space, being spread in the same print as the text over page after page, and appear to be simply copies of a busy lawyer's memoranda of citations, each introduced by a word or two of purported explanation, apparently without effort at generalization under common note headings.

The anti-trust acts are set forth, discussed, and annotated in a chapter entitled, "Trust and other Combinations in Restraint of Trade." The other federal statutes relating to interstate commerce seem to have been carefully selected and embodied, in whole or in part, in the form of appendices, including the Federal Control Act, Adamson Eight-Hour Law, Federal Trade Commission Act, United States Shipping Board Act, National Motor Vehicle Theft Act, and the National Prohibition Act. Unfortunately the citations of these acts in the United States Statutes at Large are not given.

The résumé of the case law of the subject is especially valuable in that it covers the Interstate Commerce Commission's decisions as well as those of the federal and, in a limited way, the state courts. Although the review of the cases seems exhaustive (the table of cases covers one hundred and seventeen pages) one, even in a hasty reading, notes the omission of an important decision here and there; for example, the case of *Arthur v. Texas and Pacific Railway*, 204 U. S. 505 (1907) relating to "Accessorial Services," and, under the discussion of the Federal Employers Liability Act, *Southern Pacific Railway v. Jensen*, 244 U. S. 205 (1917) defining the limits of said act and the meaning of the expression therein "Engaged in interstate commerce."

There is a good table of contents setting forth the subject matter of the eleven chapters in the words of the section headings, and a detailed general index.

The title of the work is somewhat misleading for, as the author states in his preface, the law relating to intrastate freight is discussed only as it bears, directly or indirectly, upon the principal subject, — interstate transportation

of goods. This is further exemplified by the designation of the chapter purporting to deal particularly with intrastate carriage: "State Regulation of Carriers Engaged in Interstate Commerce." Of course, the laws and regulations governing the two types of commerce overlap, perhaps more extensively than is generally appreciated; but even so, the coördination of intrastate freight with interstate freight in the title seems hardly justified by the content.

The author has occasionally written on his subject in the law periodicals, from which we may judge that he possesses a measure of legal perspective. For instance, he observes that a procedural point which he suggested to the commission had been adopted by it, and also points out that certain principles which he had unsuccessfully presented to his state court later prevailed in other cases in the Supreme Court of the United States. At intervals a paragraph of his text appears as written in previous editions followed by a new paragraph citing and quoting later decisions settling the law in accord with his view as expressed therein. These instances, however, are chiefly confined to points upon which the decisions were in conflict, the work as a whole containing no broad, general critique. It undertakes briefly to state the law as it is, or at most probably will be; not what it should be.

A vein of provincialism threads the book in an overaccentuation of the cases and opinions of the author's own Supreme Court of Georgia. Since of necessity there can be comparatively few references to state decisions upon a subject so peculiarly federal, it seems unfortunate that one jurisdiction, and that not one of the great commercial states, should be so emphasized.

This trait has produced, however, one very interesting although probably wholly un contemplated effect. In justification of governmental regulation of common carriers the author quotes from an opinion wherein the Georgia Supreme Court cites the Babylonian Code of Hammurabi as providing over two thousand years before Christ for government control of carriers and rates for public service. Again, in a later passage the author himself refers to this ancient authority, and adds "the same principle appears in the common law." This well-nigh unconscious flash of comparative historical jurisprudence seems strangely out of place in a practical handbook for shippers and carriers of interstate freight, yet it touches upon a fundamental juristic truth. Does it not carry to the thinking lawyer the message that the law has ever been ultimately as it is to-day, a product of the living actualities of the time and place, and as those fact situations tend to recur in successive civilizations, though thousands of years apart, so may there be a repetition of the jural postulates, springing independently from the similar *de facto* needs of the respective eras? In this connection it is of interest to note the Roman maxim — "*ex facto oritur lex.*"

The author treats with as little realization of the significance of his subject matter the principal common-law standards relating to common carriers, such as the obligations to render reasonable service, to charge reasonable rates, etc., although in general quite successfully by way of introductory paragraphs at the beginning of the chapters as the starting point for the discussion. There is no indication that he appreciates that these are legal standards of conduct, and that the general standard of reasonableness under the circumstances was the characteristic means by which the common law made itself readily adjustable to an ever-changing *de facto* situation.

This edition comes at a time of peculiar need in the field of interstate commerce, and is especially valuable, for the author has carefully reedited his work with a view to the comprehensive Transportation Act of February 28, 1920. The book is well adapted to serve the end intended, that of providing a ready reference to the law as it is upon the more common problems arising in relation to the shipping of interstate freight.

GEORGE J. THOMPSON.

THE PRINCIPLES OF EQUITY. By A. M. Wilshire. London: Sweet and Maxwell, Ltd. 1920. pp. xxvii, 584.

To writers of legal treatises the field of Equity has been an inviting one. Of the larger works the fourteenth American and third English editions of Story's treatise and the fourth edition of Pomeroy's treatise have recently appeared. There have been three editions of Strahan and Kendrick's Digest of Equity, somewhat similar in its scope and purpose to the book under review. A few months ago Clark's Equity appeared. And of course there are numberless treatises on separate heads of equity jurisdiction, particularly Trusts, Mortgages and Partnership.

The author, writing as he says primarily for students, has devoted five hundred pages of his text (summarized in a convenient epitome of seventy-four pages) to a general survey of equity jurisdiction, including the subjects of Trusts; Conversion, Election, Performance and Satisfaction; Mortgages; Separate Property of Married Women; Infants and Persons of Unsound Mind; Partnership; Assignments of *Choses in Action*, Subrogation and Contribution; Misrepresentation and Fraud; Mistake; Partition; Specific Performance; Injunctions; Receivers and Equitable Execution; Accounts; and Administration of Assets. To treat all these subjects thoroughly in five hundred pages is of course an impossible task. The author does however lay down with accuracy and precision the fundamental underlying principles and cites the leading English cases. He labors under the disadvantages which result from his confining himself to the law of England; he shows little disposition to inquire into the validity of the principles developed in the English decisions. For this reason Professor Clark's book, in spite of some inaccuracies contained in it, is, it is believed, a more useful tool to place in a student's hands.

A. W. S.

COMMENTARIES ON EQUITY JURISPRUDENCE. By Hon. Justice Storey, LL.D. Third English Edition. By A. E. Randall. London: Sweet and Maxwell, Ltd. 1920. pp. xxxvii, 673.

American lawyers in general and those interested in the Harvard Law School in particular may well take pride in the fact that almost a century after the first edition of Mr. Storey's great work it retains such value that a third English edition should be published. The law has advanced since Mr. Storey wrote his Commentaries on Equity Jurisprudence. It was to be expected that a 1920 edition would differ from the original work. So we may take all the more pride in the fact that only two chapters of the original work have been omitted and it has only been necessary to subdivide one chapter into two. The changes for the most part have been minor ones, and the excellent historical discussions and broad principles of the early work remain practically unchanged.

The present edition is preëminently one for the practitioner who wants to know what the law is rather than for the student or theorist who tries to determine what the law should be. It is frankly an English book for the use of the English lawyer. No American citations have been retained and passages where Mr. Storey spoke of points of difference between English and American law have been deleted. Where a decision or statute law has settled what was formerly a debatable point, or has altered the powers of the Chancery Court, the original discussion is omitted and the effect of the decision or of the statute is substituted. By such changes and by the elimination of many long footnotes, the book has been materially shortened, probably without seriously impairing its usefulness to the English practitioner; but the book can hardly be said to retain all the value of the original work as a discussion of the basic principles of Equity Jurisprudence.

The editor deserves much praise for having avoided the tendency of modern textbooks to become mere digests. To be sure, little of the author's own reasoning has been added, but on the other hand the reader is not given a multitude of specific cases which have little, if any, bearing on the general principles involved.

While this edition must be of great assistance to the English bar the literary form is open to severe criticism. Many English citations as well as all American citations have been omitted, often leaving a proposition unsupported by the evidence which the author evidently considered necessary. More serious, however, is the fact that there is nothing in the book to indicate deletions, insertions, or other changes from the last edition which Mr. Storey worked on, namely the fourth American edition. It would seem that this would seriously impair the value of any citations from the book since it is only by comparison with an earlier edition, very likely difficult to obtain in England, that a lawyer or a judge could tell what statements were those of the author and what statements are to be ascribed to the editor. If Mr. Randall had written a book under his own name and had acknowledged his indebtedness to Mr. Storey's book this criticism would not apply. But it is submitted that if a writer uses the name of a great jurist he should be very careful that the reader may know the sponsor for any given statement without referring to an earlier volume. Of course no one would expect the editor of a 1920 edition to subscribe to every statement made by the author, but it is submitted that a member of the bar who, by undertaking a new edition of Mr. Storey's work, admits some measure of gratitude and admiration for the author, should express his dissent in terms more respectful than those of section 1212.

CAMPBELL BOSSON.

HANDBOOK OF ADMIRALTY LAW. By Robert M. Hughes. Second Edition. St. Paul: West Publishing Company. 1920. pp. xviii, 572.

The law of Admiralty is a subject so foreign to many of our common-law conceptions, and yet involves cases often of such large importance that the noteworthy lack of adequate American treatises on the subject seems particularly unfortunate. Those interested in admiralty law must therefore note with especial satisfaction the appearance of a second edition of what is generally acknowledged as the best American textbook covering the general field of admiralty law.

The second edition maintains the same paragraphing as the first, and follows closely the original text, such additions being inserted as have been necessitated by the developments of the law since the first edition appeared. Several such changes have caused considerable alteration of the former text, particularly in regard to the law concerning the creation of maritime liens through the furnishing of supplies and repairs to domestic vessels (§§ 45-52), rights of action on the part of the crew against the vessel owner (§ 101), and the right of action arising from death injuries upon the sea (§ 114). The new text incorporates the provisions of the important Act of June 23, 1910 (pp. 99-101) which sweeps away much of the law under the *General Smith* decision,¹ the Salvage Act of 1912 (pp. 137, 425), pertinent provisions of the Seamen's Act of 1915 (p. 207), and the important death statute of March 30, 1920 (p. 240). Reference is also made to the Workmen's Compensation Act of October 6, 1917 (p. 209), since declared unconstitutional, and to the English Maritime Conventions Act of 1911 (p. 318). Unfortunately the book went to press too early to include the recent Merchant Marine Act of June 5, 1920, which in several particulars substantially alters the law of admiralty.

¹ 4 Wheat. (U. S.) 438, 4 L. Ed. 609 (1819). This Act of 1910 has since been supplanted by the Act of June 5, 1920, section 30, subsects. P-T, X.

Many new cases are added, decided since the appearance of the first edition, some of them of large importance as enunciating hitherto unsuspected doctrines of admiralty law, such as *Southern Pacific Co. v. Jensen*,² *Chelentis v. Luckenbach S. S. Co.*,³ *Union Fish Co. v. Erickson*,⁴ and (briefly mentioned in a footnote, p. 209) the recent important case of *Knickerbocker Ice Co. v. Stewart*.⁵

The Appendix contains in addition to what appeared in the first edition, the text of the Salvage Act of 1912, the Stand-By Act of 1890, the Handwriting Act of 1913, and the Act of March 9, 1920, authorizing certain admiralty suits against the United States.

F. B. S.

AN ELEMENTARY COMMENTARY ON ENGLISH LAW. (Designed for use in schools.) By His Honour Judge Ruegg, K. C., (County Court Judge of North Staffordshire and Joint-Judge of Birmingham). London: George Allen and Unwin, Ltd. 1920. pp. 194.

It is a happy event when the broad principles of an intricate and highly specialized subject are set down in plain language and straightforward style by one who, through attaining eminence in his profession, is competent to perform this task. In the sphere of law it may well be considered a public service to place a simple outline of its rules in the hands of the general reader or of children in schools, for whom primarily this book was written. The experiment of teaching law to children is one that is largely untried, but there is no reason why it should fail. It is not claimed that children could be made into lawyers, but neither is it to-day suggested that by studying physics or hygiene does a child become an engineer or competent to practice medicine. A knowledge of the legal system of one's country is necessary to every well-informed person.

The book will be found of service in giving a general idea of what law is, and might well be perused by those proposing to begin legal study; they may be helped in deciding whether they have aptitude which justifies their proceeding. The book deals at first with the nature of English Law and the Courts, their personnel and practice; the other contents include most of the larger divisions of law — Real and Personal Property, Wills and Intestacy, Contracts, Negotiable Instruments, Marriage and the Law of Persons, the Law of Master and Servant, Torts, Crime, and elementary Procedure and Evidence.

The first part of the book describing the component parts of English Law and the Courts is admirably clear and concise. The same is true of the chapters on real property, though the author's misgivings as to whether the topics discussed — such as Lease and Release before and after the Statute of Uses — may not be above the understanding of the normal school child, must be shared. Chapter VII dealing with former and present methods of land conveyance could be abbreviated into a simple statement that, since 1845, freehold land is conveyed by deed. More space might instead have been given to the treatment of contracts. Of the branches of law that are scarcely mentioned, Trusts and Bankruptcy would seem to merit brief treatment. A simple explanation of the way in which legal proceedings are begun would have been a valuable addition to the book. The place of case law in a modern system is not made clear; as it is, the impression is given that the law is a series of definite all-embracing rules.

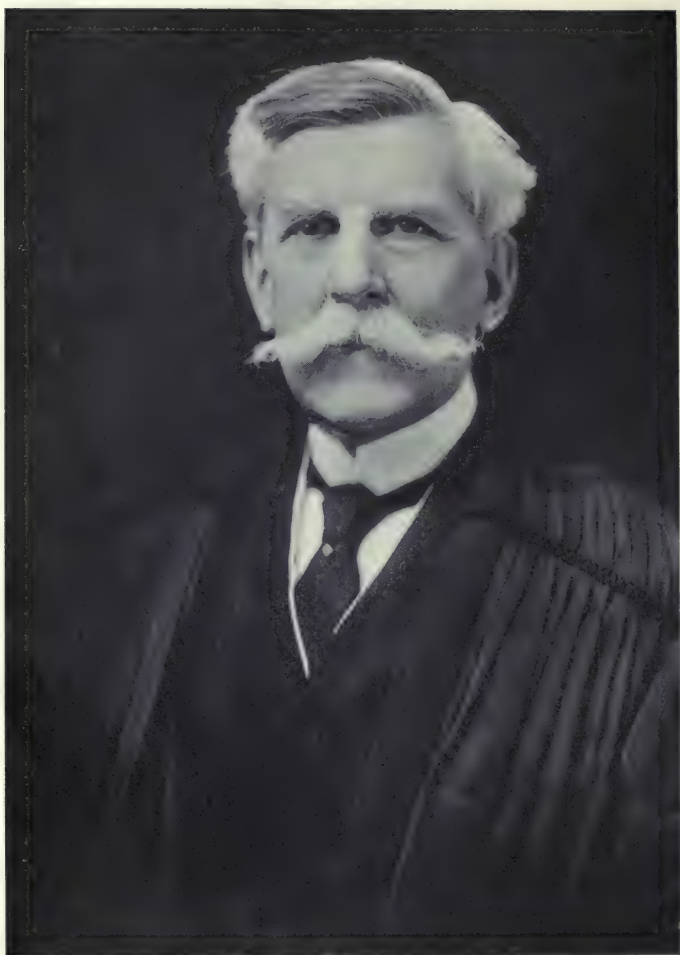
The book is of necessity full of misleading generalizations. However, for the purpose for which it was written it is sufficiently accurate and has the merits of brevity and lucidity; as a new venture it deserves only commendation.

² 244 U. S. 205; 37 Sup. Ct. 524; 61 L. Ed. 1086; L. R. A. 1918 C, 451.

³ 247 U. S. 572; 38 Sup. Ct. 501; 62 L. Ed. 1171.

⁴ 248 U. S. 308; 39 Sup. Ct. 112; 63 L. Ed. 261.

⁵ 252 U. S. —; 40 Sup. Ct. 438; 64 L. Ed. —.



MR. JUSTICE HOLMES

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JUDGE HOLMES'S CONTRIBUTIONS TO THE SCIENCE OF LAW

IN the preface to his recently published "Collected Papers,"¹ Mr. Justice Holmes reminds us that a later generation has carried on the work which he began nearly half a century ago. His ideas have so thoroughly entered into the substance of our legal thought, and the papers and addresses in which they were set forth are so buried in the periodical literature of the law that the epigoni could easily forget whose armor they were wearing and whose weapons they were wielding. The papers and addresses entitled "Agency" (1891), "Privilege, Malice and Intent" (1894), "Learning and Science" (1895), "The Path of the Law" (1897), and "Law in Science and Science in Law" (1899) for the most part are addressed directly to problems of immediate importance in the law of today, and might have been written in the second decade of the twentieth century instead of the last decade of the nineteenth. Rereading them consecutively in their new form and remembering the dates of their original publication, one can but see that their author has done more than lead American juristic thought of the present generation. Above all others he has shaped the methods and ideas that are characteristic of the present as distinguished from the immediate past.

Comparing twentieth-century science of law in America with the legal science of the last quarter of the nineteenth century, the most

¹ COLLECTED LEGAL PAPERS by Oliver Wendell Holmes, New York, Harcourt, Brace and Howe, 1920, pp. vii, 316.

significant changes are, the definite break with the historical method; the study of methods of judicial thinking and understanding of the scope and nature of legal logic; recognition of the relation between the law-finding element in judicial decision and the policies that must govern lawmaking; conscious facing of the problem of harmonizing or compromising conflicting or overlapping interests; the pulling apart and setting off of the several conceptions involved and concealed in the protean term "a right;" faith in the efficacy of effort to improve the law and make it more effective for its purposes; a functional point of view in contrast with the purely anatomical or morphological standpoint of the last century; giving up of the idea of jurisprudence as a self-sufficient science, and unification of the methods each of which formerly claimed exclusive possession of the whole field. In each of these respects the present book testifies that Mr. Justice Holmes anticipated the teachers and thinkers of today from twenty to thirty years.

Compare Carter's "Law: Its Origin, Growth and Function"² with the paper on "Agency."³ The former is written wholly from the metaphysical-historical standpoint of the seventies and eighties. It assumes that legislation is a futile attempt to make what cannot be made, that law is something which may only grow and is not to be shaped consciously. It employs an ethical-idealistic interpretation of legal history. It seeks to deduce everything from and measure everything by a metaphysically given ultimate datum of individual free self-assertion. The latter has already parted ways with the then dominant historical school and has done so after developing the best possibilities of its method.⁴ It has seen through the dogmatic fiction of representation, by which men were seeking to reconcile employer's or principal's liability with the rising juristic principle of no liability without fault, and has pointed out the policy behind the fiction and the historical process of its development.⁵ It conceives of historic continuity with the past, not as a duty, but at most as a condition of effective use of the materials with which we must work.⁶ Also in the address "The Path of the

² Published 1907, written 1904-1905.

³ pp. 49-116, published 1891.

⁴ See also the paper "Early English Equity."

⁵ See pp. 49, 50, 54, 58-59, 87, 89, 93.

⁶ See also, "Learning and Science," 139.

Law,"⁷ with the assurance of a master of historical method, the functional use of legal history is illustrated; we are shown what is behind particular legal traditions, what their course of development has been, and how we may use them intelligently for the ends of today instead of remaining slaves to them.⁸ Its author had long ago rejected the idea of a statute as a temporary excrescence on the *Corpus Juris*, to be ignored for historical purposes, which grew out of judicial reaction from the legislative reform movement of the first half of the nineteenth century.⁹

Geny's *Méthode d'interprétation*¹⁰ is commonly put as a landmark. But years before it appeared Mr. Justice Holmes had begun to study legal method, had called attention to the modes of judicial thought and had anticipated the main ideas of today.¹¹ Throughout the last century analytical and historical jurists were agreed on a complete separation between jurisprudence and the theory of legislation and professed to exclude all ideas of policy from the domain of legal thought.¹² Mr. Justice Holmes was already well aware of the relation between law-making policy and the shaping of law through judicial decision and of the actual process which goes on more or less subconsciously under the name of legal logic and finding of the law.¹³ Yet he had too firm a grasp of the problem of the legal order to go to the other extreme of advocating the putting of judicial action wholly at large, as did the "progressives" of two decades ago who would have made of precedents no more than a "flickering light" to guide the judge when uncertain what he desired to do. The proposition that a decision is only evidence of the law, that the rule existed logically or potentially theretofore and was but found, is not a purposeless fiction. It serves to maintain

⁷ pp. 167-202.

⁸ See pp. 192, 193. Cf. "Law in Science and Science in Law," 226-227.

⁹ p. 67. Compare with Carter's attitude the way in which Coke's Second Institute develops legal doctrine on the basis of the legislation of Edward I. Yet the former assumes that his is the immemorial common-law position.

¹⁰ 1 ed. 1899.

¹¹ See a statement of these by the other leader of American legal scholarship, in WIGMORE, *PROBLEMS OF LAW* (1920). Compare HOLMES, *COLLECTED PAPERS*, pp. 8, 101, 104, 180, 181.

¹² HOLLAND, *JURISPRUDENCE*, chap. 1; MAINE, *EARLY HISTORY OF INSTITUTIONS*, chap. 12; POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, 1 ed. I, xxiii.

¹³ See particularly the paper, "Privilege, Malice and Intent," pp. 117-134; also "The Path of the Law," p. 184.

the social interest in the general security by holding the judicial lawmaker to traditional premises and traditional lines and modes of development. He chooses from among competing legal analogies by a traditional technique, and the rôle of legislative policy is in determining his choice within restricted limits.¹⁴

Again, as early as 1894 Mr. Justice Holmes had given up the form of legal science that sought only to put a historical or philosophical foundation under existing doctrines,¹⁵ and instead of deductions from liberty, was thinking of harmonizing and compromising conflicting or overlapping interests and of the valuing of interests which that process presupposes.¹⁶ He had seen into the pseudo-concept of "a right" and begun the process of setting off the several conceptions involved in our use of that term long before the present ferment in analytical jurisprudence in America.¹⁷ While the fashion was to add a positivist doctrine of juristic futility to the historical doctrine of legislative futility, he had borne testimony to his faith in the efficacy of effort.¹⁸ While it was still the fashion to thrash over the barren straw of the controversy as to the nature and definition of law, he was looking at the legal order functionally.¹⁹ As early as 1895 he had given up the ideas of jurisprudence as a self-sufficient science, of law as something to be measured by itself or judged by a critique derived from itself, and of legal rules and doctrines as resting on their own basis.²⁰ That he should have urged unification of the methods of jurisprudence as early as 1897, when it was still assumed that some one true method was the one key to social and legal science, was but a corollary.²¹

If the ambiguity of the term "law" that requires us to use one word for the legal precepts which are actually recognized and applied

¹⁴ As he said elsewhere, judicial making of law is "interstitial."

¹⁵ "I am not trying to justify particular doctrines, but to analyze the general method by which the law reaches its decisions." P. 122.

¹⁶ See also pp. 231, 288.

¹⁷ "Privilege, Malice and Intent," *e. g.* pp. 120-121.

¹⁸ "The time has gone by when law is only an unconscious embodiment of the common will." P. 130. See also p. 230. Compare CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION*, 203; *CENTRALIZATION AND LAW*, 23 (1906).

¹⁹ "The Path of the Law." Compare CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION*, 131: "Statically regarded law is custom, when dynamically it is the force acting in harmony with custom and compelling obedience to it."

²⁰ "Learning and Science," *e. g.* p. 139.

²¹ "The Path of the Law," *e. g.* p. 198. Compare WARD, *PURE SOCIOLOGY*, 12-14 (1902).

in the tribunals of a given time and place and for the more general body of doctrine and tradition from which those precepts are chiefly drawn and by which we criticize them, if the longevity of scholastic logic in law after other sciences have given it up and the assumption that application of a rule of property and of a standard of conduct are one and the same process, — if these things have seemed to give the juristic charlatan an opportunity for pettifogging criticism, the author of "The Path of the Law," and of the dissenting opinion in *Lochner v. New York*,²² may await the assured verdict of time.

Roscoe Pound.

HARVARD LAW SCHOOL.

²² 198 U. S. 45, 75 (1905).

PARTICIPATION IN A BREACH OF TRUST

ANYONE who participates with a trustee in a breach of trust may be held liable in a court of equity to the *cestui que trust*. If he has received and still holds the trust property or its proceeds, he may be held as constructive trustee thereof; if he has never received or no longer holds the trust property or its proceeds, he may be held liable in equity for damages.

A purchaser of trust property is not liable merely because at the time of the purchase he knew of the existence of the trust attaching to the property. If the sale was not in fact in breach of trust, the purchaser takes the property free and clear of the trust. At common law, however, an extraordinary doctrine was widely accepted, to the effect that a purchaser of trust property is liable in equity to the *cestui que trust* for the purchase-price, although the trustee had made the sale in the proper exercise of a power of sale and although the purchaser had paid the purchase-money to the trustee, unless the money so paid was properly applied by the trustee for the purposes of the trust.¹ As Professor Ames has said,² "this highly artificial doctrine would seem to be indefensible on any principle." Why should the purchaser be responsible for a misapplication of the purchase-money by the trustee in which the purchaser did not participate and which he had no reason to anticipate? The courts have whittled away the rule by making many exceptions to it,³ and in England and in many of the states it has been abolished by statute.⁴ The effect of the rule is to ob-

¹ LEWIN, TRUSTS, 12 ed., pp. 534 *et seq.*; 2 PERRY, TRUSTS, 6 ed., §§ 790-799. The rule was applicable to mortgagees and pledgees as well as purchasers of trust property.

² AMES, CASES ON TRUSTS, 2 ed., 269 n.

³ LEWIN, TRUSTS, 12 ed., pp. 535 *et seq.*; 2 PERRY, TRUSTS, 6 ed., §§ 790-799; 19 Am. St. Rep. 281.

⁴ Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), § 23; Lord Cranworth's Act (23 & 24 Vict. c. 145), § 29 (1860); Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), § 36; Trustee Act, 1893 (56 & 57 Vict. c. 53), § 20. The last named Act provides: "The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall

struct the proper administration of trusts by making it difficult for trustees to find persons who are willing to incur the risk attending the purchase of trust property. Where the rule prevails it is almost the universal custom to insert in a trust instrument containing a power of sale a provision that purchasers shall not be bound to see to the application of the purchase-money.

Except so far as a purchaser of trust property is bound to see to the application of the purchase-money, the general rule is well settled that a third person dealing with a known trustee is not liable to the *cestui que trust*, although the trustee in fact committed a breach of trust, unless the third person knew or ought to have known that the trustee was committing or intending to commit a breach of trust. He is not chargeable with participation in a breach of trust merely because he knew or ought to have known of the existence of the trust; it must appear also that he knew or ought to have known that the trustee was committing or contemplating the commission of a breach of trust.⁵

It is easy to affix liability upon one who obtains trust property from a trustee with actual knowledge of the existence of the trust and of the fact that the trustee is committing a breach of trust. No principle in the law of trusts is more clearly settled than that a transferee of trust property who knows that the transfer is in breach of trust is liable to the *cestui que trust*.⁶ It was settled law as to uses as far back as 1465.⁷ Similarly a purchaser of trust

effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof."

A number of the American statutes are cited in 2 PERRY, TRUSTS, 6 ed., § 790. One of the most recent statutes is MASS. L. 1918, c. 68, § 2. New York Real Property Law, § 108, provides: "A person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall not be responsible for the proper application of the money, according to the trust; and any right or title derived by him from the trustee in consideration of the payments shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid."

⁵ "A stranger to the trust receiving money from the trustee which he knows to be part of the trust estate is not liable as a constructive trustee unless there are facts brought home to him which shew that to his knowledge the money is being applied in a manner which is inconsistent with the trust; or (in other words) unless it be made out that he is party either to a fraud, or to a breach of trust on the part of the trustee." *Re Blundell*, 40 Ch. D. 370, 381 (1888), per Stirling, J.

⁶ See SCOTT, CASES ON TRUSTS, c. VII.

⁷ Y. B. 5 Ed. IV., fol. 7, pl. 16; SCOTT, CASES ON TRUSTS, 688. See also Y. B. 11 Ed. IV., fol. 8 (1471), cited 3 MAITLAND, COLLECTED PAPERS, 345.

property is liable if he pays the purchase-price to the trustee with knowledge that the trustee intends to misapply the money so paid.⁸ Similarly, if a *chose* in action is held by the obligee in trust, the obligor is liable if, knowing of the trust, he accepts a release in consideration of the cancellation of a personal indebtedness of the obligee to him.⁹ So also the obligor is liable if he pays the obligee-trustee, with knowledge that the latter intends to misappropriate the money.¹⁰ *A fortiori* an obligor is precluded from setting off a personal debt of the obligee to him, if he knows that the obligee's claim against him is held in trust.¹¹

But suppose that a purchaser of trust property has no actual knowledge that the vendor is committing or contemplating the commission of a breach of trust. When and to what extent ought he make inquiry, ought he investigate, in order to ascertain whether or not the vendor is acting in breach of trust? Of course, strictly speaking, there is no "duty" to make any inquiry. But the circumstances may be such that the purchaser cannot escape liability if an inquiry or investigation would disclose the vendor's breach of trust.¹²

If one takes a conveyance as purchaser or mortgagee from a person whose name in the document of title is followed by the word "trustee" or other words indicating a fiduciary character, he

In Georgia it is expressly provided by statute that "All persons aiding and assisting trustees of any character, with a knowledge of their misconduct, in misapplying assets, are directly accountable to the persons injured." 3 PARK'S ANN. CODE, GA. (1914), § 3784.

⁸ *M'Leod v. Drummond*, 17 Ves. 152 (1810) (executor); *Tillinghast v. Champlin*, 4 R. I. 173, 209 (1856) (partner). See *Manhattan Bank v. Walker*, 130 U. S. 267, 279 (1889). Cf. *Tapley v. Tapley*, 115 Ga. 109, 41 S. E. 235 (1902) (subsequent collusion in misapplication of purchase-price held not to affect validity of sale).

⁹ SCOTT, CASES ON TRUSTS, 646 n. See notes 14, 15, 24 and 66, *infra*.

¹⁰ *Taylor v. Harris' Adm'r*, 164 Ky. 654, 176 S. W. 168 (1915) (guardian).

¹¹ AMES, CASES ON TRUSTS, 270 n; SCOTT, CASES ON TRUSTS, 647 n, 739 n. See note 65, *infra*.

¹² The English Conveyancing Act, 1882 (45 & 46 Vict. c. 39), § 3 provides that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless it is within his own (or his agent's) knowledge, or "would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made." In *Bailey v. Barnes*, [1894] 1 Ch. 25, 35, it is explained that the word "ought" does not import a duty or obligation, and that the expression "ought reasonably" means "ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances."

is chargeable with notice of the existence of a trust;¹³ and if he actually knows that the transferor is making a conveyance in payment of or as security for his individual indebtedness, the transferee is liable to the *cestui que trust*, unless upon a reasonable inquiry it would appear that the transferor was not violating his duty as trustee.¹⁴ The result is the same whenever the circumstances are such as to inform the transferee that the transferor is a fiduciary and is making the conveyance for his own personal advantage.¹⁵ It is of course possible that there was in reality no trust, or the trust may have been of such a character that the transferor was not acting improperly in making the transfer, or the beneficiary may have authorized the transfer. But the transaction is *prima facie* wrongful, and the transferee should make

¹³ By the great weight of authority such words are not treated as mere *descriptio personae* and of no effect. In the leading case of *Shaw v. Spencer*, 100 Mass. 382, 393 (1868), Foster, J., said: "The fact that it is common to issue certificates of stock in the name of one as trustee, when no trust actually exists, has no legal bearing on the decision of the present case. The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word 'trustee' alone has any significance and does amount to notice of the existence of a trust."

¹⁴ *Scott v. Tyler*, 2 Dick. 712, 724 (1788) (executor); *Hill v. Simpson*, 7 Ves. 152 (1802) (executor); *M'Leod v. Drummond*, 14 Ves. 353, 358 (1807), 17 Ves. 152, 172 (1810) (executor); *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273 (1903) (trustee); *Cohen v. Parish*, 105 Ga. 339, 31 S. E. 205 (1898) (trustee); *Hill v. Fleming*, 128 Ky. 201, 107 S. W. 764 (1908) (public officer); *Shaw v. Spencer*, 100 Mass. 382 (1868) (trustee); *Smith v. Burgess*, 133 Mass. 511 (1882) (trustee); *Galloway v. Gleason*, 61 Mo. App. 21 (1895) (trustee); *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678 (1902) (treasurer). See LEWIN, TRUSTS, 12 ed., 562; PERRY, TRUSTS, 6 ed., §§ 225, 814. See notes 24, 25 and 26, *infra*.

¹⁵ As where the property is pledged by the trustee to secure a present loan which is apparently a loan to the trustee personally. *Bank of Montreal v. Sweeny*, 12 App. Cas. 617 (1887); *Keane v. Robarts*, 4 Madd. 332, 357 (1810) (*semble*); *Duncan v. Jaudon*, 15 Wall. (U. S.) 165 (1872); *Henshaw v. State Bank*, 239 Ill. 515, 88 N. E. 214 (1909); *Clemens v. Heckscher*, 185 Pa. 476, 40 Atl. 80 (1898). Cf. *Taylor v. Harris' Adm'r*, 164 Ky. 654, 176 S. W. 168 (1915).

"If there are circumstances that would arouse the suspicion of a reasonable man, inquiry must be made until a reasonable man would be satisfied; and if inquiry be not made, the person charged cannot take advantage of his own wrong, but is held to have notice of everything that a proper inquiry would have revealed." LOWELL, TRANSFER OF STOCK, § 67.

inquiry, and is chargeable with notice of everything that upon a reasonable inquiry would appear.

But suppose that the transferee does not know that the transferor is making a conveyance for his own personal advantage, and has no more reason to think that the transfer is wrongful than that it is rightful. Is the transferee bound to make inquiry as to the authority of the transferor to make the transfer? The courts have usually answered this question in the affirmative. One who purchases or lends money on the security of property which he knows to be trust property should inquire whether the trustee is empowered to sell or mortgage it.¹⁶ If the trustee's authority is evidenced by a will or other instrument in writing of which the transferee knows, he has failed to make a reasonable inquiry if he has not examined the instrument; and he is liable if the instrument shows that the trustee was exceeding his authority in making the transfer.¹⁷ And if the instrument shows that the transfer is authorized only if, for example, one of the beneficiaries gives a written consent to the transfer, he should ascertain whether such

¹⁶ *Stroughill v. Anstey*, 1 DeG., M. & G. 635 (1852) (trustee); *Sternfels v. Watson*, 139 Fed. (C. C. Ore.) 505 (1905) (T, holding land "as trustee," makes unauthorized mortgage; subsequent purchaser bound to inquire into authority of T to mortgage); *Tuttle v. First Nat. Bank*, 187 Mass. 533, 73 N. E. 560 (1905) (pledge by trustee of stock); *Donnelly v. Alden*, 229 Mass. 109, 118 N. E. 298 (1918) (mortgage of land by executor improperly carrying on testator's business); *Snyder v. Collier*, 85 Neb. 552, 123 N. W. 1023 (1909) (trustee of land); *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98 (1878) (T, holding stock "as trustee," makes unauthorized pledge); *Suarez v. de Montigny*, 1 App. Div. 494, 37 N. Y. Supp. 503 (1896), affirmed 153 N. Y. 678, 48 N. E. 1107 (1897) (trustee of mortgage); *First National Bank v. National Broadway Bank*, 156 N. Y. 459, 51 N. E. 398 (1898) (trustee of stock); *Ludington v. Mercantile National Bank*, 102 App. Div. 251, 92 N. Y. Supp. 454 (1905) (trustee of stock); *McLeod v. Despain*, 49 Ore. 536, 90 Pac. 492, 92 Pac. 1088 (1907) (trustee); *Kenworthy v. Equitable Trust Co.*, 218 Pa. 286, 67 Atl. 469 (1907) (trustee of mortgage); *Freeman v. Bailey*, 50 S. C. 241, 27 S. E. 686 (1897) (trustee of overdue note). See note 28, *infra*.

But see *Northwestern, etc. Co. v. Atlantic Co.*, 174 Cal. 308, 163 Pac. 47 (1917) (holding the word "trustee" not enough to put the purchaser upon inquiry); *Salisbury Mills v. Townsend*, 109 Mass. 115 (1871) (holding that a purchaser of stock need not ascertain validity of previous assignments).

¹⁷ *Donnelly v. Alden*, 229 Mass. 109, 118 N. E. 298 (1918); *Suarez v. de Montigny*, 1 App. Div. 494, 37 N. Y. Supp. 503 (1896), affirmed 153 N. Y. 678, 48 N. E. 1107 (1897); *First National Bank v. National Broadway Bank*, 156 N. Y. 459, 51 N. E. 398 (1898); *Ludington v. Mercantile National Bank*, 102 App. Div. 251, 92 N. Y. Supp. 454 (1905); *Kenworthy v. Equitable Trust Co.*, 218 Pa. 286, 67 Atl. 469 (1907). See 2 PERRY, TRUSTS, 6 ed., p. 1313 n.

consent has been given.¹⁸ If there is no such instrument of which the transferee knows, he should make such inquiry as to the authority of the transferor as a reasonable man would make under the circumstances. If a reasonable inquiry shows that the transferor has apparently authority to make the sale or mortgage, and there is nothing in the nature of the transaction to indicate a breach of trust, the transferee is not bound to inquire further. He need not ascertain whether there are circumstances which may make the transfer improper, or whether the trustee is exercising a sound discretion or whether his motives in making the transfer are proper, nor need he inquire into the intended application of the proceeds.¹⁹

How far are these principles applicable to negotiable instruments? The mere fact that the name of a payee of a negotiable instrument is followed by the word "trustee" or other words indicating a fiduciary character, does not render the instrument non-negotiable.²⁰ But if the purchaser of such an instrument is bound

¹⁸ *Suarez v. de Montigny*, 1 App. Div. 494, 37 N. Y. Supp. 503 (1896) (affirmed 153 N. Y. 678, 48 N. E. 1107 (1897)).

¹⁹ See *Grafflin v. Robb*, 84 Md. 451, 35 Atl. 971 (1896); *Kirsch v. Tozier*, 143 N. Y. 390, 396, 38 N. E. 375 (1894); *Spencer v. Weber*, 163 N. Y. 493, 57 N. E. 753 (1900); *PERRY, TRUSTS*, 6 ed., §§ 225, 814; 1 *COOK, CORPORATIONS*, 7 ed., § 326; *LOWELL, TRANSFER OF STOCK*, §§ 67-79; 14 *CORP. JUR.* 785.

Since it is the duty of an executor to reduce the estate to money so far as is necessary to enable him to pay debts and pecuniary legacies, the purchaser may assume that the executor has power to sell, and need not inquire whether the sale is actually necessary for the payment of debts or otherwise, where statutes do not require a court order to authorize a sale. *Ewer v. Corbet*, 2 P. Wms. 148 (1723); *Keane v. Robarts*, 4 Madd. 332, 356 (1819); *Fletcher v. American Trust & B. Co.*, 111 Ga. 300, 36 S. E. 767 (1900); *Prall v. Tilt*, 28 N. J. Eq. 479 (1877); *Wood's Appeal*, 92 Pa. 379 (1880); *WARREN, CASES ON WILLS*, 611-626; *PERRY, TRUSTS*, 6 ed., §§ 225, 809. This is true also of guardians, where statutes do not require a court order. *Fountain v. Anderson*, 33 Ga. 372 (1862); *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150 (1823). On the other hand since a trustee is not in general empowered to sell trust property unless expressly or by implication authorized by the instrument creating the trust or, by an order of court, a purchaser should ascertain whether a power of sale is to be found in the instrument. *PERRY, TRUSTS*, 6 ed., § 814. In some jurisdictions by statute power to change investments and to make sales is conferred upon trustees in the absence of any provision by the settlor to the contrary. See *MASS. LAWS*, 1918, c. 68, § 1. See also *Trustee Act*, 1893 (56 & 57 Vict. c. 53), § 1.

²⁰ *Walter v. Kirk*, 14 Ill. 55 (1852) (administrator); *Central State Bank v. Spurlin*, 111 Iowa 187, 82 N. W. 493 (1900) (trustee); *Downer v. Read*, 17 Minn. 493 (1871) (trustee); *Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149 (1897) (trustee); *Dollar Sav. & T. Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089 (1911) (trustee). See 8 *CORP. JUR.* 174. But see *Hazeltine v. Keenan*, 54 W. Va. 600, 46 S. E. 609 (1904) (attorney).

to make an investigation as to the authority of the holder to negotiate the instrument, and to ascertain whether he has exceeded his authority, its marketability will be much impaired. It is provided in the Uniform Negotiable Instruments Law, section 56, that:

"To constitute notice of an infirmity in the instrument or defect²¹ in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Of course an indorsee of negotiable paper payable to a fiduciary is not a *bona fide* purchaser if he actually knows that the holder is acting wrongfully in negotiating it, or if he suspects that the lender is acting wrongfully and refrains from making an inquiry in order to avoid obtaining such actual knowledge. But does the mere fact that the fiduciary character of the holder appears on the face of the instrument preclude the indorsee from asserting that he is a holder in due course, if he has failed to make any inquiry as to the right of the holder to negotiate it?²²

If the name of the holder of a negotiable instrument is followed by the word "trustee" or other words indicating a fiduciary character, and it is transferred by him in payment of a private debt,²³ it is held that the purchaser is bound to make inquiry as to the propriety of the holder's conduct. The transaction is *prima facie* wrongful. This applies when the holder is designated as a trustee, executor, administrator, guardian, agent, or the like,²⁴ and also

²¹ "The title of a person who negotiates an instrument is defective within the meaning of this act . . . when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." N. I. L., § 55.

²² It is agreed that under the Negotiable Instruments Law, and according to the weight of authority at common law, a holder is not denied protection merely because he is negligent. EATON AND GILBERT, COMMERCIAL PAPER, § 75; 8 CORP. JUR. 499-507.

²³ If a trustee incurs a debt in the administration of a trust, the creditor in receiving payment out of the trust fund, as he knows, is not bound to inquire into the state of the trustee's accounts in order to ascertain whether the trustee has lost his right of indemnity. *Re Blundell*, 40 Ch. D. 370 (1888).

²⁴ *Manhattan Bank v. Walker*, 130 U. S. 267 (1888) (agent); *McBain v. Seligman*, 58 Mich. 294, 25 N. W. 197 (1885) (agent); *Payne v. First Nat. Bank*, 43 Mo. App. 377 (1891) (trustee); *Atlantic State Bank v. Savery*, 82 N. Y. 291 (1880) (partner) (*semble*); *Brovan v. Kyle*, 160 Wis. 347, 165 N. W. 382 (1917) (guardian). But see

when the instrument is payable to a corporation and is indorsed by an officer of the corporation and transferred by him in payment of his private debt.²⁵ The principle is likewise applicable when an instrument is drawn by one as fiduciary whether as trustee, executor, administrator, guardian or the like, or by a public official or corporate officer, payable to his private creditor, or by the weight of authority when payable to bearer or to himself personally and delivered in payment of his private debt.²⁶ The result is the

Fletcher v. Schaumburg, 41 Mo. 502, 506 (1867) ("Shff."); Mayer v. Bank, 86 Mo. App. 108 (1900) (curator, *semble*). See 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., §§ 271, 795 a. See note 66, *infra*.

The opposite result was reached in First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227 (1911), where the holder's name was followed by the word "attorney." Cf. Cunningham v. Bank, 13 Ida. 167, 88 Pac. 975 (1907) (attachment). But see Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609 (1904).

²⁵ Palo Alto, etc. Assn. v. First Nat. Bank, 33 Cal. App. 214, 164 Pac. 1124 (1917); Norment v. First Nat. Bank, 23 N. Mex. 198, 167 Pac. 731 (1917) (*semble*); Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585 (1908); Cheever v. Pittsburgh, etc. R. R. Co., 72 Hun (N. Y.) 380, 25 N. Y. Supp. 449 (1893); Jenkins v. Planters' & Mechanics' Bank, 34 Okl. 607, 126 Pac. 757 (1912); Pelton v. Spider Lake, etc. Co., 132 Wis. 219, 112 N. W. 29 (1907). See 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 795 c.

²⁶ Lamson v. Beard, 94 Fed. (C. C. A. 7) 30 (1899) (corporate officer); Redfield v. Wells, 31 Ida. 415, 173 Pac. 640 (1918) (partner, payable to creditor, discussion of effect of N. I. L.); Leigh v. American Brake-Beam Co., 205 Ill. 147, 68 N. E. 713 (1903) (corporate officer); Washbon v. Hixon, 87 Kan. 310, 124 Pac. 366 (1912) (treasurer of fraternal organization); Hill v. Fleming, 128 Ky. 201, 107 S. W. 764 (1908) (public officer); Newburyport v. Fidelity Ins. Co., 197 Mass. 596, 84 N. E. 111 (1908) (city treasurer); Newburyport v. Spear, 204 Mass. 146, 90 N. E. 522 (1910) (city treasurer, payable to self); Coleman v. Stocke, 159 Mo. App. 43, 139 S. W. 216 (1911) (corporate officer, payable to cash); McCullam v. Buckingham Hotel Co., 198 Mo. App. 107, 199 S. W. 417 (1917) (corporate officer, payable to creditor); McCullam v. Mermod, etc. Co., 218 S. W. (Mo. App.) 345 (1920) (corporate officer, payable to self); Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115 (1891) (agent); Rochester, etc. Ry. Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114 (1900) (corporate officer); Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141 (1903) (guardian); Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435 (1909) (executor); Lanning v. Trust Co. of America, 137 App. Div. 722, 122 N. Y. Supp. 485 (1910) (corporate officer); Surety Co. v. Nelson, 141 App. Div. 850, 126 N. Y. Supp. 453 (1910) (special guardian); Newman v. Newman, 160 App. Div. 331, 145 N. Y. Supp. 325 (1914) (corporate officer, payable to self); First Nat. Bank v. Gillette, 52 Okl. 347, 152 Pac. 1084 (1915) (corporate officer, payable to creditor); Schmitt v. Potter T. & T. Co., 61 Pa. Sup. Ct. 301 (1915) (corporate officer); Sheer v. Hall & Lyon Co., 36 R. I. 47, 88 Atl. 801 (1913) (corporate officer, payable to creditor); Clement Nat. Bank v. Connolly, 88 Vt. 55, 90 Atl. 794 (1914) (partner).

But see Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45 (1906) (corporate officer, payable to self); Goshen Nat. Bank v. State, 141 N. Y. 379, 36 N. E. 316 (1894) (cashier's draft payable to cashier's private creditor). See 8 CORP. JUR. 515, 521, 522.

same whenever the circumstances are such as to make it evident that the transaction is for the personal benefit of the fiduciary.²⁷

It is of course possible that the fiduciary is authorized to make payment to himself personally out of his principal's funds, as where the principal is indebted to him for salary, commissions, dividends, reimbursement for expenses or the like. The fiduciary may even be authorized by his principal to draw checks payable to his private creditor. *Watts v. Gordon*, 127 Tenn. 96, 153 S. W. 483 (1912). The courts almost universally hold, however, as shown by the above cases, that the transaction is *prima facie* improper and that the creditor is put upon inquiry.

The creditor is not put upon inquiry where the payee of a corporate note is a director of the corporation. *Orr v. South Amboy, etc. Co.*, 113 App. Div. 103, 98 N. Y. Supp. 1026 (1906). *Cf. Pemiscot County Bank v. Central-State Nat. Bank*, 132 Tenn. 152, 177 S. W. 74 (1915).

The mere fact that the instrument is signed by another officer as well as the fiduciary does not dispense with the necessity of making inquiry. *Newman v. Newman*, 160 App. Div. 331, 145 N. Y. Supp. 325 (1914), *supra*. But *cf. Re Troy & Cohoes Shirt Co.*, 136 Fed. (D. C., N. D., N. Y.) 420 (1905), affirmed 142 Fed. 1038 (1906).

But if one as a fiduciary draws an instrument payable to a third person who indorses to the fiduciary personally, a subsequent purchaser is not bound to make inquiry. *Cheever v. Pittsburgh, etc. R. R. Co.*, 150 N. Y. 59, 44 N. E. 701 (1896). *Cf. National City Bank v. Shelton Electric Co.*, 96 Wash. 74, 164 Pac. 933 (1917).

In *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45 (1906), it was held that where checks of a corporation signed by its treasurer payable to himself individually were indorsed by him in payment of his private debt, the indorsee was not put upon inquiry and was a *bona fide* purchaser, since it was not shown that the indorsee knew that the indorser was acting fraudulently nor that she deliberately decided to refrain from making inquiries; she either gave no thought to the matter or "may have inferred that the money so appropriated was in payment of his [the treasurer's] own salary, or otherwise was being withdrawn lawfully." This case was explained in *Johnson & Kettell Co. v. Longley Luncheon Co.*, 207 Mass. 52, 56, 92 N. E. 1035 (1910), by Loring, J., who said: "The distinction seems to be this: Where the corporation note or other negotiable instrument is payable to the creditor of the individual, the transaction which on the face of the note or other instrument is represented to have taken place is an appropriation of the corporation's money to the payment of the individual's debts and is bad unless shown to be good. Since the transaction is bad unless shown to be good and since the purchaser took with notice (given on the face of the note or other instrument), his rights depend upon the transaction's being or not being in fact what it purports on the face of the note or instrument to be, and no question of a purchase in good faith can arise. . . . But on the other hand where the note or other instrument is payable to the treasurer or to a third person and after being indorsed by

²⁷ See *Thornton v. Netherlands, etc. Co.*, 178 App. Div. 604, 165 N. Y. Supp. 682 (1917), where the treasurer of a corporation paid the defendant steamship company for a passage ticket by a check of the corporation drawn by himself as treasurer, and payable to himself. *Cf. Mayor v. Sands*, 39 Hun (N. Y.) 519 (1886). But see *Cluett v. Couture*, 140 App. Div. 830, 125 N. Y. Supp. 813 (1910), where a manager of the plaintiff firm, who had authority to indorse checks and deposit them in a bank, indorsed a check and delivered it to the defendant in payment of a hotel bill, receiving the balance in cash.

But suppose that the instrument is not used for the purpose of paying a private debt of the fiduciary. Is the indorsee or payee under an obligation to ascertain whether the indorser or drawer is committing a breach of his fiduciary obligation? To impose such an obligation seriously impairs the marketability of such instruments. It seems to deprive the indorsee or payee of the defense of purchase for value although he has no actual knowledge of the defect and does not act in bad faith. By the weight of authority nevertheless the indorsee or payee is bound to make inquiry as to the authority of the indorser or drawer to indorse or draw.²⁸ But in the absence of any circumstance in the transaction indicating a breach of trust, he is not bound to inquire further into the propriety of the transaction.²⁹

the payee in blank is used by the treasurer in paying his individual debt, the transaction which on the face of the instrument is represented to have taken place is a payment by the corporation to the treasurer (where the note or other instrument was payable to him), and a payment by the corporation to the third person and another payment by the third person to the treasurer (where the note or other instrument was payable to a third person as stated above). In each of these last two cases the transaction on its face is good unless it is proved to be bad. In that case, if the corporation proves that the application of the note or other instrument of the corporation was a wrongful one, the rights of the creditor depend upon his having acted in good faith." But see *Newman v. Newman*, 160 App. Div. 331, 145 N. Y. Supp. 325 (1914), *supra*.

In Missouri a statute (Laws 1917, 144) provides: "If any check, draft or order of any corporation, firm or copartnership shall be given in payment of the debt of any officer, agent or employee, of said corporation, firm or copartnership, the payee or other person collecting such check, draft or order shall not be liable to said corporation, firm or copartnership therefor, unless it shall be shown that such payee or other person, at the time of collecting same, had actual knowledge that said check, draft or order was issued without authority of said corporation, firm or copartnership."

²⁸ *McMasters v. Dunbar*, 2 La. Ann. 577 (1847) (tutor); *Nicholson v. Jacobs*, 2 La. Ann. 666 (1847) (syndic); *Third National Bank v. Lange*, 51 Md. 138 (1878) (trustee); *Ford v. Brown*, 114 Tenn. 467, 88 S. W. 1036 (1904) (trustee, holding that the Negotiable Instruments Law does not protect subsequent purchasers since the defect appeared on the face of the instrument); *Dollar Sav. & T. Co. v. Crawford*, 69 W. Va. 109, 70 S. E. 1089 (1911) (trustee, *semble*). See 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., §§ 271, 795 a, 795 c; PERRY, TRUSTS, 6 ed., §§ 225, 814.

In some states it is held that the payee of a negotiable instrument cannot be a holder in due course; but the better view and the weight of authority are otherwise. *Redfield v. Wells*, 31 Ida. 415, 173 Pac. 640 (1918). See BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., 162, commenting on N. I. L., § 52.

²⁹ *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217 (1861) (trustee); *Norman v. Towne*, 130 Mass. 52 (1880) (trustee); *Mason v. Bank of Commerce*, 16 Mo. App. 275 (1884) (trustee); *Weeks v. Fox*, 3 Thom. & C. (N. Y.) 354 (1874) (agent). See 1 DANIEL,

Such being the general rules as to purchasers of trust property, including those who take a security interest, the question arises whether these rules are applicable to persons who are not purchasers but who in other capacities deal with trustees in respect to the trust property.

In England it is held that a person who does not himself receive any part of the trust property and who in no way profits by a breach of trust is not liable for participation therein merely because he has in some way aided in the commission of the breach of trust, even though he knows or might have known of the breach of trust. In *Re Barney* ³⁰ a testator who had been carrying on business left his property to his widow upon trust for herself and his children, but gave no directions as to the carrying on of his business. The widow decided to carry on the business. The defendants, two of her friends, who were aware that the carrying on of the business would be a breach of trust, agreed to assist her by advice and by supervising her conduct of the business. Among other things it was agreed that they should initial all checks drawn by her as trustee, and the bank in which deposits were made by her was directed to honor such checks only as were so initialed. The defendants never had possession of any of the trust property. It was held that they were not liable for participation in the breach of trust. Similarly it has been held ³¹ that the solicitor of a trustee who had advised against a delegation of the trust was not liable for a participation in the misconduct of the trustee in making such delegation, merely because he had prepared the instruments whereby the trustee effected the delegation, although the new trustee misappropriated the trust property, since the solicitor had no knowledge of or reason to suspect a dishonest design of the old or of the new trustee in the transaction.³² On the other hand, if the defendant

NEGOTIABLE INSTRUMENTS, 6 ed., §§ 271, 795 a, 795 c; EATON AND GILBERT, COMMERCIAL PAPER, § 75; PERRY, TRUSTS, 6 ed., §§ 225, 814. See note 19, *supra*. But see Third National Bank v. Lange, 51 Md. 138 (1878) (trustee); Strong v. Straus, 40 Ohio St. 87 (1883) (guardian); Ford v. Brown, 114 Tenn. 467, 88 S. W. 1036 (1904) (trustee).

³⁰ [1892] 2 Ch. 265.

³¹ Barnes v. Addy, L. R. 9 Ch. 244 (1874).

³² See also Mara v. Browne, [1896] 1 Ch. 199; and see 28 HALSBURY, LAWS OF ENGLAND, "Trusts and Trustees," §§ 193-97. Cf. Bank v. Byrnes, 61 Kan. 459, 59 Pac. 1056 (1900).

had known of the trustee's dishonest design, he would have been liable.³³

In the United States it has been held that where the name of the holder of shares of stock or other corporate securities as registered on the books of the corporation, is followed by the word "trustee" or other words indicating a fiduciary character, and the holder transfers the securities in breach of trust, the corporation is liable for participation in the breach of trust if it registers the transfer without making inquiry as to the extent of the powers of the trustee, if such inquiry would have disclosed the breach of trust.³⁴ The effect of this doctrine, which has never prevailed in England,³⁵

³³ See *Lee v. Sankey*, L. R. 15 Eq. 204 (1872). Cf. *Safe Deposit Co. v. Cahn*, 102 Md. 530, 62 Atl. 819 (1906) (stockbrokers).

In *Hoyt v. Dollar Savings Bank*, 187 App. Div. 243, 175 N. Y. Supp. 377 (1919), it was held that where a bank lent \$17,000 and a guardian lent \$3,000 to the same person, under an agreement that the whole debt of \$20,000 was to be secured by a bond and mortgage to be held by the bank, and that the bank was to have priority in the security, the bank was not liable to the ward, although the loan by the guardian under such an agreement was in breach of trust.

In *Isham v. Post*, 71 Hun 184, 23 N. Y. Supp. 211, 1168 (1893), it was said that when a trustee sends a check to a banker signed by the sender as trustee, with instructions to lend the proceeds upon securities sufficient to assure its repayment, the banker need not inquire into the terms of the trust, and is not put on notice that the trust is of such a character that the investment should be limited to "legal investments." See also *Titcomb v. Richter*, 89 Conn. 226, 93 Atl. 526 (1919) (money deposited in name "M, trustee" with broker for speculative purposes; held broker not chargeable with notice of trust). But if a broker receives trust funds for speculation, knowing that the trustee is committing a breach of trust, he is liable. *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697 (1898).

³⁴ *Lowry v. Commercial Bank, Taney* (U. S.) 310, 335 (1848); *Geyser-Marion Gold Min. Co. v. Stark*, 106 Fed. (C. C. A. 8) 558 (1901); *Stewart v. Firemen's Ins. Co.*, 53 Md. 564 (1880); *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648 (1890); *Baltimore Trust Co. v. George's Creek, etc. Co.*, 119 Md. 21, 85 Atl. 949 (1912); *Loring v. Salisbury Mills*, 125 Mass. 138, 151 (1878) (see *Iasigi v. Chicago, etc. R. R. Co.*, 129 Mass. 46 (1880)); *Cooper v. Ill. Cent. R. R. Co.*, 38 App. Div. 22, 57 N. Y. Supp. 925 (1899); *Baker v. Atlantic, etc. R. R. Co.*, 173 N. C. 365, 92 S. E. 170 (1917) (executor); *Bayard v. Farmers' and Mechanics' Bank*, 52 Pa. 232 (1866); *Peck v. Providence Gas Co.*, 17 R. I. 275, 21 Atl. 543 (1892); *Chapman v. City Council*, 28 S. C. 373, 6 S. E. 158 (1887); *Caulkins v. Gas-Light Co.*, 85 Tenn. 683, 4 S. W. 287 (1887). See 1 COOK, CORPORATIONS, 7 ed., §§ 327, 330, 399; 1 MACHEN, CORPORATIONS, §§ 985-994; LOWELL, TRANSFER OF STOCK, §§ 149-159; CAMPBELL, LEGAL ASPECTS OF THE TRANSFER OF SECURITIES, 28-44; 14 CORP. JUR. 744; 3 MASS. L. QUART. 284. But see *Thompson v. Toland*, 48 Cal. 99 (1874) ("trustee" not notice of trust).

³⁵ *Hartga v. Bank of England*, 3 Ves. 55 (1796); *Bank of England v. Parsons*, 5 Ves. 665 (1800). See *Franklin v. Bank of England*, 9 B. & C. 156 (1820). Cf. *Simpson v. Molsons' Bank*, [1895] A. C. 270, which construes a provision in a Canadian statute

is to put upon the corporation responsibility for preventing breaches of trust. But it seems absurd to compel the transfer agent of a corporation to determine the different questions which may arise as to the powers of a trustee. The effect is seriously to obstruct the administration of trusts and to increase the expenses of administration. As Lord Loughborough said in *Hartga v. Bank of England*,³⁶ in speaking of the responsibility that such a rule would throw upon the Bank of England in registering transfers of shares in the public funds:

"The consequence would be exceedingly alarming, if in all cases, where there is a legacy in trust, the Bank is to take notice of the execution of the trust. The consequence would be that for every legacy in trust of stock there must be a bill in Chancery."³⁷

The rule has recently been changed in Massachusetts by statute.³⁸ Where the rule prevails it is not uncommon for a trustee to avoid its application by registering the stock in his own name

incorporating the defendant bank that "The bank shall not be bound to see to the execution of any trust whether express, implied or constructive to which any of the shares of the bank may be subject," and holds the bank not liable for registering a transfer without actual knowledge of a breach of trust.

The Companies (Consolidation) Act, 1908 (8 Ed. VII, c. 69) § 27, provides: "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland." See PALMER'S COMPANY LAW, 10 ed., c. XIV.

³⁶ 3 Ves. 55, 58 (1796).

³⁷ In *Re Perkins*, 24 Q. B. D. 613, 616 (1890), Lord Coleridge, C. J., said: "It seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their *cestuis que trust* in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register. It seems to me that, if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves."

³⁸ MASS. L. 1918, c. 68, § 3. This statute provides: "A company or corporation, public or private, or quasi corporation, or the managers of any trust shall not be bound to see to the execution of any trust, express, implied, or constructive, to which any of its shares, bonds, or securities are subject, or to ascertain or inquire whether the trust authorizes a transfer thereof by the holder, but the provisions of this section shall not be a protection against liability for knowingly participating in a breach of trust." See 3 MASS. L. QUART. 70, 284. See also RUSSELL, STATS. KY. (1909), § 4169; DEL. REV. CODE (1915), § 3396; 4 PURDON'S DIG. PA., 13 ed., 4850, § 7.

individually, keeping the trust off the register — an undesirable practice. It is a not uncommon practice to insert in a trust instrument a provision that no corporation shall be affected by notice that its shares, bonds, or other securities are subject to the trust or shall be bound to see to the execution of the trust or to ascertain or inquire whether any transfer thereof is authorized.

What are the liabilities of depositories of trust funds? In the course of the administration of a trust, it frequently happens that a certain amount of cash comes into the hands of the trustee. It is natural and proper that for safekeeping he should deposit the cash in a bank.³⁹ As a rule, the trust funds should be deposited in an account separate from that in which the trustee keeps his own funds, and the form of the deposit should be such as to indicate its fiduciary character; and according to the weight of authority if the bank becomes insolvent the trustee is personally liable if the trust fund was blended with the trustee's individual account;⁴⁰ and even if there was no such blending he is liable if the deposit does not on its face indicate its fiduciary character.⁴¹ But there is some authority the other way.⁴² At any rate the question of the liability of the depository bank is quite different from that of the liability of the depositor.

If a trustee in the proper performance of his duty makes a deposit in a bank in a trust account, the bank does not become a trustee of the money,⁴³ unless indeed it agrees with the trustee to

³⁹ SCOTT, CASES ON TRUSTS, 784.

⁴⁰ AMES, CASES ON TRUSTS, 484 n.

⁴¹ *Chancellor v. Chancellor*, 177 Ala. 44, 58 So. 423 (1912) (administrator); *Re Arguello*, 97 Cal. 196, 31 Pac. 937 (1893) (administrator); *McAllister v. Comm.*, 30 Pa. 536 (1858) (trustee); *Booth v. Wilkinson*, 78 Wis. 652, 47 N. W. 1128 (1891) (guardian). See AMES, CASES ON TRUSTS, 484 n; SCOTT, CASES ON TRUSTS, 787 n; Ann. Cas. 1915 C, 54.

⁴² *United States, etc. Co. v. First Nat. Bank*, 18 Cal. App. 437, 123 Pac. 352 (1912) (guardian); *Goodwin v. American Nat. Bank*, 48 Conn. 550 (1881) (executor); *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759 (1916) (executor); *Sagone v. Mackey*, 225 N. Y. 594, 122 N. E. 621 (1919) (agent). But see N. Y. Surrogate Court Act, Laws 1920, c. 928, § 231, making it a misdemeanor for an executor, administrator, guardian or testamentary trustee to deposit funds of the estate in his own name.

⁴³ *Fletcher v. Sharpe*, 108 Ind. 276, 9 N. E. 142 (1886) (administrator); *Officer v. Officer*, 120 Ia. 389, 94 N. W. 947 (1903) (executor); *Brown v. Sheldon State Bank*, 139 Ia. 83, 91, 117 N. W. 289 (1908) (public officer); *Phillips v. Bank*, 98 Kan. 383, 158 Pac. 23 (1916) (public officer); *Paul v. Draper*, 158 Mo. 197, 59 S. W. 77 (1909)

keep the money separate and distinct from the other funds of the bank. A general deposit, though it be a deposit of trust funds placed to the credit of the depositor "as trustee," creates the relationship of debtor and creditor between the depository bank and the depositor. The trustee becomes a creditor of the bank, and holds his claim against the bank in trust for the beneficiary.

If the trustee in fact has no authority to make the deposit in the bank and if the bank actually knows of the absence of authority, then indeed the bank is chargeable with participation in the breach of trust, and may be held as constructive trustee of the money.⁴⁴ But has a bank any duty to inquire as to the trustee's authority to make the deposit? The depositor may of course be acting improperly in making the deposit; on the other hand it is possible that he is acting properly. It would impose too severe a burden on the bank if it were bound to investigate the conduct of the depositor and to determine whether his conduct is proper or not. It might indeed make inquiry of the depositor, but such an inquiry would naturally be regarded by a depositor as officious and insulting, and in most cases if the depositor were in fact acting wrongfully, his answers would be false and of no avail in preventing a breach of trust.⁴⁵ And as a practical business matter it is impossible for

(guardian); *City of Sturgis v. Meade Co. Bank*, 38 S. D. 317, 161 N. W. 327 (1917) (public officer). See PERRY, TRUSTS, 6 ed., § 122; 7 CORP. JUR. 633; 5 L. R. A. (N. S.) 888; 16 L. R. A. (N. S.) 918; L. R. A. 1917 A, 683; 8 Ann. Cas. 116; 3 R. C. L. 644.

⁴⁴ *Board of Com'rs v. Strawn*, 157 Fed. (C. C. A. 6) 49 (1907) (public officer); *State v. Bruce*, 17 Ida. 1, 102 Pac. 831 (1909) (public officer); *Tesene v. Iowa State Bank*, 173 N. W. (Iowa) 918 (1919) (guardian); *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905 (1902) (public officer); *Watts v. Board of Com'rs*, 21 Okl. 231, 95 Pac. 771 (1908) (public officer). Cf. *Franklin Sav. Bank v. International Trust Co.*, 215 Mass. 231, 102 N. E. 363 (1913) (check illegally indorsed by public officer for circulation). See also *Quincy Mut. Fire Ins. Co. v. International Trust Co.*, 217 Mass. 370, 104 N. E. 845 (1914). Cf. *Ross v. London, etc. Bank*, [1919] 1 K. B. 678. See 3 R. C. L. 555.

If at the time of the deposit the bank had no notice that the depositor was acting wrongfully in making the deposit, but receives notice before the deposit is withdrawn, it is liable if it allows a withdrawal. *Frazier v. The Erie Bank*, 8 Watts & S. (Pa.) 18 (agent) (1844); *Miller v. Bank of Washington*, 176 N. C. 152, 96 S. E. 977 (1918) (agent or trustee).

⁴⁵ Where an inquiry is required, an inquiry of the trustee may be sufficient (*Grafflin v. Robb*, 84 Md. 451, 35 Atl. 971 (1896); *Mercantile National Bank v. Parsons*, 54 Minn. 56, 55 N. W. 825 (1893)); or under some circumstances it may not be sufficient.

banks to make any real investigation of the circumstances before deposits are received. In a case decided by the Supreme Court of New Hampshire, it was said:

"To charge banks with the duty of supervising the administration of trusts, when in the due course of business they receive checks and drafts payable to and properly indorsed by trustees in their trust capacity, would place an unreasonable burden upon the banks and seriously interfere with commercial transactions."⁴⁶

Accordingly by the weight of authority a bank is not liable for participation in a breach of trust merely because it receives funds which it knows to be fiduciary funds and credits them to the private account of the depositor, in accordance with his directions.⁴⁷ Thus if a trustee or other fiduciary indorses a check payable to him as trustee and deposits the same to the credit of his individual account, the bank is under no duty to make inquiry as to the propriety of the depositor's conduct.⁴⁸ So too if a trustee

Chicago Title & T. Co. v. Brugger, 196 Ill. 96, 63 N. E. 637 (1902). See *LOWELL, TRANSFER OF STOCK*, § 72.

In *Wilson v. Metropolitan El. Ry. Co.*, 120 N. Y. 145, 24 N. E. 384 (1890), it was held that if an inquiry by a purchaser would have shown apparent authority in the transferor, the purchaser is protected although he made no inquiry and the transferor in fact was committing a breach of trust. Cf. *Buckley v. Hansfield*, 72 Misc. 218, 131 N. Y. Supp. 105 (1911); *Hanover Nat. Bank v. American Dock Co.*, 75 Hun 55, 26 N. Y. Supp. 1055 (1894); *Fensterer v. Pressure Lighting Co.*, 85 Misc. 621, 149 N. Y. Supp. 49 (1914); *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585 (1908). In *Jones v. Williams*, 24 Beav. 47 (1857), however, it was held that where the purchaser is put on inquiry but makes no inquiry, he is not protected although a false answer to his inquiry by the transferor might have been made and if made would have dispensed with further inquiry. See *Allen v. Puritan Trust Co.*, 211 Mass. 409, 421, 97 N. E. 916 (1912).

⁴⁶ *Brookhouse v. Union Publishing Co.*, 73 N. H. 368, 370, 373, 62 Atl. 219 (1905), per Chase, J.

⁴⁷ In general a bank may be liable when it disobeys instructions either in receiving deposits, as where a check sent for trust account is credited to depositor's private account (*Blanton v. First Nat. Bank*, 136 Ark. 441, 206 S. W. 745 (1918); *Duckett v. Mechanics' Bank*, 86 Md. 400, 38 Atl. 983 (1897); but see *Coleman v. Bucks, etc. Bank*, [1897] 2 Ch. 243); or in honoring checks. *American Nat. Bank v. Fidelity & D. Co.*, 129 Ga. 126, 58 S. E. 867 (1907) (check of receiver paid without order of court); *U. S. Fidelity & G. Co. v. U. S. Nat. Bank*, 80 Ore. 361, 157 Pac. 155 (1916) (individual check paid out of deposit as guardian). See *British America Elevator Co. v. Bank of British North America*, [1919] A. C. 658; *Cushman v. Ill. Starch Co.*, 79 Ill. 281 (1875); *Neiman v. Beacon Trust Co.*, 170 Mass. 452, 49 N. E. 748 (1898). See *L. R. A.* 1915 C, 522.

⁴⁸ *Coleman v. Bucks, etc. Bank*, [1897] 2 Ch. 243 (trustee); *Shields v. Bank of Ire-*

draws a check upon an account in another bank standing in his name as trustee, and deposits the same to his individual credit with the defendant bank, the latter bank is not bound to inquire as to the propriety of the trustee's conduct.⁴⁹

If a bank should not be liable for receiving deposits when it has no knowledge of the misconduct of the depositor in making the deposits, *a fortiori* it should not be liable for allowing withdrawals if it has no knowledge of the misconduct of the depositor in making the withdrawals.⁵⁰ For although a bank is not bound to accept deposits, it is under an obligation to honor its depositor's checks,

land, [1901] 1 I. R. 222 (executor); *Santa Marina Co. v. Canadian Bank*, 254 Fed. (C. C. A. 9) 391 (1918), *certiorari* denied, 39 Sup. Ct. Rep. 493 (1919) (corporate officer); *United States, etc. Co. v. First Nat. Bank*, 18 Cal. App. 437, 123 Pac. 352 (1912) (guardian); *Miami County Bank v. State*, 61 Ind. App. 360, 112 N. E. 40 (1916) (administrator, *semble*); *Duckett v. Mechanics' Bank*, 86 Md. 400, 38 Atl. 983 (1897) (trustee); *Batchelder v. Central Nat. Bank*, 188 Mass. 25, 73 N. E. 1024 (1905) (trustee); *Brookhouse v. Union Publishing Co.*, 73 N. H. 368, 62 Atl. 219 (1905) (guardian); *Gate City B. & L. Ass. v. Bank*, 126 Mo. 82, 28 S. W. 633 (1894) (corporate officer); *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759 (1916) (executor); *Mills v. Nassau Bank*, 52 Misc. 243, 102 N. Y. Supp. 1119 (1906) (agent); *Safe Deposit & Trust Co. v. Bank*, 194 Pa. 334, 44 Atl. 1064 (1909) (administrator); *Life Ins. Co. v. Amer. Nat. Bank*, 6 VA. L. REG., (N. S.) 106 (1919) (corporate officer); *Mott Iron Works v. Bank*, 78 Wash. 294, 139 Pac. 36 (1914) (agent); *United States Fidelity & G. Co. v. Bank*, 77 W. Va. 665, 88 S. E. 109 (1916) (administrator). *Cf. Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617, 89 N. W. 618 (1902) (agent).

But see *contra*, *Bank v. McPherson*, 102 Miss. 852, 59 So. 934 (1912) (public officer); *United States Fidelity & G. Co. v. Bank*, 127 Tenn. 720, 157 S. W. 414 (1913) (guardian).

In a recent New York case where a number of checks payable to the order of a corporation were indorsed by its president, who had authority to indorse checks, and were deposited by him in his individual account in a bank, and subsequently he withdrew the proceeds and misappropriated them, the bank was held liable. *Wagner Trading Co. v. Battery Park Nat. Bank*, 228 N. Y. 37, 126 N. E. 347 (1920). See *Niagara Woolen Co. v. Pacific Bank*, 141 App. Div. 265, 126 N. Y. Supp. 980 (1910). See 37 BANK L. J. 277, 505.

⁴⁹ *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916 (1912) (administrator); *Allen v. Fourth Nat. Bank*, 224 Mass. 239, 112 N. E. 650 (1916) (administrator); *Kendall v. Fidelity Trust Co.*, 230 Mass. 238, 119 N. E. 861 (1918) (treasurer of business trust); *Havana Central R. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. 12 (1910) (corporate officer).

It is immaterial whether the check is payable to the depository bank or to the depositor. *Kendall v. Fidelity Trust Co.*, *supra*.

⁵⁰ If the bank has actual notice that the trustee is improperly making a withdrawal it is liable. *Lowndes v. City Nat. Bank*, 82 Conn. 8, 72 Atl. 150 (1909); *Miami County Bank v. State*, 61 Ind. App. 360, 112 N. E. 40 (1916); *Atwood-Stone Co. v. Bank*, 38 S. D. 377, 161 N. W. 539 (1917); 12 Ann. Cas. 669; Ann. Cas. 1914 B, 677; 7 CORP. JUR. 645.

and if it refuses without justification to honor his check it renders itself liable to the depositor. The fact that the depositor is a trustee and may possibly be acting wrongfully is not a sufficient justification for a refusal to honor his check. It would be unfair to the bank to put it in a position where it would be compelled to ascertain at its peril whether the depositor is committing a breach of trust. In *Gray v. Johnston*,⁵¹ in holding that the defendant bank was not liable for honoring a check drawn upon it by an executrix and payable to and deposited in the same bank to the credit of a firm of which the executrix was a member, Lord Cairns said:—

“On the one hand, it would be a most serious matter if bankers were to be allowed, on light and trifling grounds—on grounds of mere suspicion or curiosity—to refuse to honour a cheque drawn by their customer, even although that customer might happen to be an administrator or an executor. On the other hand, it would be equally of serious moment if bankers were to be allowed to shelter themselves under that title, and to say that they were at liberty to become parties or privies to a breach of trust committed with regard to trust property, and, looking to their position as bankers merely, to insist that they were entitled to pay away money which constituted a part of trust property at a time when they knew it was going to be misapplied, and for the purpose of its being so misapplied. I think, fortunately, your Lordships will find that the law on that point is clearly laid down, and may be derived without any hesitation from the authorities which have been cited in the argument at your Lordships’ bar, and I apprehend that you will agree with me when I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place, as was said by Sir *John Leach*, in the well known case of *Keane v. Roberts* (4 Madd. 357), be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privy with the breach of trust which is about to be committed.”

⁵¹ L. R. 3 H. L. 1, 11 (1868).

Accordingly a drawee bank is not liable merely because it honors a check drawn by a depositor as fiduciary and payable to a third person.⁵² Nor is it liable where it honors such a check payable to the depositor personally, either by paying cash over the counter to the depositor, or by paying a subsequent holder, or by paying another bank through which the check is collected for the depositor or for a subsequent holder,⁵³ or by crediting the depositor's individual account in the drawee bank.⁵⁴ And a bank is not liable

⁵² *Evans v. Evans & Co.*, 82 Iowa 492, 48 N. W. 929 (1891) (partner); *Young v. Trust Co.*, 134 La. 879, 64 So. 806 (1914) (liquidator of corporation); *Eyrich v. Capital State Bank*, 67 Miss. 60, 6 So. 615 (1889) (partner); *Federal Heating Co. v. Buffalo*, 182 App. Div. 128, 170 N. Y. Supp. 515 (1918) (trustee); *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, 80 S. W. 604 (1904) (trustee). See BRADY, BANK CHECKS, 167; 1 MORSE, BANKS AND BANKING, 5 ed., § 317; 3 R. C. L. 549; 7 CORP. JUR. 644; DEC. DIG., BANKS AND BANKING, § 130; 32 BANK. L. J. 397. See MO. REV. STAT., 1909, § 11929. See *Newburyport v. First Nat. Bank*, 216 Mass. 304, 103 N. E. 782 (1914) ("The defendant bank had no pecuniary interest in the payment of the note, and for that reason was not on the same footing as a purchaser of it in the matter of making inquiry").

⁵³ *Havana Central R. R. Co. v. Central Trust Co.*, 204 Fed. (C. C. A. 2) 546 (1913) (corporate officer); *Newburyport v. Spear*, 204 Mass. 146, 90 N. E. 522 (1910) (public officer); *State v. Chicago, etc. Co.*, 215 S. W. (Mo.) 20 (1919) (receiver, *semble*); *Hood v. Kensington Nat. Bank*, 230 Pa. 508, 79 Atl. 714 (1911) (guardian).

In *Havana Central R. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. 12 (1910), the treasurer of a corporation, who was authorized to draw checks on its behalf, drew checks to his own order upon an account of the corporation with the A bank and deposited them to the credit of his private account with the B bank, and after the B bank had collected them, he drew out the proceeds which he used for his own purposes. The court held that the B bank was not liable to the corporation, on the ground that though the B bank was put upon inquiry, it was not bound to look beyond the A bank, because the A bank was the agent of the corporation to determine whether the checks were properly payable. The implication that the A bank was liable was criticized in *Havana Central R. R. Co. v. Central Trust Co.*, 204 Fed. (C. C. A. 2) 546 (1913), in which the same transaction was involved and the corporation sued the A bank. The federal court held that the A bank was not the agent of the corporation, but simply its debtor, and that it was not put upon inquiry by the mere fact that the check was payable to the corporate officer who drew it, and consequently was not liable. It is submitted that the decision of the federal court is sound, and that neither bank was chargeable with notice of the treasurer's misconduct. See *L. R. A.* 1915 B, 715.

⁵⁴ *Gray v. Johnston*, L. R. 3 H. L. 1 (1868) (executrix, check credited to firm of which she was member); *Goodwin v. American Nat. Bank*, 48 Conn. 550 (1881) (executor); *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916 (1912) (administrator); *Allen v. Fourth Nat. Bank*, 224 Mass. 239, 112 N. E. 650 (1916) (administrator); *Wickenheiser v. Colonial Bank*, 168 App. Div. 329, 153 N. Y. Supp. 1035 (1915), affirmed 224 N. Y. 651, 121 N. E. 899 (1918) (executor); *Taylor v. Astor Nat. Bank*, 105 Misc. 386, 174 N. Y. Supp. 279 (1918) (trustee); *Corn Exch. Bank v. Manhattan*

when after allowing a depositor to deposit fiduciary funds in his individual account, it subsequently honors his personal checks drawn on that account.⁵⁵ The bank is not bound in any of these cases to inquire into the use the fiduciary depositor is making or intends to make of the proceeds of the checks.

Certain risks of course a bank must run even though it acts in good faith and is not in any way negligent. If a bank honors a forged check or a check with a forged indorsement, it is liable to the depositor.⁵⁶ It has not discharged its indebtedness to the depositor, for it has paid a person not authorized by him to receive payment. Similarly a bank is liable when it pays one who falsely represents himself to be the payee of a check,⁵⁷ or when the amount of the check has been raised,⁵⁸ unless indeed the depositor by his

Sav. Inst., 105 Misc. 615, 173 N. Y. Supp. 799 (1919), affirmed 188 App. Div. 922, 176 N. Y. Supp. 894 (1919) (trustee); *Town of Eastchester v. Mt. Vernon T. Co.*, 173 App. Div. 482, 139 N. Y. Supp. 289 (1916) (public officer); *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, 80 S. W. 604 (1904) (agent); *Clench v. Consolidated Bank*, 31 U. C. C. P. 169 (1880) (assignee). But see *contra*, *American Bonding Co. v. Bank*, 97 Md. 598, 55 Atl. 395 (1903) (public officer, interest credited to private account).

⁵⁵ See notes 48 and 49, *supra*.

The Georgia Banking Act, Art. 19, § 42 (GA. LAWS, 1919, 209) provides: "Whenever any agent, administrator, executor, guardian, trustee, either express or implied, or other fiduciary whether *bona fide* or *mala fide*, shall deposit any money in any bank to his credit as an individual, or as such agent, trustee, or other fiduciary, whether the name of the person or corporation for whom he is acting or purporting to act be given or not, such bank shall be authorized to pay the amount of such deposit or any part thereof, upon the check of such agent, administrator, executor, guardian, trustee, or other fiduciary, signed with the name in which such deposit was entered, without being accountable in any way to the principal, *cestui que trust*, or other person or corporation who may be entitled to or interested in the amount so deposited.

"Nothing herein contained shall prevent the person or corporation claiming the beneficial interest in or to any deposit in any bank from resorting to the courts to subject such deposit, provided such action is brought and served before such deposit is paid out, and to any action brought for this purpose both the bank and the depositor shall be necessary parties defendant." See MO. REV. STAT., 1909, § 11929; STATUTES OF CANADA, 3 & 4 Geo. V, c. 9, § 96 (1913).

There are statutes in many states providing that when a deposit is made by one person in trust for another, and no other notice of its existence and terms is given to the bank, the bank may pay the latter on the death of the former. New York Banking Law, §§ 148, 198, 249; BRADY, BANK DEPOSITS, App. B. Similarly, there are statutes governing joint deposits, *ibid.*; and deposits made by minors or married women.

⁵⁶ *Szwento Juozupo Let Draugystes v. Manh. Sav. Inst.*, 178 App. Div. 57, 164 N. Y. Supp. 498 (1917); 7 CORP. JUR. 683, 686.

⁵⁷ 7 CORP. JUR. 677.

⁵⁸ 7 CORP. JUR. 684.

negligence made possible the alteration.⁵⁹ So also a bank is liable when it holds on deposit funds of a corporation and honors a check drawn upon it in the name of the corporation by an officer who was not empowered to draw checks,⁶⁰ or when it honors a check payable to a corporation and indorsed by an officer who had no power to indorse on behalf of the corporation.⁶¹ So also a bank is liable when it honors a check drawn upon his principal's account by an agent acting outside the scope of his employment,⁶² or a check payable to the principal and indorsed by an agent not empowered to indorse.⁶³ A distinction must be made between want of power and abuse of authority. If the corporate officer or the agent was empowered to draw or indorse checks on behalf of the corporation or principal, the bank will not be liable although the officer or agent was abusing his authority in drawing or indorsing checks, unless it knew or ought to have known of the abuse of authority. Similarly in the case of trusts if there are several trustees and the bank honors a check drawn or indorsed by only a part of the trustees it will be liable, since one trustee has no power to bind his co-trustees,⁶⁴ although it will not be liable if all the trustees sign or indorse a check unless it knows or ought to know that they are in fact acting wrongfully.

If the bank is a creditor of the depositor individually, as in the case where he is liable on a note held by the bank or where he has overdrawn his individual account with the bank, it cannot set off

⁵⁹ 7 CORP. JUR. 684.

⁶⁰ 2 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 1616; 7 CORP. JUR. 676. See *Havana Cent. R. Co. v. Central Trust Co.*, 204 Fed. (C. C. A. 2) 546, 550 (1913).

⁶¹ *Buena Vista Oil Co. v. Park Bank*, 39 Cal. App. 710, 180 Pac. 12 (1919); *Walker v. State Trust Co.*, 40 App. Div. 55, 57 N. Y. Supp. 525 (1899); *Moch Co. v. Security Bank*, 176 App. Div. 842, 163 N. Y. Supp. 277 (1917), affirmed 225 N. Y. 723, 122 N. E. 879 (1919).

⁶² *Merchants' Nat. Bank v. Nichols & Co.*, 223 Ill. 41, 79 N. E. 38 (1906). See *Sims v. United States Trust Co.*, 103 N. Y. 472, 9 N. E. 605 (1886); 1 MORSE, BANKS AND BANKING, 5 ed., § 314. But if the account is in the name of the depositor as agent, the bank may safely honor checks drawn by him as agent. *Pennsylvania T. & T. Co. v. Meyer*, 201 Pa. 299, 50 Atl. 998 (1902). Cf. *Holden v. Bank*, 77 N. H. 535 (deposit by executor who had not qualified). See *Tassel v. Cooper*, 9 C. B. 509 (1850).

⁶³ *Schaap v. State Bank*, 137 Ark. 251, 208 S. W. 309 (1918); *Hope, etc. Co. v. Bank*, 101 Kan. 726, 168 Pac. 870 (1917); *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404 (1881).

⁶⁴ *Barroll v. Forman*, 88 Md. 188, 40 Atl. 883 (1898). Cf. *Lee v. Sankey*, L. R. 15 Eq. 204 (1872) (payment by solicitor to one of two trustees). See 2 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 1615; 7 CORP. JUR. 677.

a deposit standing in his name as trustee or otherwise in such form as to indicate the fiduciary character of the deposit.⁶⁵ In the United States it is held that it is not proper for the bank to accept in payment of an individual indebtedness of the depositor a check payable to the depositor as fiduciary and indorsed by him, or a check drawn by him upon his account as fiduciary in the same bank or in another bank.⁶⁶ It is held that the bank has notice under such circumstances that the payment is presumptively wrongful. The same result has been reached where a deposit of fiduciary funds is made in the fiduciary's personal account, and the depositor subsequently pays a personal debt to the bank by a check drawn on that account; for it is held that although the bank is not chargeable with notice that the deposit is in breach of trust, it is chargeable with notice that a trust attaches to the personal account to the extent of the fiduciary funds therein deposited; and the bank is liable to the extent that such funds are withdrawn in paying the depositor's debt to the bank.⁶⁷ The effect of these

⁶⁵ *Ex parte Kingston*, L. R. 6 Ch. 632 (1871) (public officer); *National Bank v. Insurance Co.*, 104 U. S. 54 (1881) (agent); *Keeney v. Bank of Italy*, 33 Cal. App. 515, 165 Pac. 735 (1917) (trustee); *First Nat. Bank v. Banking Co.*, 108 Me. 79, 79 Atl. 4 (1911) (agent); *Edwards v. MacArtney*, 183 N. Y. Supp. 851 (1920) (trustee). See 1 MORSE, BANKS AND BANKING, 5 ed., § 326; 7 CORP. JUR. 658, 660; DEC. DIG., BANKS AND BANKING, § 134(7). See note 11, *supra*.

⁶⁶ *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411 (1890) (factor); *United States Fidelity & G. Co. v. Union Bank*, 228 Fed. (C. C. A. 6) 448 (1913) (public officer); *Washbon v. Bank*, 87 Kan. 698, 125 Pac. 17 (1912) (treasurer of fraternal organization); *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916 (1912) (administrator); *State Bank of St. Johns v. McCabe*, 135 Mich. 479, 98 N. W. 20 (1904) (trustee); *Hale v. Windsor Sav. Bank*, 90 Vt. 487, 98 Atl. 993 (1916) (executor); *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585 (1908) (corporate officer); *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759 (1916) (executor); *Fidelity & D. Co. v. Rankin*, 33 Okl. 7, 124 Pac. 71 (1912) (public officer); *Brovan v. Kyle*, 166 Wis. 347, 165 N. W. 382 (1917) (guardian). See 1 MORSE, BANKS AND BANKING, 5 ed., § 317; DEC. DIG., BANKS AND BANKING, § 130.

As to the validity of loans on the security of savings bank trust deposits, in view of the decision in *Re Totten*, 179 N. Y. 112, 71 N. E. 748 (1904), see *Corn Exch. Bank v. Manhattan Sav. Inst.*, 105 Misc. 615, 173 N. Y. Supp. 799 (1919); 37 BANK. L. J. 753.

⁶⁷ *United States Fidelity & G. Co. v. Union Bank*, 228 Fed. (C. C. A. 6) 448 (1913) (public officer); *First Nat. Bank v. Greene*, 114 S. W. (Ky.) 322 (1908) (guardian); *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916 (1912) (administrator); *Bischoff v. Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759 (1916) (executor). But see *United States Fidelity & G. Co. v. Bank*, 77 W. Va. 665, 670, 88 S. E. 109 (1918) ("For aught a bank would know a check though payable to its depositor in some

decisions is to put upon the bank the burden of ascertaining how far the account is made up of fiduciary funds deposited therein and not subsequently withdrawn. In England however the courts have taken a somewhat different view in these cases. Even though a depositor in a bank who has overdrawn his private account deposits in that account a check drawn by him as fiduciary the bank is not necessarily liable; the bank, if it has no actual knowledge that the depositor is committing a breach of trust, is liable only if a personal benefit to the bank "is designed or stipulated for," as Lord Cairns said in *Gray v. Johnston*. The benefit to the bank is merely a circumstance tending to prove that the bank knew of or was "privity to" the breach of trust, that is to say, was guilty of bad faith. When therefore an overdraft is amply secured and the bank is not pressing for payment, it is not held to participate in the breach of trust, merely because it receives payment by a check drawn or indorsed by the depositor as fiduciary.⁶⁸

In certain cases, particularly in New York, the courts have gone very far in holding a depository bank chargeable with constructive notice of the depositor's misconduct.

In *Wagner Trading Company v. Battery Park National Bank*,⁶⁹

representative or fiduciary character, the money would belong absolutely to him, and represent money already paid out by him in discharge of his fiduciary liability"). Cf. *Bank of New South Wales v. Goulburn, etc. Co.*, [1902] A. C. 543 (corporate officer).

⁶⁸ See *Gray v. Johnston*, L. R. 3 H. L. 1 (1868) (executor); *London Joint Stock Bank v. Simmons*, [1892] A. C. 201 (stockbroker); *Thomson v. Clydesdale Bank*, [1893] A. C. 282 (stockbroker); *Bank of New South Wales v. Goulburn, etc. Co.*, [1902] A. C. 543 (corporate officer); *Backhouse v. Charlton*, 8 Ch. D. 444 (1878) (partner); *Marten v. Rocke, Eyton & Co.*, 53 L. T. (N. S.) 946 (1885) (auctioneer); *Greenwood Teale v. Brown & Co.*, 11 T. L. R. 56 (1894) (solicitor); *Coleman v. Bucks & Oxon Union Bank*, [1897] 2 Ch. 243 (trustee); *Shields v. Bank of Ireland*, [1901] 1 I. R. 222 (executor).

The bank was held liable on the ground that it was privity to the breach of trust in *British America Elevator Co. v. Bank*, [1919] A. C. 658 (agent); *Pannell v. Hurley*, 2 Coll. C. C. 241 (1845) (trustee); *Bodenham v. Hoskyns*, 2 DeG. M. & G. 903 (agent); *Ex parte Adair*, 24 L. T. (N. S.) 198 (1871) (public officer); *Foxton v. Manchester, etc. Banking Co.*, 44 L. T. (N. S.) 406 (1881) (trustee); *Re Wall*, 1 T. L. R. 522 (1885) (trustee).

⁶⁹ 228 N. Y. 37, 126 N. E. 347 (1920). See *Niagara Woolen Co. v. Pacific Bank*, 141 App. Div. 265, 126 N. Y. Supp. 980 (1910). See note 48, *supra*. Cf. *Havana Central R. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. 12 (1910), note 53, *supra*. It is uncertain to what classes of fiduciaries the holding of the principal case extends. The opposite result was reached in the case of executors. See *Bischoff v. Yorkville Bank*, hereinafter discussed. But query under the statute

it appeared that a number of checks payable to the order of a corporation were indorsed by its president, who had authority to indorse checks on its behalf, and were deposited by him in his individual account in the defendant bank. Subsequently he withdrew and misappropriated the proceeds of the checks. The bank was held liable, because "the nature of this transaction was such as to warn defendant that the checks were being diverted from usual business channels."

In *Bischoff v. Yorkville Bank*,⁷⁰ one Poggenburg, an executor, deposited money of the estate in the Bowery Bank in New York in the name of "Estate of Josephine F. Schneider by H. F. W. Poggenburg, executor." He, as an individual, had at that time a deposit account with the defendant Yorkville Bank. From time to time he drew checks upon the Bowery Bank signed by him as executor and payable to the defendant bank, and sent these checks to the defendant bank, the proceeds to be placed to the credit of his individual account with that bank. Additional sums from sources other than the estate were deposited by Poggenburg with the defendant bank from time to time. An individual note of Poggenburg held by the defendant bank was paid by him by a check upon his individual account with that bank in which the amount standing to his credit at that time was less than the proceeds of the checks drawn upon his account as executor in the Bowery Bank. Other individual notes of Poggenburg held by the defendant bank maturing from time to time were paid by him from his individual account with that bank. Eventually Poggenburg withdrew all the funds deposited to his credit with the defendant bank (except a small balance) and used the proceeds for his private purposes. The defendant at no time made any inquiry as to the source of the deposits or the purpose of the withdrawals. The Supreme Court held that the defendant bank was liable to the estate for the proceeds of all the checks drawn by Poggenburg as executor and deposited with the defendant bank and subsequently withdrawn by him. The Appellate Division affirmed the decision of the Supreme Court, but one of the Justices, dissenting, declared

making it a misdemeanor for executors to make deposits of funds of the estate in his own name. See note 42, *supra*. Query also as to trustees. See 37 BANK. L. J. 505.

⁷⁰ 218 N. Y. 106, 112 N. E. 759 (1916). See *Pratt v. Commercial Trust Co.*, 105 Misc. 324, 174 N. Y. Supp. 88 (1918), affirmed 188 App. Div. 881, 175 N. Y. Supp. 918 (1919).

that the recovery should be limited to the amount paid to the defendant bank on the notes.⁷¹ The Court of Appeals took a third and intermediate view, holding that the defendant bank was liable for the amount of the notes, and also for all amounts withdrawn from the defendant bank by Poggenburg after the time of the payment of the first note, but not for the amounts withdrawn before the payment of that note. The court said:

"In the present case Poggenburg paid to the defendant, as his creditor, on June 3, 1908, the sum of \$765 from his account with the defendant. The finding of the trial court, supported by the evidence, is that the account at that time was constituted wholly from the trust funds. At that time and through the transaction the defendant knew that Poggenburg had appropriated \$765 of those funds for his private benefit. The presumption that he would not thus violate his duty and lawful right — that he would apply the moneys to their proper purposes under the will then ceased to exist. There was absolute proof in the possession of the defendant to the contrary. The defendant had no longer the right to assume that in paying the checks of Poggenburg it was paying the executor's moneys to the executor and not to Poggenburg, the individual, or that Poggenburg would use the moneys lawfully. It had knowledge of such facts as would reasonably cause it to think and believe that Poggenburg was using the moneys of the executor for his individual advantage and purposes. Those facts indicated that the payment to it was not an isolated incident; they indicated, rather, that it was within a method or system. Having such knowledge, it was under the duty to make reasonable inquiry and endeavor to prevent a diversion. Having such knowledge, it was charged by the law to take the reasonable steps or action essential to keep it from paying to Poggenburg as his own the moneys which were not his and were the executor's, and was bound by the information which it could have obtained if an inquiry on its part had been pushed until the truth had been ascertained. It did nothing of that sort, and by supinely paying, under the facts here, as found, the subsequent checks of Poggenburg, it became privy to the misapplication. It must now pay the plaintiffs the moneys of the estate which it had and received on and after June 3, 1908."

The holding that the defendant bank was not liable for the amounts withdrawn by Poggenburg before payment of the first note, is, as has been shown,⁷² in accord with the great weight of

⁷¹ 170 App. Div. 679, 156 N. Y. Supp. 563 (1915).

⁷² See note 49, *supra*.

authority. The holding that the defendant bank was liable for the amounts paid to it in discharging Poggenburg's individual indebtedness to it on the notes, is, as has been shown,⁷³ in accord with the authorities, although of questionable soundness. But the decision so far as it held the defendant bank liable for the amounts withdrawn by Poggenburg after the payment of the first note and not used in paying other notes held by the defendant, goes much further than any prior decisions. In a similar case in Massachusetts, *Allen v. Puritan Trust Company*,⁷⁴ it was held that the bank's liability was limited to the amount of the checks used in discharging the depositor's individual indebtedness to the bank.⁷⁵ It is submitted that the [Massachusetts decision is preferable to the New York decision. To hold that a bank as a creditor must not accept payment from its debtor out of funds which it knows were received by the debtor as a fiduciary without inquiring whether such funds had ceased to be fiduciary funds may be proper. But to hold that a bank as depository is chargeable with notice of all facts which such inquiry would elicit, and is liable for all subsequent misappropriations by the fiduciary, would seem to extend the doctrine of constructive notice too far and impose a burdensome responsibility upon the bank.⁷⁶

In *Fidelity and Deposit Company v. Queens County Trust Company*,⁷⁷ the New York Court of Appeals again went far in holding a depository bank chargeable with constructive notice. In that case one Peebles, a trustee in bankruptcy of one Bailey, opened an account in the defendant bank in the name of "Robert J. Peebles, Trustee," and deposited therein funds of the estate. He made withdrawals from time to time by checks, some of which were countersigned by the clerk of the Federal District Court and con-

⁷³ See note 67, *supra*.

⁷⁴ 211 Mass. 409, 97 N. E. 916 (1912). See L. R. A. 1915 C, 518.

⁷⁵ It is to be noticed that although the checks were for a greater sum than the amount of the overdrafts, the bank was held liable for the full amount of the checks used in paying the overdrafts, and not merely for the amount of the overdrafts.

⁷⁶ "And farther than that, I take leave to doubt very much whether the mere fact that some breach of trust . . . had in time past been committed by their customer would, alone, have entitled the bankers, or justified them, in refusing to honour the cheque of their customer, unless it could be shewn that they knew, as regards that particular cheque, that it also was to go in the same line of misapplication." *Gray v. Johnston*, L. R. 3 H. L. 1, 12, 13 (1868), per Cairns, L. C.

⁷⁷ 226 N. Y. 225, 123 N. E. 864 (1919).

tained in the margin the words "*In re Wm. Trist Bailey*"; others were not so countersigned or marked. Most of the latter checks were deposited to the individual credit of Peebles with the defendant, and the proceeds were subsequently drawn out and used by Peebles for his own purposes. A general order in bankruptcy of the United States Supreme Court provides that no moneys of a bankrupt estate shall be drawn from a depository unless by check countersigned by a judge or referee or clerk of the court; and that a copy of the general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign such check. No copy of the order or name of any referee or clerk authorized to countersign checks was furnished to the defendant, and it had no actual notice that the depositor was a trustee in bankruptcy. The court reached the conclusion, "with hesitation however," that the defendant was liable. The court was of the opinion that the bank was chargeable with notice of the bankruptcy of Bailey, for the adjudication was a judgment *in rem*; that it was chargeable with notice of the Bankruptcy Act and of the general order; that it was chargeable with notice that the deposit was of funds of the bankrupt estate, since some of the checks were countersigned by a clerk of the court and contained the words "*In re Wm. Trist Bailey*." ⁷⁸ "A simple inquiry, by the bank of the trustee, for the reason of the countersignature, would have revealed the existence of the general order and of its provisions." The decision, it is submitted, carries the doctrine of constructive notice to an unreasonable extent.

It is easy to sit down at leisure after the event and to see how a cautious and inquiring banker might have discovered the depositor's misconduct. It would not require the acumen of a Sherlock Holmes to follow the clues which may have been afforded. But should bankers be turned into detectives in order to prevent depositors from acting in violation of their obligations to third persons? It must be remembered also that frequently all the clues

⁷⁸ If the bank had had actual knowledge of these things of course it would be liable. *American Nat. Bank v. Fidelity & D. Co.*, 129 Ga. 126, 58 S. E. 867 (1907).

It is agreed that a depository bank is not chargeable with notice of facts appearing in memoranda written on checks. *State Nat. Bank v. Dodge*, 124 U. S. 333 (1888); *State Nat. Bank v. Reilly*, 124 Ill. 464, 14 N. E. 657 (1888); *Duckett v. Nat. Mechanics' Bank*, 86 Md. 400, 38 Atl. 983 (1897); *Eyrich v. Capital State Bank*, 67 Miss. 60, 6 So. 615 (1889).

are not known to any one employee of the bank, and that the facts known to any one employee are not sufficient to arouse suspicion. It must be remembered that the processes of receiving deposits and paying checks are processes in which many employees of the bank take each his separate part.⁷⁹ If no one of the employees has knowledge of any breach of trust the bank should not be held liable merely because it appears that at some stage by piecing together all the facts known to different employees a breach of trust would become more or less apparent. The bank is in no way to blame for receiving deposits or allowing withdrawals merely because all the facts known to several employees would, if known to one employee, have aroused a suspicion of misconduct by the depositor. The bank it is submitted should not be liable unless some officer or employee had actual knowledge of the depositor's misconduct or knowledge of facts so clearly indicating such misconduct as to show that the bank was guilty of bad faith.

A trustee or other fiduciary is placed in a situation where there may be a great temptation to pursue his own interest and lose sight of the interest of those for whom he acts. The rules as to the liability of fiduciaries may well be made strict. But a very different question arises as to the liability of third persons dealing with fiduciaries. If third persons knowingly participate with a fiduciary in a breach of his obligations it is proper to hold them liable. It is quite a different matter however to compel them to supervise the conduct of the fiduciary and to hold them liable for failure to do so. A rule imposing such liability upon them makes it dangerous to deal with a fiduciary and seriously interferes with the proper performance by the fiduciary of his duties. It is right to require that one who knowingly purchases trust property from a trustee or other fiduciary whose conduct is *prima facie* wrongful should make a reasonable inquiry, and to hold that he cannot escape liability unless such inquiry would satisfy a reasonable man that the vendor was not committing a breach of trust. If the vendor's conduct is not such as to excite suspicion, still it is held that the purchaser should make inquiry as to the power of the trustee to sell; and it has been so held, with questionable wisdom perhaps, in the case of negotiable instruments. But the rule that purchasers of

⁷⁹ See the Master's Report, pp. 15-20, in the record in *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916 (1912).

trust property are bound to see to the application of the purchase-money imposed too heavy a burden on purchasers and resulted in such an intolerable obstruction to the administration of trusts that statutes have in many jurisdictions abolished the rule. The rule that a corporation whose securities are held in trust is bound to investigate whether a transfer of the securities is in breach of trust, imposes a heavy burden on corporations and results in a serious obstruction to the administration of trusts. Similarly to the extent that depositories of trust funds are held bound to inquire into the trustee's conduct, a heavy burden is imposed upon them and the administration of trusts is seriously obstructed. Corporations whose securities are held in trust, and depositories of trust funds, should not be held liable for participation in a breach of trust in the absence of actual knowledge of the breach of trust or conduct amounting to bad faith. This is the view expressed in the English cases, although departures from it have occasionally occurred. In *Barnes v. Addy*,⁸⁰ Sir W. M. James, L. J., said:

"I have long thought, and more than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of *cestuis que trust*, or the good of the world, that those cases should be extended."

Are not these observations of peculiar force in the United States, where courts of equity have gone further than in England in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees, at the expense of third persons, who are honest and not always even injudicious?

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⁸⁰ L. R. 9 Ch. 244, 251, 255, 256 (1874). See note 31, *supra*.

THE LIABILITY OF AN INACTIVE CO-TRUSTEE

PLURAL trustees are perhaps the rule rather than the exception. Where the trust estate is large, settlors usually desire the combined skill and judgment of several men. One trustee may be selected on account of his reputation for honesty and acumen, another because of business association with the settlor, and still a third from motives of relationship. In these co-trusteeships inequality of experience, ability, prudence and initiative is of course common. Such disparities are illustrated in the cases where one trustee was a solicitor and the other was a linen-draper,¹ or a retired physician,² or the settlor's widow;³ or where the trustees consisted of a man in active life and another of great age,⁴ the settlor's son and the son's clerk,⁵ an able-bodied person and one of advanced years and poor eye-sight,⁶ or the settlor's widow and a man.⁷

Where there is inequality of position among trustees, as well as in some instances of equal standing, there is often found inequality of participation in the management of the trust. Frequently one trustee takes complete control of the trust and the co-trustee performs no act under it, or at least none but formal acts. The passive trustee, though accepting the trust, undertakes no responsibilities under it and idly surrenders the trust property and powers to his more energetic, more skillful, or less occupied co-trustee. In numerous cases this assumption of control by one trustee has resulted disastrously to the *cestui que trust*. Through the dishonesty or inaptitude of the managing trustee the trust fund has been reduced or altogether dissipated. In this situation the active trustee is frequently insolvent or financially irresponsible and the only hope of the *cestui que trust* is a claim against the passive trustee.

¹ *In re Turner*, [1897] 1 Ch. 536.

² *In re Linsley*, [1904] 2 Ch. 785.

³ *In re Partington*, 57 L. T. R. 654 (1888).

⁴ *Darnaby v. Watts*, 13 Ky. L. R. 457 (1891).

⁵ *Birely's Estate*, 7 Pa. Dist. R. 395 (1898).

⁶ *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932 (1911).

⁷ *Greiner's Estate*, 20 Pa. Dist. R. 762 (1911).

Thus has been presented the rather troublesome question to what extent an inactive trustee shall be held liable when the trust estate has been diminished by the negligence or defalcation of an active co-trustee.

There is, unfortunately, a lack of unanimity among judges and writers in the wording of a rule to govern this case, as well as among the courts in its application.

In 1634 the Lord Keeper stated the rule to be that the inactive trustee was not liable "unless some purchase, fraud, or evil dealing appear."⁸ This doctrine seemed to limit the liability to cases of practical joinder by the passive trustee in a breach of trust by the active trustee.⁹

In 1837 we find a Tennessee court making the rule depend upon the discretionary or directory nature of the trust.

"A discretionary trust is, when by the terms of the trust no direction is given as to the manner in which the trust fund shall be vested, till the time arrives at which it is to be appropriated in satisfaction of the trust. In such cases in order to charge a trustee for an abuse by his co-trustee, some act of commission must be shown on his part, by which the trust fund was attained by his co-trustee, or some act of commission [omission?] amounting, to gross neglect in permitting the fund to be wasted. . . . A directory trust is when by the terms of the trust the fund is directed to be vested in a particular manner, till the period arrives at which it is to be appropriated. In such cases if the fund be not vested, or vested in a different manner from that pointed out, it is an abuse of trust for which both trustees are responsible, though but one received the money, because both are bound to attend to the directions of the trust, and must be careful to execute it faithfully, according to its terms and the intention of the person by whom it was created."¹⁰

A Pennsylvania judge in 1843 thus formulated the doctrine:

"It is said to be the harshest demand that can be made in equity, to compel a trustee to make up a deficiency, where the money has not

⁸ *Townley v. Sherborne*, J. Bridgman, 35, 37. To the effect that agreement to be bound and coöperation and connivance are the only grounds of liability, see *Stowe v. Bowen*, 99 Mass. 194 (1868).

⁹ Obviously actual joinder in a breach renders a trustee liable. *Walker v. Symonds*, 3 Swanst. 1 (1818); *Sandford v. Jodrell*, 2 Smale & Giff. 176 (1854); *Costello v. O'Rorke*, Ir. Rep. 3 Eq. 172 (1869).

¹⁰ *Turley, J.*, in *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263, 269, 270, 272 (1837).

come into his hands. In such a case, equity will not charge him unless he has been guilty of negligence so gross as almost amounts to fraud."¹¹

In 1852 we find Sir John Romilly, Master of the Rolls, saying that "giving one trustee the sole and absolute control over the fund, was a breach of trust."¹² By this rule affirmative action by the passive trustee giving the active trustee entire control seemed to be all that was necessary to establish liability.

Leading text writers cite the rule, where unaffected by statute, to be that "one trustee shall not be liable for the acts or defaults of his co-trustee."¹³ This statement might imply that the positive wrongdoer alone was liable for the results of his negligence or fraud.

In 1871 a Canadian judge asserted that "the present rule is, that if a trustee knowing of a breach of trust by his co-trustee, or having means of knowledge by the exercise of ordinary vigilance, stands by and permits such breach of trust to go on, he is accountable therefor, equally with the person actively guilty: . . ."¹⁴ Actual or constructive notice of an existing breach of trust is a prerequisite to liability under this rule.

In 1895 the position was taken by the New York Court of Appeals that an inactive trustee is only liable if he "unnecessarily do an act by which the funds are transferred from the joint possession of all to the sole possession of one," and it was said that "an act is unnecessary when done outside of the usual course of business pertaining to the subject."¹⁵

In 1911 a Massachusetts court declared that "It is well settled, that a trustee is not responsible for the acts or misconduct of a co-trustee in which he has not joined, or to which he does not consent, or has not aided or made possible by his own neglect."¹⁶

Thus, the basis of liability has been variously defined as fraud,

¹¹ Bell, J., in *Nyce's Estate*, 5 W. & S. (Pa.) 254, 255, 256 (1843). See also *Boyd's Ex'rs v. Boyd's Heirs*, 3 Gratt. (Va.) 113 (1846), and *Stell's Appeal*, 10 Pa. 149 (1848).

¹² *Wiglesworth v. Wiglesworth*, 16 Beav. 269, 272 (1852). To the same effect is *Rodbard v. Cooke*, 36 L. T. N. S. 504, 505 (1877).

¹³ LEWIN, TRUSTS, 11 ed., p. 294; PERRY, TRUSTS, 6 ed., § 415.

¹⁴ *Boyd*, Master in Ordinary, in *City Bank v. Maulson*, 3 Chanc. Ch. R. (U. C.) 334, 339 (1871).

¹⁵ *Purdy v. Lynch*, 145 N. Y. 462, 473, 40 N. E. 232 (1895). A similar view is expressed in *Crowe v. Craig*, 29 Nov. Sc. 394 (1897).

¹⁶ *Ashley v. Winkley*, 209 Mass. 509, 528, 95 N. E. 932 (1911).

entrusting of control, gross negligence, entrusting of control after notice of breach, unnecessary entrusting of control, and ordinary neglect. This disorder, further illustrated by an analysis of the decisions in England and America, affords some support for the assertion of Woodward, J., in *Irwin's Appeal*¹⁷ that "there is, perhaps, no one subject on which English authorities are so contradictory and irreconcilable as upon the question, when is one trustee or executor liable for moneys that have been lost in the hands of a co-trustee or executor."

The decisions may, perhaps, be placed in four classes, namely, (a) those in which the inactive trustee has done nothing but *passively allow* his co-trustee to assume exclusive possession of the trust property; (b) those in which the sole basis of the inactive trustee's alleged liability is an *affirmative act* on his part giving the active trustee exclusive possession; (c) cases in which there is an entrusting of possession by positive or negative conduct and, in addition, a failure to supervise the administration of the trust after the co-trustee has taken exclusive control; (d) instances in which the entrusting of exclusive possession was followed by notice to the inactive trustee of a possible specific danger to the trust fund, and thereafter by continued inaction by the passive trustee.

PASSIVELY ALLOWING CO-TRUSTEE TO TAKE EXCLUSIVE POSSESSION

The earliest case raising the question of an inactive trustee's liability is *Townley v. Sherborne*.¹⁸ There a trustee who had passively allowed his fellow trustee to receive the rents of the trust realty was held not liable when the funds were lost, the Lord Keeper saying that the passive trustee was not responsible in the absence of some "purchase, fraud or evil dealing" in allowing the co-trustee exclusive possession of the rents,

"for they being by law joyntenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by; and it being the case of most men in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part

¹⁷ 35 Pa. 294, 295 (1860). For a further remark as to the uncertainty of the law on this subject see *Pim v. Downing*, 11 S. & R. (Pa.) 66, 71 (1824).

¹⁸ J. Bridgman, 35 (1634).

of their real estate, to make up the same, either by the sale, or perception of profits; and if such of these friends, who carry themselves without fraud, should be chargeable out of their own estate for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust. And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall by law charge him only, and not his co-executor: and in that case, *equitas sequitur legem*, there having been many presidents resolved in this court, that one executor shall not answer nor be charged for the act or default of his companion. And it is no breach of trust, to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits.”¹⁹

This early case, which treated exclusive possession by one trustee as natural and the liability of a trustee as confined to his own receipts, in the absence of fraud, has been followed by many English decisions.²⁰ This rule has also been applied to passively allowing the co-trustee to have the exclusive possession of the evidence of the trust property, as, for example, title deeds.²¹ The court said in the last cited case²² that “no laches could be imputed to the trustees for suffering one of their number to hold the deeds. The reason is, that the deeds must be held by some one person, unless they are deposited with bankers, or placed in a box secured by a number of different locks, of which each trustee should hold one of the keys; and negligence cannot be imputed to trustees for not taking such precautions as these.”

Yet in other English cases passively allowing a co-trustee to take exclusive possession has been regarded as a breach of trust, rendering the inactive trustee liable for loss of the funds while in the co-trustee's hands.²³ In *Rodbard v. Cooke*, the court said: ²⁴

¹⁹ J. Bridgman, 37, 38.

²⁰ *Spalding v. Shalmer*, 1 Vern. 301 (1684); *Anonymous*, 12 Mod. 560 (1701); *Aplyn v. Brewer*, Finch's Prec. Ch. 173 (1701), *semble*; *Fellows v. Mitchell*, 1 P. Wms. 81 (1705); *Leigh v. Barry*, 3 Atk. 583 (1747), *semble*; *In re Fryer*, 3 Kay & J. 317 (1857).

²¹ *Cottam v. Eastern Counties Ry. Co.*, 1 Johns. & H. 243 (1860).

²² *Ibid.*, 247.

²³ *Ex parte Shakeshaft*, 3 Bro. Ch. 197 (1791); *Gregory v. Gregory*, 2 Y. & C. 313 (1836); *Lockhart v. Reilly*, 25 L. J. Ch. 697 (1856); *Rodbard v. Cooke*, 36 L. T. N. S. 504 (1877); *Lewis v. Nobbs*, 8 Ch. D. 591 (1878).

²⁴ 36 L. T. N. S. 504, 505 (1877).

"It may be stated as a general rule of law, that where there are two trustees, and one of them places a fund so that it is under the sole control of the other, if the money is misapplied by that other, both are equally liable. The object of having two trustees is to double the control over the trust property, and when one trustee thinks fit to give the other the sole power of dealing with the trust property he defeats that object and becomes himself responsible."

The words of this quotation suggest active conduct resulting in exclusive control by the co-trustee, but the facts of the case seem to indicate mere passivity.

Rare circumstances may justify exclusive control by one trustee and thus obviate any dispute as to the inactive trustee's liability. Thus, where the trust property consists of shares in a company, the deed of creation of which prohibited ownership of shares by two or more jointly, obviously one trustee must hold the shares.²⁵ If exclusive possession is obtained without the actual or constructive knowledge of the passive trustee, naturally there is no liability on his part, because there is no acquiescence in the sole control by the active trustee;²⁶ and the same is true where exclusive control is obtained by fraud, as by altering a check.²⁷ Here there is lack of real consent.

In a number of American cases the doctrine of *Townley v. Sherborne* has been approved, passive acquiescence in exclusive possession by a co-trustee has not been regarded as negligence or a breach of trust, and the inactive trustee has been absolved from liability.²⁸ In support of the attitude of these American courts

²⁵ *Consterdine v. Consterdine*, 31 Beav. 330 (1862).

²⁶ *Derbshire v. Home*, 3 De G. M. & G. 80 (1853).

²⁷ *Barnard v. Bagshaw*, 3 De G. J. & S. 355 (1862).

²⁸ *Colburn v. Grant*, 181 U. S. 601 (1901); *Taylor v. Roberts*, 3 Ala. 83 (1841); *Glenn v. McKim*, 3 Gill (Md.) 366 (1845); *Stowe v. Bowen*, 99 Mass. 194 (1868); *Hunter v. Hunter*, 50 Mo. 445 (1872), *semble*; *Dyer v. Riley*, 51 N. J. Eq. 124, 26 Atl. 327 (1893); *Kip v. Deniston*, 4 Johns. (N. Y.) 23 (1809); *Banks v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99 (1845); *Ormiston v. Olcott*, 84 N. Y. 339 (1881); *Purdy v. Lynch*, 145 N. Y. 462, 40 N. E. 232 (1895); *Westerfield v. Rogers*, 174 N. Y. 230, 66 N. E. 813 (1903); *Worth v. M'Aden*, 1 Dev. & Bat. Eq. (N. C.) 199 (1835); *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. (N. C.) 336 (1836); *State v. Guilford*, 18 Oh. 500 (1849), reversing 15 Oh. 593 (1846); *Stell's Appeal*, 10 Pa. St. 149 (1848); *Fesmire's Estate*, 134 Pa. 67, 19 Atl. 502 (1890); *Birely's Estate*, 7 Pa. Dist. R. 395 (1898); *Boyd's Ex'rs v. Boyd's Heirs*, 3 Gratt. (Va.) 113 (1846); *Griffin's Ex'r v. Macaulay's Adm'r*, 7 Gratt. (Va.) 476, 578 (1851); *Keenan v. Scott*, 78 W. Va. 729, 90 S. E. 331 (1916). See also *City Bank v. Maulson*, 3 Chanc. Ch. R. (U. C.) 334 (1871). Due to the purely re-

Finch, J., said in *Ormiston v. Olcott*:²⁹ "There would be neither wisdom nor justice in a rule which would practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent." The question will later be raised whether this view does not lose sight of the fact that an inactive trustee may himself be a wrongdoer and that diligence on his part may well have prevented the error or fraud of his fellow. A smaller number of American courts have considered passively surrendering the trust property to the exclusive care of a co-trustee to be negligence and have held the inactive trustee liable.³⁰ Where the co-trustee was found in exclusive possession,³¹ or was passively allowed to assume it,³² and the inactive trustee thereafter did nothing to return the property to joint control, he has been held liable.

If the active trustee has obtained exclusive control of the property without the knowledge or consent of the inactive trustee, obviously there is no basis for a judgment against the latter.³³

ENTRUSTING THE CO-TRUSTEE WITH EXCLUSIVE CONTROL BY POSITIVE ACT

The English cases are almost unanimous in regarding as a negligent breach of trust a positive act by the passive trustee (as, for example, the execution of a power of attorney) by means of which the co-trustee is enabled to get exclusive control of trust assets and thereby to waste them.³⁴ But *Mendes v.*

medial nature of constructive trusts it would seem that such trustees should never be liable except for property actually received (*Hunter v. Hunter*, 50 Mo. 445 (1872)), unless several were jointly engaged in a fraud, in which case each might be said to receive the whole. *Harrigan v. Gilchrist*, 121 Wis. 127, 280, 99 N. W. 909 (1904).

²⁹ 84 N. Y. 339, 346 (1881).

³⁰ *Royall's Adm'r v. McKenzie*, 25 Ala. 363 (1854); *Fox v. Tay*, 89 Cal. 339, 24 Pac. 855 (1891), *semble*; *Ringgold v. Ringgold*, 1 Harr. & G. (Md.) 11 (1826); *Mac-cubbin v. Cromwell*, 7 Gill & J. (Md.) 157 (1835); *Laroe v. Douglass*, 13 N. J. Eq. 308 (1861), *semble*; *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1 (1822); *Bowman v. Raine-taux, Hoff. Ch. (N. Y.)* 150 (1839); *Spencer v. Spencer*, 11 Paige (N. Y.) 299 (1844); *Earle v. Earle*, 93 N. Y. 104 (1883).

³¹ *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 400 (1837).

³² *Harvey v. Schwettman*, 180 S. W. (Mo.) 413 (1915).

³³ *Lansburgh v. Parker*, 41 App. D. C. 549 (1914).

³⁴ *Bradwell v. Catchpole*, 3 Swanst. 78, n (1818); *Chambers v. Minchin*, 7 Ves. 186 (1802); *Hanbury v. Kirkland*, 3 Simon, 265 (1829); *Marriott v. Kinnersley*, Tamlyn, 470 (1830); *Wiglesworth v. Wiglesworth*, 16 Beav. 269 (1852); *Brumridge v. Brum-*

*Guedalla*³⁵ seems to run counter to this weight of authority. In that case two trustees placed in the hands of a third the key to a bank box for the purpose of enabling him to get the coupons from trust securities. The bank was instructed to deliver to the active trustee the coupons only and not the box, but it negligently delivered the box to the active trustee and he defaulted. The court declined to hold the passive trustees liable, although it would seem that their act made possible the loss of the trust funds, because it put them in a position where the combined negligence of the bank and fraud of the co-trustee could cause their dissipation.

The American courts have not been harmonious in their treatment of the inactive trustee whose sole negligence, if such it be, has been the taking of a positive step for the purpose of entrusting his active co-trustee with exclusive possession of the trust property. In a number of instances the passive trustee, or guardian or other fiduciary treated by the court as a trustee, has been held responsible, upon the loss of the property by the negligence or crime of the active trustee.³⁶ But the opposite result has been reached in several cases,³⁷ the courts stating that, in the absence of warning that the active trustee is in financial difficulty or is dishonest, such conduct by the inactive trustee is not negligent. In *Purdy v. Lynch*³⁸ the purpose of the trust was the payment of

ridge, 27 Beav. 5 (1858); *Cowell v. Gatcombe*, 27 Beav. 568 (1859); *Ingle v. Partridge*, 32 Beav. 661 (1863); *Re Taylor*, 81 L. T. N. S. 812 (1900), *semble*.

³⁵ 2 Johns. & H. 259 (1862). See also *Home v. Pringle*, 8 Clark & F. 264 (1841), and *Shepherd v. Harris*, [1905] 2 Ch. 310.

³⁶ *Wallis v. Thornton's Adm'r*, 2 Brock. (U. S. C. C.) 422 (1831); *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166 (1840); *Gray v. Reamer*, 11 Bush. (Ky.) 113 (1874); *Barroll v. Forman*, 88 Md. 188, 40 Atl. 883 (1898); *Smith v. Pettigrew*, 34 N. J. Eq. 216 (1881); *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283 (1821); *Bruen v. Gillet*, 115 N. Y. 10, 21 N. E. 676 (1889); *Matter of Litzenberger*, 85 Hun (N. Y.) 512, 33 N. Y. Supp. 155 (1895); *Graham v. Davidson*, 2 Dev. & Bat. Eq. (N. C.) 155 (1838); *Hauser v. Lehman*, 2 Ired. Eq. (N. C.) 594 (1843); *Clark's Appeal*, 18 Pa. 175 (1851); *Donnelly's Estate*, 11 Pa. Dist. R. 211 (1902); *Graham v. Austin*, 2 Gratt. (Va.) 273 (1845). To the same effect is *Mickleburgh v. Parker*, 17 Grant Ch. (U. C.) 503 (1870).

³⁷ *Laurel Co. Ct. v. Trustees*, 93 Ky. 379, 20 S. W. 258 (1892); *Adair v. Brimmer*, 74 N. Y. 539 (1878); *Purdy v. Lynch*, 145 N. Y. 462, 40 N. E. 232 (1895); *State v. Guilford*, 18 Oh. 500 (1849), reversing 15 Oh. 593 (1846); *Jones' Appeal*, 8 W. & S. (Pa.) 143 (1844); *Appeal of Hatch*, 12 Atl. (Pa.) 593 (1888). In *Re McLatchie*, 30 Ont. R. 179 (1898), it was held that where the affirmative action of the passive trustee would put the co-trustee in sole control only if the co-trustee committed a crime (forgery), there was no negligence by the passive trustee.

³⁸ 145 N. Y. 462, 473, 40 N. E. 232 (1895).

the debts of a bank. One trustee, who was also a receiver of the bank and had a good reputation, was entrusted by the other trustees with exclusive possession of the trust property for the purpose of paying off the bank's debts to its depositors. This was approved by the court as reasonable conduct and liability for the loss of the funds by the active trustee was not fastened upon the inactive trustees.

The act of entrusting the *res* to a co-trustee may obviously be negligent, if the passive trustee has knowledge, prior to his surrender of possession, that the co-trustee is financially embarrassed.³⁹

FAILURE TO SUPERVISE THE CONDUCT OF THE ACTIVE CO-TRUSTEE

In many instances the evidence shows, not only exclusive possession by the active trustee, obtained through the acquiescence or affirmative aid of the inactive trustee, but also the lapse of a considerable period of time after such entrusting, with no investigation by the inactive trustee of the conduct of the active trustee. This situation raises the question whether failure to supervise the work of a co-trustee, as, for example, failure to examine the investments made by him, or to inspect his accounts, is such negligence as makes the inactive trustee liable for the damage to the trust estate.

The English cases have been unanimous in asserting a duty to watch an active co-trustee in exclusive control, to examine his books and inspect the property in his hands from time to time. To fail to give such supervision has been held negligence rendering the passive trustee accountable, whether the active trustee acquired exclusive control through the mere passivity of the inactive trustee⁴⁰ or through his positive action.⁴¹

³⁹ *Estate of Evans*, 2 Ashm. (Pa.) 470 (1841).

⁴⁰ *Lincoln v. Wright*, 4 Beav. 427 (1841); *Thompson v. Finch*, 22 Beav. 316 (1856); *Wynne v. Tempest*, 13 T. L. R. 360 (1897). In the last-named case the trustee was held not to be protected by the provision of section 3 of the Judicial Trustees Act of 1896 to the effect that a court might relieve from liability for a breach of trust a trustee who had acted "honestly and reasonably."

⁴¹ *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16 (1841); *Wiglesworth v. Wiglesworth*, 16 Beav. 269 (1852); *Trutch v. Lamprell*, 20 Beav. 116 (1855); *Mendes v. Guedalla*, 2 Johns. & H. 259 (1862); *Hale v. Adams*, 21 W. R. 400 (1873); *In re Second East Dulwich Soc.*, 68 L. J. Ch. (N. S.) 196 (1899). In *Horton v. Brocklehurst*, 29 Beav. 504 (1858), there was the additional fact that the passive trustee had represented to

The American decisions also very generally place upon the inactive trustee the duty of supervising and inspecting the work of the active trustee. A trustee who has by failure to act or by direct action enabled his co-trustee to obtain exclusive control of the trust subject-matter must examine the investments and accounts of the active trustee.⁴² Thus, in *Richards v. Seal*⁴³ an inactive trustee who for eleven years made no examination of the status of a bond entrusted to a co-trustee, and thus failed to learn that the co-trustee had collected it and held the proceeds uninvested, was charged with a loss resulting from the inability of the co-trustee to turn over the money.⁴⁴ This duty to supervise exists whether the nonparticipating trustee at the time when he becomes a trustee finds the co-trustee in control,⁴⁵ or has passively allowed the co-trustee to take exclusive charge,⁴⁶ or has by his own positive act put the companion trustee into possession.⁴⁷

the *cestui que trust* that the funds had been properly invested by the active co-trustee, although he (the inactive trustee) knew nothing about the investments. Liability was fixed upon the inactive trustee.

⁴² *Adams' Estate*, 221 Pa. 77, 84, 70 Atl. 436 (1908). But see *Kerr v. Kirkpatrick*, 8 Ired. Eq. (N. C.) 137 (1851), where it is denied that "one trustee is bound to keep a supervision over the acts of another."

⁴³ 2 Del. Ch. 266 (1861).

⁴⁴ To the same effect see *Estate of Hilles*, 13 Phila. 402 (1880). *Jones's Appeal*, 8 W. & S. (Pa.) 143 (1844), held that mere inquiry of a co-guardian was sufficient performance of the duty to investigate, *Gibson, J.*, saying (p. 151): "To require him to have dealt with his colleague as a rogue, by calling for the securities, would require of him the highest and most exact vigilance; a degree of it that would ruin every guardian." This seems a questionable rule as applied to trustees.

⁴⁵ *Ralston v. Easter*, 43 App. D. C. 513 (1915).

⁴⁶ In the following cases the loss arose from the bad management or improper investments of the active trustee: *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932 (1911); *Klatt v. Keuthan*, 185 Mo. App. 306, 170 S. W. 374 (1914); *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665 (1886). In other cases the defalcation of the active trustee was the immediate cause of the loss: *Bates v. Underhill*, 3 Redf. Surr. (N. Y.) 365 (1878); *City Bank v. Maulson*, 3 Chanc. Ch. R. (U. C.) 334 (1871); *Crowe v. Craig*, 29 Nov. Sc. 394 (1897). In *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665 (1886), however, the court refused to hold the passive trustee liable for the conversion of the trust property by the active trustee, saying that there was no duty to guard against such conduct, unless there was reason to suspect the co-trustee, that is, some fact to put the inactive trustee upon his guard. And in *Matter of Halstead*, 110 App. Div. 909, 95 N. Y. Supp. 1131 (1905), affirmed without opinion, 184 N. Y. 563, 76 N. E. 1096 (1906), a trustee who for five years allowed trust securities to remain in a bank box to which both trustees had keys, without examining the securities, was held not liable when his active co-trustee stole the securities, since the passive trustee had no reason to suspect the co-trustee.

⁴⁷ *Caldwell v. Graham*, 115 Md. 122, 80 Atl. 839 (1911); *Thompson v. Hicks*, 1 App.

If the trust settlement directs that the funds be invested in a particular way, as, for example, in mortgages upon real estate, the duty of the inactive trustee to supervise the conduct of the active colleague would seem to be accentuated, if anything. For failure to make such inspection, resulting in the continuance of an improper investment or in no investment at all, the passive member of the trusteeship has been charged.⁴⁸ The opinion of a Tennessee court is forcefully put in *Deaderick v. Cantrell* by Turley, J., as follows:⁴⁹

"Two trustees are appointed to execute a trust, the final operation of which is not to be completed for years, they undertake to execute it, they are intended as checks on each other, have an equal control over the fund, are mutually bound to attend to the interest of the trust, and shall one of them be permitted to go to sleep and trust everything to the management of his co-trustee, and when in the course of ten or fifteen years, the fund having been wasted, and his co-trustee insolvent, he is called upon to make it good, shall he be heard to say that he had implicit confidence in his companion, and permitted him to retain all the money, and appropriate it as he pleased, and that he ought not therefore to be charged? Surely not, it is neither law nor reason."

If the settlor directs no specific investments, the law implies a duty to invest in the securities allowed by chancery. In both cases the trust is in a sense "directory" and the duty to inspect and supervise investments ought to be the same in both cases.

WARNING OF DANGER TO TRUST FUND, FOLLOWED BY CONTINUED INACTIVITY

Let us next suppose that the active trustee has got exclusive possession of the trust property, either by the act of the passive

Div. 275, 37 N. Y. Supp. 340 (1896); *Fesmire's Estate*, 134 Pa. 67, 19 Atl. 502 (1890); *McMurray v. Montgomery*, 2 Swan (Tenn.), 374 (1852). *Contra*, *In re Cozzens' Estate*, 15 N. Y. Supp. 771 (1891). In *Caldwell v. Graham* the court said (p. 129): "In accepting the appointment the trustees assumed the joint and equal obligation of exercising their discretion and control with respect to the trust in its entirety."

⁴⁸ *Beatty's Estate*, 214 Pa. 449, 63 Atl. 975 (1906); *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263 (1837). But in *Cocks v. Haviland*, 124 N. Y. 426, 26 N. E. 976 (1891), a passive trustee was not held liable, notwithstanding a direction to invest in bonds and mortgages and knowledge by the inactive trustee that the direction had not been obeyed by his co-trustee.

⁴⁹ 10 Yerg. (Tenn.) 263, 272 (1837).

trustee or without his objection, and that the inactive trustee thereafter learns of a step taken or about to be taken by the active trustee which is or will be dangerous to the interests of the beneficiary. In such circumstances there can be no doubt of the passive trustee's duty to move to protect the *cestui que trust*, and if he fails to bestir himself, he will be liable for injury to the trust estate subsequently resulting from the fault of the active trustee.⁵⁰ Robertson, L. P., in *Millar's Trustees v. Polson* has graphically described the position of the inactive trustee in this case:⁵¹

"It is, of course, disagreeable to take a co-trustee by the throat, but if a man undertakes to act as a trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs in letting things slide and losing money rather than create ill feeling."

The American courts have been equally clear that idleness after a warning of danger is a negligent breach of trust. "It is the duty of one trustee to protect the trust estate from any misfeasance by his co-trustee, upon being made aware of the intended act, by obtaining an injunction against him; and if the wrongful act has been already committed, to take measures, by suit or otherwise, to compel the restitution of the property, and its application in the manner required by the trust."⁵² This rule has been applied where the knowledge was of an improper investment,⁵³ a refusal to return the property to joint control,⁵⁴ the insolvency of the active trustee,⁵⁵ an interest of the active trustee antagonistic to that of

⁵⁰ *Boardman v. Mosman*, 1 Bro. Ch. 68 (1779); *Brice v. Stokes*, 11 Ves. 319 (1805); *Booth v. Booth*, 1 Beav. 125 (1838); *Curtis v. Mason*, 12 L. J. Ch. (N. S.) 442 (1843); *Millar's Trustees v. Polson*, 34 Sc. L. R. 798 (1897).

⁵¹ *Ibid.*, 804.

⁵² *Crane v. Hearn*, 26 N. J. Eq. 378, 381 (1875); see also *Elmendorf v. Lansing*, 4 Johns. Ch. (N. Y.) 562 (1820).

⁵³ *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822 (1898); *Matter of Niles*, 113 N. Y. 547, 21 N. E. 687 (1889); *In re Cozzens' Estate*, 15 N. Y. Supp. 771 (1891); *Meldon v. Devlin*, 31 App. Div. 146, 53 N. Y. Supp. 172 (1898), aff'd without opinion, 167 N. Y. 573, 60 N. E. 1116; *Pim v. Downing*, 11 S. & R. (Pa.) 66 (1824).

⁵⁴ *Ralston v. Easter*, 43 App. D. C. 513 (1915). *Contra*, *Stewart's Estate*, 21 Pa. Dist. R. 635 (1912).

⁵⁵ *Darnaby v. Watts*, 21 S. W. (Ky.) 333 (1893).

the *cestui que trust*,⁵⁶ or any breach of trust.⁵⁷ A recent case of this type is *Adams' Estate*,⁵⁸ where a trustee had knowledge that a co-trustee had wrongfully assumed exclusive control of the trust securities, but, after restoring the property to a bank box rented in the names of both, the inactive trustee failed to instruct the bank to open the box only on the application of both trustees and thus allowed the co-trustee the means of getting exclusive possession again. Such failure to guard the estate was held negligence, rendering the inactive trustee liable.

STATUTORY RULES

An English statute of 1859⁵⁹ lays down important rules regarding the liabilities of trustees. It provides that every trust instrument shall be deemed to contain a clause to the effect that the several trustees shall be chargeable only for such property "as they shall respectively actually receive notwithstanding their respectively signing any receipt for the sake of conformity,"⁶⁰ and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, . . ." This act has been copied in Canada, Australia and New Zealand,⁶¹ and was incorporated into the English Trustee Act of 1893.⁶² A statute applicable to Scotch trustees enacted in 1861 provides that each trustee "shall only be liable for his acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions."⁶³

⁵⁶ *Hill v. Hill*, 79 N. J. Eq. 521, 82 Atl. 338 (1912).

⁵⁷ *Matter of Howard*, 110 App. Div. 61, 97 N. Y. Supp. 23 (1905), aff'd without op., 185 N. Y. 539, 77 N. E. 1189 (1906).

⁵⁸ 221 Pa. 77, 70 Atl. 436 (1908).

⁵⁹ 22 & 23 VICT., ch. 35, § 31.

⁶⁰ Some courts in earlier cases made the distinction that trustees acting "for conformity only," that is, merely formally, were not liable for the property received by their co-trustees. *Gray v. Reamer*, 11 Bush (Ky.) 113 (1874); and the same doctrine has been applied to executors. *Terrell v. Matthews*, 11 L. J. Ch. (N. S.) 31 (1841).

⁶¹ BRIT. COL. TR. ACT, § 88; NEW BRUNS. TR. ACT, § 17; CONS. STAT. NEWF. (1892), chap. 84, § 14; NOV. SC. TR. ACT, § 24; ONT. TR. ACT, § 35; SASK. TR. ACT, § 9; NEW SO. WALES TR. ACT (1898), § 69; QUEENSL. TR. & EX. ACT (1897), § 25; VICT. ST. TRUSTS (1864), § 78; NEW ZEAL. TR. ACT, § 82.

⁶² 56 & 57 VICT., chap. 53, § 24.

⁶³ 24 & 25 VICT., chap. 84, § 1.

The English statute of 1859 would logically seem to require proof of two facts before liability could be fixed upon any trustee, namely, (a) that the trust property lost was at some time in the hands of the defendant trustee, that is, that he had actually received it; and (b) in addition that the loss was occasioned by an act or failure to act on the part of the defendant trustee. If the property in question has always been in the exclusive possession of the defendant's co-trustee, the defendant would seem not to be liable, even though he may have caused or consented to such exclusive possession or failed to have the property restored to joint possession after an opportunity so to do. In other words this statute would seem to bar liability by a trustee in case number one of the analysis above, namely, the case of merely passively allowing the co-trustee exclusive possession. It would seem to sanction this conduct by a trustee and to indicate that it is proper for one trustee to stand by while his co-trustee takes possession of the trust property, and that, after such taking, the inactive trustee is under no duty to supervise the acts of the co-trustee with respect to this property or to require joint control, even if he knows of specific danger to the trust estate. This construction would make the trust severable, would provide that as to the property over which one trustee assumes complete control he is in the same position as a sole trustee and that he and he alone is liable for the safety of that trust property.

Cases two, three and four of the analysis, those of affirmative action to give the co-trustee exclusive control, lack of supervision of exclusive control, and failure to protect the trust property after a warning of danger, would seem under the statute of 1859 still to furnish cases where the inactive trustee may be liable, if he has himself had possession of the trust property at any time. If he has received the trust property at some time and turned it over to his active co-trustee, a later failure to act on the part of the inactive trustee may be a "neglect" under the statute, for which he should be liable, notwithstanding the exclusive possession by his co-trustee.

When one turns from a consideration of the apparent meaning of the statute of 1859 to the actual decisions in England since that date, one finds no mention of the statute, but a number of cases in which an inactive trustee, who had at one time had possession of the property, has been held accountable for neglect which con-

tributed to the loss.⁶⁴ As suggested above, this seems logical under the statute. There are also a few cases in which an inactive trustee is held responsible for property which he never actually received, on the basis of neglect after the receipt of it by his co-trustee.⁶⁵ These cases are difficult to reconcile with the express provision of the statute that a trustee shall be liable only for what he actually receives, unless it be on a theory suggested later in another connection, namely, that the courts are hostile to such clauses and construe them to mean that an opportunity and duty to get possession are equivalent to actual possession.

Another English statute bearing on the liability of trustees is that section of the Judicial Trustees Act of 1896⁶⁶ which gives the court power to excuse a trustee from liability for a breach of trust, if he acted "honestly and reasonably." But this statute has been held not to be intended to protect the inactive trustee who delegates the trust duties and fails to supervise the administration of the trust. Such conduct is not "reasonable" or "honest."⁶⁷ Hence this section of the Judicial Trustees Act has only a limited bearing on the questions here discussed.

A few American states have codified the law regarding the liability of an inactive trustee in the following form:⁶⁸ "A trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enabled the latter to commit, but for no others." It is not believed that these statutes alter the pre-existing rules of equity.

⁶⁴ *Hale v. Adams*, 21 W. R. 400 (1873); *Lewis v. Nobbs*, 8 Ch. D. 591 (1878); *Rodbard v. Cooke*, 36 L. T. N. S. 504 (1877); *Bacon v. Camphausen*, 58 L. T. N. S. 851 (1888); *Robinson v. Harkin*, [1896] 2 Ch. 415; *Re Taylor*, 81 L. T. N. S. 812 (1900), *semble*.

⁶⁵ *Bahin v. Hughes*, 31 Ch. D. 390 (1886); *Wynne v. Tempest*, 13 L. T. R. 360 (1897); *In re Second East Dulwich Soc.*, 68 L. J. Ch. (N. S.) 196 (1899).

⁶⁶ 59 & 60 VICT., chap. 35, § 3 (1896). This act has been copied in the dominions. BRIT. COL. TR. ACT, § 89; NEW BR. TR. ACT, § 49; ONT. TR. ACT, § 37; NEW SO. WALES TR. AMEND. ACT (1902), § 9; QUEENSL. TR. & EX. ACT (1897), § 51; NEW ZEAL. TR. ACT, § 89.

⁶⁷ *In re Turner*, [1897] 1 Ch. 536. See also *In re Second East Dulwich Soc.*, 68 L. J. Ch. (N. S.) 196 (1899), in which Kekewich, J., said (p. 198): "It seems to me that a man who accepts such a trusteeship, and does nothing, swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanations, is dishonest." But see *Dover v. Denne*, 3 Ont. L. R. 664 (1902).

⁶⁸ CAL. CIV. CODE, § 2239; MONT. CIV. CODE, § 5385; N. D. CIV. CODE, § 6292; S. D. REV. CODE (1919), § 1206.

CONTROL OF INACTIVE TRUSTEE'S LIABILITY BY PARTIES

A settlor may provide that each of two trustees shall be liable for a moiety of the trust property only,⁶⁹ or that four trustees shall take turns in administering the trust for a year each and that each shall be liable only during the period of his active administration.⁷⁰ English courts have not been friendly to clauses in trust instruments excusing trustees from liability except for property actually received by them, and have construed such clauses to mean that the trustee is liable for what he ought to have received, as well as for what he actually did have in his hands.⁷¹ In *Brumridge v. Brumridge*, Romilly, M. R., said: ⁷²

"This clause is constantly brought forward to sanction the misappropriation of trust moneys; but until it is provided, by the instrument creating the trust, that the trustee shall be liable for no breach of trust, provided he does not obtain a personal advantage, I shall not consider the clause as giving a trustee the right or liberty of conniving at a breach of trust. Even if an instrument containing such an inconsistent clause were brought before me, I express no opinion on the result; but until it is, I cannot allow a trustee to say, that it is not his business to act properly in the performance of his duty as a trustee."

A provision in the trust deed or will that each trustee shall be liable only for his own default does not protect an inactive trustee from liability for allowing a co-trustee to have exclusive possession. Such negligence is a default as much as a positive breach of trust would be.⁷³ These constructions of the clauses in English trust instruments before 1859 are consistent with the decisions previously referred to as occurring since the Act of 1859. Both sets of decisions recognize negligence as a default and both treat a duty to get actual possession as equivalent to actual possession.

Upon examining the American cases we find that in *Walker v.*

⁶⁹ *Birls v. Betty*, 6 Madd. 90 (1821). And so, too, clauses making each executor liable only for his own acts (*Westley v. Clarke*, 1 Eden, 357 (1759)), or excusing a trustee from the duty of watching his co-trustee (*Wilkins v. Hogg*, 3 Giff. 116 (1861); *Pass v. Dundas*, 29 W. R. 332 (1881)), have been held valid.

⁷⁰ *Att'y Gen. v. Holland*, 2 Y. & C. 683 (1837).

⁷¹ *Mucklow v. Fuller*, Jacobs 198 (1821); *Bone v. Cook*, McCl. 168 (1824); *Brumridge v. Brumridge*, 27 Beav. 5 (1858).

⁷² *Ibid.*, 7.

⁷³ *Marriott v. Kinnersley*, Tamlyn, 470 (1830); *Dix v. Burford*, 19 Beav. 409 (1854).

*Walker's Ex'rs*⁷⁴ the settlor's direction that one trustee should have exclusive possession of the trust property was held to excuse the inactive trustees from liability for the loss of such property.⁷⁵ But in *Graham v. Austin*⁷⁶ an attempt by the settlor to restrict the responsibility of a trustee to a moiety of the property was not allowed to have effect. No matter what may be the settlor's power to limit liability by insertions in the trust instrument, it is obvious that oral statements of a testator-settlor to a prospective trustee, not incorporated into the will, can have no effect to restrict the trustee's liability.⁷⁷

The hostility of the courts to a settlor's direction that a trustee's liability shall be limited to the property he actually receives was further shown in *Caldwell v. Graham*,⁷⁸ where such a clause was somewhat remarkably construed to provide merely against liability for the depreciation of the property while in the trustee's hands. A clause restricting the trustee's responsibility to cases of "wilful default" was sustained in *Crabb v. Young*,⁷⁹ Ruger, Ch. J., stating:⁸⁰ "The testator had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done. . . . the court has not the right to increase the measure of their responsibility or impose obligations from the burden of which he has in his will so carefully protected them." But in *Litchfield v. White*⁸¹ an assignment for the benefit of creditors, containing a provision that the trustee should be liable only for gross negligence and wilful default, was held void. A clause excusing the trustees from all liability for losses occurring without "wilful default" was held in *Matter of Howard*⁸² not to exempt from liability a trustee who,

⁷⁴ 88 Ky. 615, 11 S. W. 718 (1889).

⁷⁵ The decisions in *Duckworth v. Ocean Steamship Co.*, 98 Ga. 193, 26 S. E. 736 (1896), and *Markel v. Peck*, 168 Mo. App. 358, 151 S. W. 772 (1912), allowing the settlor to alter the usual powers of the trustee, would seem to support the principle that the settlor may also change the several liabilities of the trustees.

⁷⁶ 2 Gratt. (Va.) 273 (1845).

⁷⁷ *Dover v. Denne*, 3 Ont. L. R. 664 (1902).

⁷⁸ 115 Md. 122, 80 Atl. 839 (1911).

⁷⁹ 92 N. Y. 56 (1883).

⁸⁰ *Ibid.*, 65-66.

⁸¹ 3 Selden (N. Y.) 438 (1852).

⁸² 110 App. Div. 61, 97 N. Y. Supp. 23 (1905), aff'd without op., 185 N. Y. 539, 77 N. E. 1189 (1906).

after knowledge of a breach of trust by his co-trustee, passively allowed the co-trustee to take exclusive possession of the property.

The settlor's power over the details of trust administration has frequently been sustained; as, for example, in giving to trustees greater latitude than usual in the selection of investments. It would seem that this power should extend to such limitations of the trustees' liability as are not repugnant to the essential ideas of a trust and do not attempt to make crime lawful.

Trustees have no power by agreement among themselves to divide their responsibilities and to limit the liability of any particular trustee to a portion of the trust property.⁸³ Thus, in *Caldwell v. Graham*,⁸⁴ where trustees divided the trust property among themselves, one taking the realty and the other the personalty, the court declined to excuse one trustee for negligence respecting the property allotted to the other trustee and said:⁸⁵ "It was optional with him to accept or decline the trust, but, having undertaken the duty imposed by the will, it was not competent for him to limit his obligation or divest himself of any part of his fiduciary discretion." This view seems unquestionably correct, since the function of a trustee is to administer the trust and not to alter its terms.

The consent of the *cestui que trust* to division of responsibility among trustees has been held not to render such division proper.⁸⁶ This result is readily understandable where the consenting beneficiary possesses only a temporary interest and attempts to affect the rights of a remainderman *cestui que trust*.⁸⁷ But it would seem patent that any *cestui que trust* of full age and sound mind may estop himself from asserting liability against any particular trustee, either wholly or partially.

A contract by trustees in the trust instrument that each shall be liable for the acts of the other is unobjectionable and valid.⁸⁸

⁸³ *Fellows v. Mitchell*, 1 P. Wms. 81 (1705); *Lewis v. Nobbs*, 8 Ch. D. 591 (1878); *Mickleburgh v. Parker*, 17 Grant's Ch. (U. C.) 503 (1870); *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822 (1898); *Stong's Estate*, 160 Pa. 13, 28 Atl. 480 (1894); *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 400 (1837). *Contra*, *In re Cozzens' Estate*, 15 N. Y. Supp. 771 (1891); *Jones's Appeal*, 8 W. & S. (Pa.) 143 (1844) (case of joint guardians treated as trustees).

⁸⁴ 115 Md. 122, 80 Atl. 839 (1911).

⁸⁵ *Ibid.*, 127.

⁸⁶ *Fellows v. Mitchell*, 1 P. Wms. 81 (1705).

⁸⁷ *Mickleburgh v. Parker*, 17 Grant's Ch. (U. C.) 503 (1870).

⁸⁸ *Leigh v. Barry*, 3 Atk. 583 (1747).

The power of equity to make one trustee liable primarily and another secondarily would seem beyond doubt,⁸⁹ but the action of a Federal court,⁹⁰ in approving the decree of a probate court which divided the trust property between trustees and in limiting the liability of each trustee to his share of the property, seems to amount to violating the settlor's intent and remaking the trust for him.

DISCUSSION ON PRINCIPLE

The liabilities of an inactive trustee should be determined by the application of the broad general principles of equity (*a*) that trustees are joint tenants;⁹¹ (*b*) that the trust powers in private trusts are jointly held and must be exercised by unanimous action, in the absence of express provision to the contrary;⁹² (*c*) that the trustee is required to use the care which an ordinarily prudent man would use in the conduct of his own affairs;⁹³ and (*d*) that the trustee may not delegate the exercise of discretionary powers,⁹⁴ but may leave to agents the performance of ministerial duties or mere mechanical acts.⁹⁵ These rules are well settled and fundamental. They should govern the inactive member of a co-trusteeship, as well as all other trustees.

When tested by these standards the problem raised by case four, that of the trustee who remains inactive after notice of a past specific breach of trust or a threatened breach by his co-trustee, seems simple. To fail to act to repair a past wrong or prevent a

⁸⁹ *McCartin v. Traphagen*, 43 N. J. Eq. 323, 11 Atl. 156 (1887). Space will not permit a discussion of the questions whether a trustee who has been held liable for a breach of trust ever has a right to contribution or to indemnity from his co-trustees. The former problem is treated in *Fletcher v. Green*, 33 Beav. 426 (1864), and the latter in *Lockhart v. Reilly*, 25 L. J. Ch. 697 (1856); *Price v. Price*, 42 L. T. R. 626 (1880); *Bahin v. Hughes*, 31 Ch. D. 390 (1886); *Bacon v. Camphausen*, 58 L. T. N. S. 851 (1888); *In re Turner*, [1897] 1 Ch. 536; *Head v. Gould*, [1898] 2 Ch. 250; and *In re Linsley*, [1904] 2 Ch. 785.

⁹⁰ *American Bonding Co. v. Richardson*, 214 Fed. 897 (1914).

⁹¹ PERRY, TRUSTS, 6 ed., § 343.

⁹² *Sinclair v. Jackson*, 8 Cowen (N. Y.), 543 (1826); *Cornett v. West*, 102 Wash. 254, 173 Pac. 44 (1918). In *Fritz v. City Tr. Co.*, 72 App. Div. 532, 533, 76 N. Y. Supp. 625 (1902) (aff'd, 173 N. Y. 622), 66 N. E. 1109 (1903), Woodward, J., stated that "trustees, however numerous, constitute in law but a single person."

⁹³ *Rae v. Meek*, 14 App. Cas. 558, 569 (1889).

⁹⁴ *Re Partington*, 57 L. T. R. 654 (1888); *Robinson v. Harkin*, [1896] 2 Ch. 415; *In re Turner*, [1897] 1 Ch. 536; *Colburn v. Grant*, 181 U. S. 601, 606 (1901).

⁹⁵ 39 Cyc. 304.

threatened injury is to fail to use the care of a reasonably prudent man. No person of ordinary judgment would remain idle when he heard that an agent to whom he had entrusted bonds had stolen a portion of them, or was making preparations to decamp to South America. Trustees have been held to be under a duty to act against *third persons* to remedy a past injury⁹⁶ or ward off impending danger to the estate,⁹⁷ as, for example, where trespassers have cut or threaten to cut timber from trust land. That the actual or prospective wrongdoer is a co-trustee does not diminish the duty of a trustee to act to repair or avoid injury.

And so, too, case three, that of the passive trustee who fails to inspect or supervise the administration of the trust by his active colleague, seems easy of solution. In the first place, to allow the co-trustee exclusive control of investments, the keeping of accounts, and expenditures from trust funds, is a delegation of discretionary duties. If the inactive trustee supervises the acts of his co-trustee, he becomes active and he may be said to make the acts of the co-trustee his own acts, to use his own discretion in the administration of the trust. But where there is no inspection, and the inactive trustee knows that discretionary duties must be performed, he is assuredly authorizing the active co-trustee to exercise such discretion and ought to be regarded as committing a breach of trust. Secondly, judged by the measure of care of the ordinarily prudent man, the inactive trustee is guilty of a fault in failing to supervise. No man of common business ability would entrust a stock of goods, for example, to an agent for months or years without an accounting or inspection, even if there were no breath of suspicion against the agent.

Cases one and two, where there has been mere passivity, as a result of which the co-trustee has obtained exclusive possession, or where the affirmative act of the inactive trustee has caused such exclusive possession, seem identical in principle. The result is the same in both cases. Nonfeasance where there is a duty to act ought to be regarded as the equivalent of misfeasance. A trustee who accepts a trust impliedly promises to assume his full share of

⁹⁶ *Davis v. Charles River Br. R. Co.*, 11 Cush. (Mass.) 506 (1853); *State v. Mayor*, 32 N. J. L. 49 (1866).

⁹⁷ *Roman v. Long Dist. Tel. & Tel. Co.*, 147 Ala. 389, 41 So. 292 (1906); PERRY, TRUSTS, 6 ed., § 328.

control and responsibility. Since the trust title and the trust powers are joint, it is the duty of each trustee to aid in reducing the property to joint possession where it may be jointly controlled.⁹⁸

It is believed that some courts have been misled by the rules applied to executors and administrators. These latter fiduciaries have separate powers. Any one of them may act alone. It is lawful for one executor to collect and disburse the assets of the testator, without the joinder of the other executors. Passivity, therefore, by an executor or administrator is not a breach of duty, and hence numerous cases have held that an executor who passively allows his co-executor exclusive possession is not liable for the wasting of the estate by his co-executor.⁹⁹ But once an executor or administrator has received possession of assets of the estate, he is under a duty to administer them himself, and if he thereafter delivers them to a co-executor or co-administrator, he is deemed to remain liable for their proper administration and to be responsible for the wasting of them by his co-fiduciary.¹⁰⁰ In the fields of executorship and administratorship there has been

⁹⁸ *Dix v. Burford*, 19 Beav. 409 (1854); *Stong's Estate*, 160 Pa. 13, 28 Atl. 480 (1894).

⁹⁹ *Dix v. Burford*, 19 Beav. 409 (1854); *Peter v. Beverly*, 10 Pet. (U. S.) 532, 562 (1836); *Fleming v. Walker*, 152 Ala. 386, 44 So. 536 (1907); *Hall v. Carter*, 8 Ga. 388 (1850); *Ray v. Doughty*, 4 Blackf. (Ind.) 115 (1835); *Moore's Adm'r v. Tandy*, 3 Bibb (Ky.), 97 (1813); *Cheever v. Ellis*, 144 Mich. 477, 108 N. W. 390 (1906); *Fennimore v. Fennimore*, 3 N. J. Eq. 292 (1835); *Douglass v. Satterlee*, 11 Johns. (N. Y.) 16 (1814); *Cocks v. Haviland*, 124 N. Y. 426 (1891); *Williams v. Maitland*, 1 Ired. Eq. (N. C.) 92 (1840); *Irwin's Appeal*, 35 Pa. 294 (1860); *Atcheson v. Robertson*, 3 Rich. Eq. (S. C.) 132 (1850). But a joint account filed by executors may make each liable for the whole property. *Suydam v. Bastedo*, 40 N. J. Eq. 433, 2 Atl. 808 (1885); *Ducommun's Appeal*, 17 Pa. 268 (1851). And the execution of a joint bond may also fasten liability for the whole estate upon each. *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453 (1844); *contra*, *Nanz v. Oakley*, 120 N. Y. 84, 24 N. E. 306 (1890).

¹⁰⁰ *Langford v. Gascoyne*, 11 Ves. 333, 335 (1805); *Knight v. Haynie*, 74 Ala. 542 (1883); *Clark v. Clark*, 8 Paige (N. Y.) 152 (1840); *Croft v. Williams*, 88 N. Y. 384 (1882); *Mathews v. Mathews' Ex'x*, 1 McMull. Eq. (S. C.) 410 (1841); *contra*, *McKim v. Aulbach*, 130 Mass. 481 (1881); *Paulding v. Sharkey*, 88 N. Y. 432 (1882). Some courts have treated the affirmative conduct giving the co-executor full control as innocent if "reasonable" (*Hunt v. State Bk.*, 2 Dev. Eq. (N. C.) 60 (1831)), or "necessary" (*In re Gascoigne*, [1894] 1 Ch. 470), or done for an "exceptional reason" (*In re Osborn*, 87 Cal. 1, 25 Pac. 157 (1890)). In one early case it was held that an executor was not liable to *legatees* for paying money over to a co-executor who thereafter became insolvent, but would have been responsible to *creditors*. *Appeal of Brown*, 1 Dall. (U. S.) 311 (1788).

and is, therefore, room for a distinction between passively allowing another exclusive control and affirmative action to give such other sole control. Unfortunately many courts have confused executors and administrators on the one hand with trustees on the other.¹⁰¹ The former are trustees only in the loose, non-technical sense that they are fiduciaries. The result of this confusion has been the application of the same rules regarding inactivity to both relationships and a tendency to differentiate passive entrusting from active entrusting in the case of co-trusteeships as well as co-executorships.

Assuming that cases one and two, that is, those of passive and active entrusting, are the same in legal effect, should the conduct of the inactive trustee in these two cases be regarded as a breach of trust? In view of the joint nature of the trust powers and title, is exclusive possession by one trustee an impropriety? Trustee A lives in New York and trustee B in Boston; the trust subject-matter consists of negotiable bonds. Must these securities be kept in a safety-deposit box to which access can be obtained only by the joint action of both trustees? Or is it sufficient if the bonds are placed in a box to which both have the separate power of access? Would it be lawful for B in Boston to agree with A in New York that the securities be placed in a bank box in New York, to be rented in the name of A and to which A was to have the only key? Going a step further, may B in Boston turn over the securities to A to be kept exclusively under A's control at such place as A may select? Should the rules regarding exclusive possession be the same, no matter what the character of the trust property, whether negotiable or non-negotiable, real or personal? Should the facility with which negotiable property, as, for example, money, notes and bonds, can be transferred in such a way as to defeat the interest of the *cestui que trust* therein, place on co-trustees a strict obligation to retain joint possession and control of such property;

¹⁰¹ *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166 (1840); *Stewart v. Conner*, 9 Ala. 803 (1846); *Hinson v. Williamson*, 74 Ala. 180 (1883); *Ormiston v. Olcott*, 84 N. Y. 339, 346 (1881); *Bruen v. Gillet*, 115 N. Y. 10, 14, 21 N. E. 676 (1889); *Matter of Provost*, 87 App. Div. 86, 84 N. Y. Supp. 29 (1903). Guardianship has also been treated as equivalent to, or a form of, trusteeship. *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283 (1821); *Kirby v. Turner*, 1 Hopk. Ch. (N. Y.) 309 (1825); *Graham v. Davidson*, 2 Dev. & Batt. Eq. (N. C.) 155 (1838); *Pim v. Downing*, 11 S. & R. (Pa.) 66 (1824); *Jones's Appeal*, 8 W. & S. (Pa.) 143 (1844); *Clark's Appeal*, 18 Pa. 175 (1851).

whereas on the other hand joint trustees of land might properly allow one trustee to have exclusive possession because of the impossibility of the conveyance of the land except by joint action?

At the outset the practical difficulty of strict joint possession and control is evident. Trustees frequently live at a distance from each other. If they are required to keep trust securities in a box capable of being opened only by the joint action of all, then great inconvenience will result every time ministerial duties are to be performed, as, for example, the clipping and depositing of bond coupons. Trust administration will become very burdensome and few will consent to accept a co-trusteeship.¹⁰²

Testing the conduct of the inactive trustee by the rules previously stated, one may ask whether there is any delegation of discretionary duties in allowing a co-trustee exclusive possession. The selection of the place where trust property shall be kept and the choice of the means of safeguarding it from loss by theft, fire, etc., undoubtedly involve discretion. To determine whether bonds shall be placed in a safety-deposit box in a bank or kept in the drawer of a secretary in a private house is not merely a ministerial or mechanical act. It would seem that an inactive trustee who consents to exclusive possession by his fellow without himself having a part in determining the particulars of possession, at what place and in what manner the active associate is to keep the trust property, is violating the trust and delegating a discretionary function. But if the inactive trustee stipulates for a certain method of safekeeping, as in a bank box, and merely allows the co-trustee exclusive access to the box or equal access with the passive trustee, it is not believed that there is any delegation of discretion. Merely acting as a depositary or holder of trust property under prescribed conditions is a mechanical process.

The question whether exclusive possession in one co-trustee is consistent with good business management, is conduct which the ordinarily prudent man would pursue in his own affairs, is different. Assuming that the colleague has a good reputation, that there is

¹⁰² For discussions of the argument from convenience, see *Cottam v. Eastern Co. Ry. Co.*, 1 Johns. & H. 243 (1860); *Banks v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99 (1845); *Miller v. Beverleys*, 4 Hen. & M. (Va.) 415 (1809). In the latter case Taylor, Ch., said (p. 422): "Could it be supposed, that the three trustees, on every occasion, were to be convened to do every act, however unimportant, for the *cestui que trust*? Such a doctrine would be unreasonable in the extreme."

no warning of danger, as we must in this class of cases, is it a disregard of the rules of common prudence to consent to exclusive control by an associate? Two points must here be raised. Was there reason for entrusting exclusive possession to the co-trustee? Was the property entrusted such that the entrusting gave to the active trustee the *indicia* of sole and separate ownership or otherwise enabled him to pass title to a *bona fide* purchaser for value? If the surrender of possession to the associate trustee was unnecessary and had no reason behind it except the indifference and laziness of the passive trustee, it may well be held that such surrender was a lack of ordinary care.¹⁰³ And if the exclusive possession gave the active trustee the power, if he were dishonest, to transfer the trust *res* to a *bona fide* purchaser for value and defeat the trust, the conduct of the inactive trustee may well be treated as negligence. True, an inactive trustee is not bound to presume that his co-trustee is a rogue, but he is presumed to know the frailties of human nature and to realize that it is not good business to place temptation in the way of an associate or intermediary. If the trust property has no element of negotiability about it, and the entrusting will not hold the co-trustee out to the world as the sole beneficial owner, there would seem to be no lack of ordinary good judgment in allowing the co-trustee to take a position similar to that of a warehouseman or other bailee.

Such confusion as there is in the cases in this field seems to arise partly from the ignoring of the joint nature of the trust title and powers and the consequent difference between trusts and executorships, partly from the failure to realize that the problem of the inactive trustee's liability is merely one of the application of the "delegation" and "ordinary care" rules, and partly from other reasons. The attitude of the English courts has probably been softened by the lack of compensation of trustees in that country. The English trustee is in a position analogous to that of a bailee for the sole benefit of the bailor, who is held to the standard of slight care only. The trustee serving without compensation is held, of course, when he acts, to the care of a reasonably prudent man in his own affairs; but when he does not act, it is natural unconsciously to exercise leniency toward him. This reason for an attitude of

¹⁰³ The necessity of the transfer has been considered important by the New York courts. *Purdy v. Lynch*, 145 N. Y. 462, 40 N. E. 232 (1895).

indulgence toward the passive trustee has never existed to any appreciable extent in America,¹⁰⁴ and does not now exist in the British dominions,¹⁰⁵ but it still prevails in England except as to judicial and public trustees.¹⁰⁶ It may have had some influence in early cases.¹⁰⁷

Furthermore, some courts have revolted at making the inactive trustee responsible because it would be mulcting one man for the wrong of another.¹⁰⁸ Such reasoning is fallacious, it is submitted, because the negligence or passivity of the inactive trustee is as much a cause of the loss as the fraud or negligence of the active trustee.¹⁰⁹ If the inactive trustee had not surrendered the trust property and management to his fellow trustee, the latter would never have had the opportunity of wasting or stealing the funds. As well say that a trustee who leaves trust money in a public place where it is stolen should not be liable because the crime of the thief was the cause of the loss, as to hold the inactive trustee innocent when his negligence has opened the door for a breach of trust by his co-trustee.

The responsibilities incident to the administration of trusts have not been appreciated by many trustees, and, it is submitted with respect, by some courts. The settlor and the *cestui que trust* have a right to expect that trustees who accept the trust will give the estate the benefit of their skill and honesty and not merely of their names. A trustee who cannot or will not participate should decline or resign the trust, instead of holding out false hopes to those interested in its performance. A strict enforcement of the "reasonable care" and "delegation" rules will expel the undesirable inactive trustee and aid in the conservation of trust estates.

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¹⁰⁴ PERRY, TRUSTS, 6 ed., §§ 916, 917.

¹⁰⁵ BRIT. COL. TR. ACT, § 80; MAN. TR. ACT, § 49; NEW BRUNS. TR. ACT, § 44; NEWF. CONSOL. ST. 1892, chap. 84, § 22; NOVA SC. TR. ACT, § 55; ONT. TR. ACT, § 67; PRINCE EDW. ISL. L. 1902, chap. 12; QUEENSL. TR. & EX. ACT (1897), § 55; SASK. TR. ACT, § 50.

¹⁰⁶ 28 HALSBURY'S LAWS OF ENGLAND, 162, 212, 219; UNDERHILL, LAW OF TRUSTS AND TRUSTEES, 7 ed., art. 53.

¹⁰⁷ *Litchfield v. White*, 3 Selden (N. Y.) 438, 444 (1852); STORY'S EQ. JURISP., 13 ed., § 1268.

¹⁰⁸ See, for example, opinion of Finch, J., in *Ormiston v. Olcott*, 84 N. Y. 339, 346 (1881).

¹⁰⁹ *Gainsborough v. Watcombe Terra Cotta Co.*, 54 L. J. Ch. 991, 996 (1885); *Klatt v. Keuthan*, 185 Mo. App. 306, 170 S. W. 374 (1914).

THE PROGRESS OF THE LAW, 1919-1920

ESTATES AND FUTURE INTERESTS

LORD BIRKENHEAD'S Law of Property Bill now pending before Parliament proposes far-reaching reforms. It contains provisions for assimilating the law of real property with the law of personal property by enacting that all land shall have the incidents of a chattel real held in perpetuity; for the registration of land; for the repeal of the Statute of Uses; and for placing "all interests in land, except legal estates in fee simple and for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement," and freeing "a purchaser in good faith from any obligation to look behind the curtain." The bill has been fully discussed in the periodicals.¹ New South Wales² and Victoria³ have passed Real Property Acts.

Two text-books, both second editions and both of distinguished excellence, have appeared in 1920.⁴ An examination of the cases following will show that a large proportion of our litigated problems in future interests now consists in the making and application of rules of construction. Mr. Kales has as successfully dealt with these rules for Illinois and in many instances for the whole country as Jarman did for England. Mr. Tiffany has secured his position as the leading American text writer on conveyancing. Reviews of both books appear on other pages of the Review.

An article on "Seisin" by the late Judge Francis M. Finch appears in the *Cornell Law Quarterly*.⁵ This was one of a series of lectures delivered by him entitled "The History and Evolution of the Law," and is described as typical of the series.

¹ Editorial Notes in 64 SOL. JOUR. 373, 388, 407, 460; James E. Hogg in 64 SOL. JOUR. 385, 405, 421, 442, 458, 474; Arthur Underhill in 36 L. QUART. REV. 107; Charles P. Sanger in 20 COL. L. REV. 652 (June, 1920); Manley O. Hudson in 34 HARV. L. REV. 341.

² 1919 CONVEYANCING ACT, N. S. Wales, No. 6.

³ 1918 REAL PROPERTY ACT in Victoria, No. 2962.

⁴ KALES, ESTATES AND FUTURE INTERESTS, 2 ed.; TIFFANY, THE LAW OF REAL PROPERTY, 2 ed.

⁵ 4 CORNELL L. Q. 1.

ESTATES

I. In this country estates tail survive in a few states. In many jurisdictions they are in terms abolished by the legislatures. The common form of statute is to turn the estate into a fee simple in the first taker; but occasionally he takes a life estate with remainder in fee simple to his issue. In a number of states the statutes are silent as to estates tail. It is said that the Statute De Donis,⁶ creating estates tail in England, was brought by the colonists to America. It has been held in Iowa, where the statutes do not mention estates tail, that the Statute De Donis is contrary to the customs and institutions of that state, and therefore not a part of its law. And so if an estate tail is attempted in Iowa a fee simple conditional, such as existed in England prior to that statute results.⁷ This fee was subject to be defeated by the failure of lineal heirs of the first taker. But the judges, who seem for centuries to have been opposed to the tying up of property in families, held that as soon as the first taker had issue born he could alienate so as to deprive his issue and the donor of any possible interests in the land. Mr. Kales says of the present situation in Iowa, "As a specimen of a legal antiquity it is certainly entitled to first place."⁸ The Supreme Court of Nebraska has just given its approval to this doctrine as part of the law of Nebraska. Its remarks, however, are *dicta*, for the court held that a conditional fee did not occur in the will under consideration.⁹

II. By Revised Statutes (1909), § 2872, one who in Missouri would take a fee tail by the English common or statute law is "seized thereof for his natural life only; and the remainder shall pass in fee simple absolute to the person to whom the estate-tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law." The Supreme Court¹⁰ held that the eldest son of the devisee must share the remainder with his brothers and sisters. This may well be supported,¹¹ without saying, as the court did, "the idea that any

⁶ STAT. 13 EDW. I, chap. I (1285). GRAY, PERPETUITIES, 3 ed., § 19 n.

⁷ Kepler v. Larson, 131 Iowa, 438, 442, 108 N. W. 1033 (1906).

⁸ KALES, FUTURE INTERESTS, 2 ed., § 19.

⁹ Yates v. Yates, 178 N. W. (Neb.) 262 (1920).

¹⁰ Gillilan v. Gillilan, 278 Mo. 99, 212 S. W. 348, 350 (1919).

¹¹ 1 LAW SERIES, MISSOURI BULLETIN, 19. See Yates v. Yates, 178 N. W. (Neb.) 262, 265 (1920).

such preference in the descent of real property could co-exist in the laws of any of the states, with the axioms of the federal Constitution guaranteeing equal protection of the laws to all persons and a republican form of government for each state, or with the social and political life modeled on those fundamental principles, is an unthinkable absurdity." The Massachusetts lawyer does not prize highly the estate tail of England since the Statute De Donis, which the laws of the Commonwealth recognize as here existing;¹² but he would be surprised to learn that it violated the Constitution of the United States.

REVERSIONS AND REMAINDERS

I. A Georgia will devised to the testator's wife a dwelling "to have, hold, use and occupy, as a home for her and our children for and during the natural life of my said wife, or until she shall marry again. Upon the happening of either of which events, said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or if any of my children shall be dead at that time, leaving children surviving them, such last mentioned children shall take the share of their deceased parent." The Federal Court¹³ correctly held the remainder to the children to be contingent.

Whether a remainder is vested or contingent depends upon the words used. If the language importing contingency is incorporated into the description of the remainderman, the interest is contingent.¹⁴ Gifts to "such children as survive," or "children who survive" the life tenant, or to "children if living," are contingent.¹⁵ And a gift over, if any die before the life tenant, does not render the prior interest vested.¹⁶

Yet in *Cole v. Cole*,¹⁷ where property was bequeathed to A for

¹² REV. LAWS (1902), c. 127, §§ 24-27. GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 19 n. Of course this involves primogeniture. *Wright v. Thayer*, 1 Gray (Mass.) 284 (1854).

¹³ *Swann v. Austell*, 261 Fed. 465 (1919). The headnote is misleading.

¹⁴ GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 108.

¹⁵ *Duffield v. Duffield*, 1 Dow & Cl. 268 (1828); *In re Francis*, [1905] 2 Ch. 295; *Abbott v. Jenkins*, 10 S. & R. (Pa.) 296 (1823); KALES, FUTURE INTERESTS, 2 ed., § 309. Compare *Thompson v. Humphrey*, 179 N. C. 44, 101 S. E. 738 (1919).

¹⁶ *Blakeley v. Mansfield*, 274 Ill. 133, 113 N. E. 38 (1916). See *Festing v. Allen*, 12 M. & W. 279 (1843).

¹⁷ 292 Ill. 154, 126 N. E. 752 (1920).

life, and at his decease to be divided among his children, and if A have no children or grandchildren to be divided among the testator's other children, the Illinois court relying on *Furnish v. Rogers*¹⁸ and *Golladay v. Knock*,¹⁹ held the gift to the children contingent. The earlier Illinois cases have been criticized,²⁰ and must be deemed incorrect. And *Cole v. Cole* should also be disapproved. That the interests were of personalty can make no difference, especially in Illinois.²¹

II. Suppose a devise of land to A for life, remainder to B "after the death" of A. If the words quoted, or similar words, are to be taken literally, B cannot take till A's death, an event possibly not occurring till after the termination of A's life estate by forfeiture or merger. The remainder would, therefore, be contingent and destructible at common law. But courts, which lean towards the vesting of future interests, have always construed those expressions to mean "at the termination, whenever and however, of the particular freehold estate." The remainder is, therefore, vested,²² and three recent cases so hold.²³

III. If a gift be made by will to A for life, with remainder to B to take effect whenever and however the prior estate ends, B's estate takes effect in possession at once if A's estate terminates in any fashion. If the interest after A's life estate is expressed to B "after the death of A" by the received construction noted above "at A's death" means "at the termination of A's life estate, whenever and however that may occur," B's interest is vested and subject to acceleration. Acceleration will occur if A's interest is void because he witnessed the will creating it,²⁴ or because his devise was revoked by a later codicil.²⁵ It is said that this is to promote

¹⁸ 154 Ill. 569, 39 N. E. 989 (1895).

¹⁹ 235 Ill. 412, 85 N. E. 649 (1908).

²⁰ KALES, FUTURE INTERESTS, 2 ed., § 349.

²¹ *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351 (1887).

²² GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 103, n. 1.

²³ *Dowd v. Scally*, 174 N. W. (Iowa) 938 (1919); *Real Estate Title Co. v. Dearborn*, 109 Atl. (Me.) 816 (1920). And see *Montague v. Curtis*, 191 App. Div. 904, 110 Misc. 717, 181 N. Y. Supp. 709, 711 (1920).

²⁴ *Jull v. Jacobs*, 3 Ch. D. 703 (1876).

²⁵ *Lainson v. Lainson*, 18 Beav. 1 (1853); *Eavestaff v. Austin*, 19 Beav. 591 (1854).

1 JARMAN, WILLS, 6 Eng. ed., p. 719; KALES, FUTURE INTERESTS, 2 ed., § 599. Compare *Crozier v. Crozier*, 3 Dr. & W. 353 (1843); *In re Mortimer*, [1905] 2 Ch. 502; GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 251. See an article on acceleration in 32 L. QUART. REV. 392, 397, 398.

the testator's intention as shown by the language of the will.²⁶ Rather, the judges are expressing a rule for guidance in a case which the testator did not have in contemplation,²⁷ and upon which he said nothing. Of course if it is clear from the will that such a construction would have defeated the intention of the testator had the contingency been called to his attention, the rule does not apply.

If the interests created by the will are to a widow for life with a direction to the executor to sell at her death and divide the proceeds between named persons, the future interests are vested remainders. And if the widow renounces the life estate to take her statutory share, some courts accelerate the remainders, as in the case of void or revoked life estates.²⁸ Suppose, however, that the taking by the widow of her intestate share so disappoints the residuary legatee that unless the life estate be preserved for his benefit by a refusal to accelerate the remainders, the amount left to him will be far short of what the testator intended him to have. In Pennsylvania this consideration does not affect the matter, and there will be acceleration nevertheless.²⁹ A recent Michigan case,³⁰ however, striving to carry out the testator's probable intent, finds in this fact enough on the face of the will to show that the testator intended to have no acceleration. This result is in accordance with the weight of authority.³¹

If the gift over after the life estate is to those who may "then be living" or who "survive" the life tenant, the settled rule is that there is no acceleration if the widow to whom the life estate is limited renounces,³² and two recent cases so hold.³³ Where the

²⁶ *Compton v. Rixey*, 124 Va. 548, 98 S. E. 651, 652 (1919).

²⁷ GRAY, NATURE AND SOURCES OF THE LAW, § 702.

²⁸ *Slocum v. Hagaman*, 176 Ill. 533, 539, 52 N. E. 332 (1898); *Disston's Estate*, 257 Pa. 537, 101 Atl. 804 (1917). But see *Rocker v. Metzger*, 171 Ind. 364, 86 N. E. 403 (1908).

²⁹ *Ferguson's Estate*, 138 Pa. 208, 20 Atl. 945 (1890); *Vance's Estate*, 141 Pa. 201, 21 Atl. 643 (1891). And see a recent case, *Hesseltine v. Partridge*, 236 Mass. 77, 127 N. E. 429 (1920). On acceleration because of a prior void accumulation see *Thistle's Estate*, 263 Pa. 60, 106 Atl. 94 (1919).

³⁰ *Sellick v. Sellick*, 173 N. W. (Mich.) 609 (1919).

³¹ 2 WOERNER, AM. LAW ADM., 2 ed. §§ 119, 439. TIFFANY, REAL PROPERTY, 2 ed., § 146.

³² *Wakefield v. Wakefield*, 256 Ill. 296, 100 N. E. 275 (1912).

³³ *Swann v. Austell*, 261 Fed. 465 (1919); *Compton v. Rixey*, 124 Va. 548, 98 S. E. 651 (1919).

rule of destructibility is in force the contingent remainder is said not to be destroyed by the renunciation of the life estate, for the interest relinquished passes by the will to the legatees who are disappointed by the widow's election.³⁴

In re Conyngham.³⁵ The testator by will created equitable interests in realty as follows: To the plaintiff, his brother and heir, for life; remainder to the plaintiff's first and other sons successively in tail male; remainder to the testator's nephew, the infant defendant, for life; remainders over with an ultimate remainder to the testator's heirs. The testator revoked the life estate to his brother, and died a bachelor. The plaintiff was married but had no children. It was held that the defendant's life interest in the rents and profits was accelerated until the plaintiff had a son. Intention was emphasized. Down to *In re Willis*³⁶ several decisions³⁷ had favored the heir where a contingent interest was interpolated between the life estate which had failed and a vested future estate. In that case the life estate was disclaimed not revoked, but the interests, as here, were equitable, and the decision was the same. The earlier cases are distinguished as dealing with legal interests, or on the special facts; but since 1917 the judicial attitude seems less favorable to a temporary intestacy in this class of cases.³⁸

IV. Suppose there be a devise to A for life, remainder to B, a bachelor and heir at law of the testator, for life, remainder to the children of B or B's descendants him surviving in fee; but if B die without children or descendants him surviving to a charity. Here B's children and the charity are said to have contingent remainders in fee;³⁹ and B, besides his life estate, to have a reversion in fee.⁴⁰ These two estates of B's, being created at the same time and through a single instrument, do not merge so as to destroy the contingent remainders.⁴¹ Now suppose that B, while still a bachelor

³⁴ *Wakefield v. Wakefield*, 256 Ill. 296, 100 N. E. 275 (1912). Compare *Page v. Rouss*, 103 S. E. (W. Va.) 289 (1920).

³⁵ [1920] 2 Ch. 495.

³⁶ [1917] 1 Ch. 365.

³⁷ *Carrick v. Errington*, 2 P. Wms. 361 (1726); *Hopkins v. Hopkins*, 1 Atk. 581 (1738); *In re Scott*, [1911] 2 Ch. 374. See 1 JARMAN, WILLS, 6 ed., 718, 719.

³⁸ See 32 L. QUART. REV. 392; 33 L. QUART. REV. 132.

³⁹ *Loddington v. Kime*, 1 Salk. 224; *Peoria v. Darst*, 101 Ill. 609 (1882).

⁴⁰ GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 11; KALLES, FUTURE INTERESTS, 2 ed., § 91.

⁴¹ *Plunket v. Holmes*, 1 Lev. 11 (1658); FEARNE, CONTINGENT REMAINDERS, 10 ed.,

and during the life of A, conveys both his estates to X with the declared purpose of destroying the contingent interests, and that B then marries and has a child born a few months after the death of A. The Illinois court ⁴² has just said that B's life estate merged in his assigned reversion, but that the contingent remainders having still A's life estate to support them were not destroyed, until A died, as he did, before the contingent remainders vested.

If a tenant for life who also owns the reversion or a vested remainder conveys both to another person, intermediate contingent remainders are destroyed by the merger of the life estate in the vested remainder.⁴³ The concession indicated above, where there was no destruction of intermediate contingent remainders if the estates were created by the same instrument, was merely a modification to prevent settlements from being nugatory at the outset. No doubt there may be merger though both estates which coalesce in the same person are remainders, and not as to one an estate in possession.⁴⁴ No authority has been found which demonstrates so well as the principal case that the reason for the destruction of a contingent remainder by merger is not that it is squeezed to death by the union of the two estates, but that it fails, as is commonly stated,⁴⁵ for want of a freehold to support it.

V. In *Matthews v. Andrews* ⁴⁶ the testator devised a lot of land to T for life, and on the death of T leaving children or descendants to them, and if T died leaving no children or descendants to E. The will contained this, the fifth, clause: "I give all my personal estate, together with the rest and residue of my lands or other estate, unto my said wife." T was the only heir of the testator; and conveyed all his interest in the lot to a third person, reciting that he conveyed his life estate under the will and the reversion

p. 345; *Biwer v. Martin*, 128 N. E. (Ill.) 518 (1920). The descent of a reversion upon the life tenant as heir at law was present in novel form in *Cole v. Cole*, 292 Ill. 154, 126 N. E. 752 (1920). See 15 ILLINOIS L. REV. 335.

⁴² *Gray v. Shinn*, 293 Ill. 573, 127 N. E. 755 (1920).

⁴³ FEARNE, CONTINGENT REMAINDERS, 10 ed., 339; Co. Lit. 28a, Hargrave n. 8; 3 PRESTON, CONVEYANCING, 3 ed., 113; CHALLIS, REAL PROPERTY, 3 ed., 137; *Randolph v. Wilkinson*, 128 N. E. (Ill.) 525 (1920). See *Stevens v. Van Brocklin*, 129 N. E. (Ill.) 68 (1920).

⁴⁴ 3 PRESTON, CONVEYANCING, 3 ed., 50, 51.

⁴⁵ FEARNE, CONTINGENT REMAINDERS, 10 ed., 324; CHALLIS, REAL PROPERTY, 3 ed., 137; KALES, FUTURE INTERESTS, 2 ed., § 311.

⁴⁶ 290 Ill. 103, 124 N. E. 871 (1919).

which had descended on him for the purpose of destroying the contingent remainders. There is no doubt, however, that any estate that the testator had in the lot after the specific bequests thereof passed to his wife under the fifth clause,⁴⁷ and that, therefore, all that T conveyed was his life estate, which left the contingent remainders unaffected. And so the court held.

*Friedman v. Friedman*⁴⁸ presents a point over which there has been much controversy. The limitations by will were of land to A for life and then to such of the testator's children as might be living at A's death in fee; but if any of the testator's children predeceased A leaving children, such children were to take their parent's share in the same manner as if the parent had survived A. The residue was bequeathed to the testator's children. A and the testator's children conveyed all their interests to the same person with the avowed purpose of destroying the contingent remainders. The court found that the two interests after A's life estate were contingent remainders with a double aspect which were defeated by merger of the life estate. The court did not attempt precisely to define the interest created by the residue other than to say that "the reversion in fee did not pass out of the owner and vest in the remainderman, but remained in him and vested in his heirs under the twelfth [residuary] clause of the will, pending the determination of the particular estate."⁴⁹

High authority has considered a definition of this interest to be controlling. In *Egerton v. Massey*,⁵⁰ where the facts were substantially similar except that the life tenant and residuary devisee were the same, the decision also was in favor of the destruction of the contingent remainders.

Mr. Gray supports *Egerton v. Massey* solely on the ground that the court spoke of the residuary devise as a reversion, which he takes to mean the grant of a reversion, although created and granted by the same instrument that created the particular estate.⁵¹ He says, however, that the residue has most of the characteristics of a remainder. "It is a future estate, taking effect, if at all, at the

⁴⁷ *Egerton v. Massey*, 3 C. B. (N. S.) 338 (1857); *Benson v. Tanner*, 276 Ill. 594, 115 N. E. 191 (1917); *Friedman v. Friedman*, 283 Ill. 383, 119 N. E. 321 (1918).

⁴⁸ 283 Ill. 383, 119 N. E. 321 (1918).

⁴⁹ 283 Ill. 383, 389, 119 N. E. 321 (1918).

⁵⁰ 3 C. B. (N. S.) 338 (1857).

⁵¹ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 113a and 113b.

termination of the particular estate and created by the same instrument." But, he goes on, there cannot be a vested remainder after a contingent remainder in fee.⁵²

Mr. Kales, in the last edition of his book on Future Interests, challenges Mr. Gray's statement that the residuary devise in the grant of the reversion, as being based on the impossible view that the testator dies at one time as regards the beginning of his will and later with respect to the residuary clause; or else that the will takes "effect in sections, with momentary lapses of time between each and that there was a moment of time in which the heir at law had a reversion by descent and then (*mirabile dictu*) the later clause of the will operated as an assignment by the testator (*sic*) of the reversion which had already vested in the testator's heir."⁵³ Mr. Kales then seems to suggest that the contingent future interests become executory devises operating by way of conditions subsequent to divest the vested remainders.⁵⁴ And, as executory devises are indestructible, he dissents from the results reached in *Egerton v. Massey* and *Friedman v. Friedman*.

In the face of such a conflict of eminent authority it may not be presumptuous to suggest a third view. It is submitted that Mr. Kales is entirely sound in finding the creation of a vested remainder by the residuary clause, but that this is no reason for turning the intermediate interests into executory devises. For it is submitted that despite the array of distinguished conveyancers to the contrary no valid reason exists for saying that there cannot be a vested remainder after a contingent remainder in fee.⁵⁵ The contingent interest, it is true, may vest and prevent the vested remainder from ever being effective in possession; but that a vested remainderman may never become entitled in possession is no argument against the vested character of the remainder.⁵⁶ It is admitted that under a devise to a bachelor for life, remainder to his children *for life*, remainder to B, that B's interest is a vested remainder;

⁵² *Loddington v. Kime*, 1 Salk. 224; FEARNE, CONTINGENT REMAINDERS, 10 ed., 225. SUGDEN, POWERS, 8 ed., 513. Compare CHALLIS, REAL PROPERTY, 3 ed., 80, 81.

⁵³ KALES, FUTURE INTERESTS, 2 ed., § 95.

⁵⁴ This was Mr. Preston's view. ESTATES, 2 ed., 84, 502.

⁵⁵ HAYES, LIMITATIONS, 81. And see TIFFANY, REAL PROPERTY, 2 ed., § 142.

⁵⁶ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 104, 108; TIFFANY, REAL PROPERTY, 2 ed., § 137.

and that the same is true if after A's life estate there were two alternative contingent remainders *for life*. No reason is conceived why B's estate should change its character or the contingent interests change their character because the contingent interests are *in fee*. B's interest is ready to take effect in possession whenever and however the preceding estates end.⁵⁷ If it be said that the happening of the contingency operates as a condition subsequent and causes the remainder to B wholly to be divested by an executory devise, the remainder to B must be *partially* divested by the vesting of a contingent interest *for life*. And no one contends that what would otherwise be a contingent remainder for life becomes an executory devise for life by reason of its being followed by a vested remainder in B. If, as all admit,⁵⁸ a contingent remainder is not an estate but a possibility of an estate, it is difficult to see how the fact that it is in fee or for life should in any way change the character of it or other interests.

It is, perhaps, not without significance that Mr. Joshua Williams, who was counsel for the successful party in *Egerton v. Massey*, referred in argument to the interest created by the residuary gift as a remainder.⁵⁹ In his work on Settlements, in discussing the decision, he speaks of the residuary gift indifferently as a reversion or as a remainder.⁶⁰ Cockburn, C. J., in his opinion terms it a reversion; but in the course of the argument he asked Mr. Joshua Williams this question: "Your contention is, that the estate for life merged in the remainder in fee?"⁶¹

Much as we regret the existence of the doctrine of destructibility of contingent remainders in Illinois we are forced to the conclusion that the intermediate estates in *Egerton v. Massey* and *Friedman v. Friedman* were contingent remainders which were destroyed by

⁵⁷ See Mr. Gray's definition of a vested remainder, RULE AGAINST PERPETUITIES, 3 ed., § 101.

⁵⁸ WILLIAMS, REAL PROPERTY, 21 ed., 361; CHALLIS, REAL PROPERTY, 3 ed., 86. GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 113b. *Gray v. Shinn*, 293 Ill. 573, 127 N. E. 755 (1920). In *Du Bois v. Judy*, 291 Ill. 340, 126 N. E. 104, 107 (1920), the court said that a contingent remainder, not being a right in land but merely a possibility of an estate, did not pass under a quitclaim deed by the prospective owners of the interest, when the remainder was to those who survive the life tenant, and the deed was given before the latter's decease.

⁵⁹ 3 C. B. (N. S.) 338, 355 (1857).

⁶⁰ WILLIAMS, SETTLEMENTS, 209, 210.

⁶¹ 3 C. B. (N. S.) 355, 357 (1857).

merger when the life estate in possession and the ultimate vested remainder in fee conferred by the residuary gift united by the conveyance to one person.

VI. The problem of merger has ordinarily arisen in regard to interests created by wills. The Illinois court has held the doctrine of merger inapplicable where the estates were originally created by deed with warranty.⁶² In *Biwer v. Martin* the settlor created a life estate in himself, remainder to his son, B, for life, contingent remainder to his son's widow for life, contingent remainder in fee to B's descendants him surviving, reversion in the settlor and his heirs. A's and B's life estates were transferred to X, and the reversion to X through Y with intent to destroy contingent remainders. The court held that the covenant of warranty, which was synonymous with a covenant for quiet enjoyment, prevented merger and held that the contingent remainders were not destroyed. But destructibility is an inherent quality and weakness of a contingent remainder. And this weakness may be taken advantage of by any one, even by him who with covenants created the remainder. These covenants cannot extend to future acts by which the settlor or those claiming under him take advantage of one of the natural limitations of the interest.⁶³

VII. Lord Coke said, "If a man make a gift in tail, of a lease for life, the remainder to his own right heirs, this remainder is void, and he hath a reversion in him."⁶⁴ And the Kentucky and Illinois courts agree.⁶⁵

VIII. The rights of an adverse possessor against a reversioner or remainderman are fully discussed by Mr. Kales in his new edition.⁶⁶ If the life tenant makes a conveyance of the fee, the adverse possessor claiming thereunder cannot assert that the statute of limitations has begun to run in his favor until the death of the life tenant. In a recent Illinois case a life tenant mortgaged land warranting title. The assignee of the mortgage foreclosed and conveyed the property by warranty deed. The court conceded that this deed of the assignee gave color of title to those claiming

⁶² 128 N. E. (Ill.) 518 (1920).

⁶³ See 34 HARV. L. REV. 430.

⁶⁴ Co. Lit. 22b. *King v. Dunham*, 31 Ga. 743 (1861), *accord*.

⁶⁵ *Nuckols v. Davis*, 221 S. W. (Ky.) 507 (1920); *Biwer v. Martin*, 128 N. E. (Ill.) 518, 521 (1920).

⁶⁶ KALES, FUTURE INTERESTS, 2 ed., §§ 383-397.

under it; but held that the statute did not run in their favor until the death of the original life tenant.⁶⁷

THE RULE IN SHELLEY'S CASE

I. The Rule in Shelley's Case presupposes two circumstances, — a freehold in the ancestor, and a remainder to the heirs or heirs of the body; and there are two principles involved. The first and the more difficult principle is one of interpretation, to discover whether the remainder is to the "heirs" or "heirs of the body" of the ancestor, or whether it is to the "children," "sons," "relatives," etc., of the ancestor. If the word "heirs" is used, or, if not used, the words employed are susceptible of that construction, the second principle is invoked; that is, the estate in remainder is inexorably turned into a fee simple or fee tail in the ancestor. If no estate intervenes between the life estate and the fee, there is a merger, and the ancestor becomes seised of a fee simple in possession. If, however, another interest has been inserted between the life estate and the limitation to the heirs, the ancestor is seised of an estate for life in possession with a mesne vested remainder to himself in tail or in fee as the case may be.

On the other hand, even though the word "heirs" is used in the original limitations, if by sound construction some other class of persons than heirs is meant, the Rule does not apply; and there is, as intended by the settlor, a contingent remainder to the persons designated.⁶⁸

It should thus be kept steadily in mind that the Rule is a rule of law defeating intent and not a rule of construction. There is indeed the preliminary question of interpretation; but once it is found that the remainder is to heirs the Rule is ruthlessly applied even though it be clear that the settlor intended a life estate and a contingent remainder to the heirs of the owner thereof.⁶⁹

Yet in *Roe v. Grew*⁷⁰ in 1767 it was suggested that the whole

⁶⁷ *Gibbs v. Gerdes*, 291 Ill. 490, 126 N. E. 155 (1920). See *Nickerson v. Nickerson*, 235 Mass. 348, 128 N. E. 834, 838 (1920); *Youmans v. Youmans*, 105 S. E. (S. C.) 31 (1920).

⁶⁸ 1 HAYES, CONVEYANCING, 5 ed., 542-546. Lord Redesdale in *Jesson v. Wright*, 2 Bligh, 1, 56 (1820); Cockburn, C. J., in *Jordan v. Adams*, 9 C. B. (N. S.) 483, 496-500 (1861); *Blackledge v. Simmons*, 105 S. E. (N. C.) 202 (1920).

⁶⁹ *Coulson v. Coulson*, 2 Strange, 1125; *Perrin v. Blake*, 4 Burr. 2579 (1770).

⁷⁰ 2 Wils. 322 (1767).

foundation of the Rule was interpretation, that there was a general intention that the estate should travel through the issue generally of a certain person, accompanied by a particular intention that the first taker have an estate for life, and the Rule in Shelley's Case was applied to give effect to the general intent, — which was said to override the particular intent. This notion was fostered by Lord Eldon;⁷¹ but was severely shaken by Lord Redesdale⁷² in the same case, by Lord Denman⁷³ in 1833, and Lord Wensleydale⁷⁴ in 1858. Later Lord Cairns revived it;⁷⁵ and his approval has been the basis of a recent discussion of the Rule by the Nebraska court.⁷⁶ A Nebraska statute read that “. . . it shall be the duty of the courts of justice to carry into effect the true interest of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law.”⁷⁷ This statute, it was said, did not abrogate the Rule in Shelley's Case, for that Rule (and Lord Cairns was cited) is designed to carry out the general intention of the testator. We regret that the true nature of the Rule was not observed. But even had it been truly perceived, the court might well have said in view of the last clause of the statute that the Rule was still in force in Nebraska.

II. A Victorian statute enacted that “where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.”⁷⁸ A will made after this act contained a trust of real estate “for my daughter Rosetta Campbell during her life and upon her death then as to said lands and tenements and the rents and profits thereof upon trust for her lawful issue and if more than one as tenants in common.”⁷⁹ The High Court of Australia held a year ago that Rosetta took an estate for life and not an estate tail.

⁷¹ *Jesson v. Wright*, 2 Bligh, 1, 51, 52 (1820). ⁷² *Ibid.*, pp. 56, 57 (1820).

⁷³ *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621, 640 (1833).

⁷⁴ *Roddy v. Fitzgerald*, 6 H. L. C. 823, 877 (1857).

⁷⁵ *Bowen v. Lewis*, 9 A. C. 890, 907 (1884).

⁷⁶ *Yates v. Yates*, 178 N. W. (Neb.) 262 (1920). See 19 MICH. L. REV. 113.

⁷⁷ NEBRASKA REV. STAT. (1913), § 6195.

⁷⁸ 1890 VICTORIAN STAT. 3626.

⁷⁹ *In re Cust*, [1919] V. L. R. 693.

The Rule has no application unless the words used in the remainder are words of limitation, and not words of purchase.⁸⁰ *Lees v. Mosley*⁸¹ had decided in England that prior to the Wills Act, which contained a clause similar to the Victorian Act, a devise to A for life remainder to his issue in equal shares with a limitation to the heirs of the issue, vested in A a tenancy for life only, for the "issue" took as purchasers. The words of distribution and limitation were thus held sufficient to mold the *prima facie* meaning of issue as embracing the whole line of inheritable descendants. The Australian court correctly decided that the same principle applied where words of distribution, *i. e.* "as tenants in common," are present and words of limitation added to issue are supplied not by the testator but by the statute.⁸²

III. A deed transferred land to "the heirs-at-law of Woodson P. Greene . . . reserving herein, however, and hereby conveying to Woodson P. Greene a life estate in the above described real estate, the said grantees first above named to have and receive said lands at the death of Woodson P. Davis." The Illinois court properly applied the Rule although the life estate was by reservation after the gift to the heirs. It further said that the last clause did not prevent the application of the Rule, for "It does not affect the case if the deed states that the heirs of Woodson P. Greene at his death shall take as purchasers;"⁸³ this, though the court had already stated that the Rule applied when "the heirs" were used as words of limitations. The theory is thus expressed by Lord Commissioner Wilmut in *Sayer v. Masterman*:⁸⁴ "Suppose one devises to A. and the Heirs of the Body of A. and says, 'I declare that the Heirs of the Body of A. shall take by Purchase,' can the Intent be more manifest and express? And yet A. shall have an Estate Tail; for the Testator shall not be permitted to controul the legal operation of the words." The authorities are collected and carefully discussed, especially those in Illinois, by Mr. Kales.⁸⁵

IV. A deed conveyed land to a daughter "during her natural

⁸⁰ 9 L. QUART. REV. 2. Compare KALES, FUTURE INTERESTS, 2 ed., §§ 421-428.

⁸¹ 1 Y. & C. 589 (1835).

⁸² See 2 JARMAN, WILLS, 6 Eng. ed., 1944-1951. The case is discussed and the authorities collected in 33 HARV. L. REV. 988.

⁸³ *Du Bois v. Judy*, 291 Ill. 340, 342, 346, 126 N. E. 104, 106 (1920).

⁸⁴ Wilm. 386, 403 (1757).

⁸⁵ KALES, FUTURE INTERESTS, 2 ed., §§ 421-428, especially § 421.

life, and after her death to the issue of her body" and provided that, if any child or children of the daughter should predecease her leaving a child or children, such child or children should take the share of the parent, but that if the daughter should die without leaving any issue living at her death, the land should revert. The Federal Circuit Court of Appeals,⁸⁶ administering South Carolina law, correctly held that "issue" meant "children," so as to vest a life estate in the daughter. The case should be compared with *Jesson v. Wright*.⁸⁷

In *McClen v. Lehker*,⁸⁸ the Indiana court said that "heirs" cannot be construed in a will to mean "children" unless it very clearly appears to have been so used. The whole discussion of the Rule as one defeating intention is excellent. On the other hand, "heirs" was held to mean "children" on slight considerations in Illinois.⁸⁹

"Legal representatives" has been held to mean "heirs;"⁹⁰ and "Descendants," "heirs of the body."⁹¹

V. There is a good discussion of the statutes abolishing the Rule in *Carter v. Reserve Gas Co.*;⁹² an Arkansas statute is considered in *Johnson v. Dillinger*.⁹³

CONSTRUCTION OF WORDS AND PHRASES

I. A will read thus:

"I give devise and bequeath all my property and estate, both real and personal, and wherever situated, to my next of kin and heirs at law, to be divided and distributed among them in the same proportions and shares provided for the descent and distribution of intestate estates of deceased persons under the laws of the State of Rhode Island.'" This with good reason was held not to include

⁸⁶ *Davenport v. Hickson*, 261 Fed. 983 (1919).

⁸⁷ 2 Bligh, 1 (1820).

⁸⁸ 123 N. E. (Ind.) 475 (1919).

⁸⁹ *Morris v. Phillips*, 287 Ill. 633, 122 N. E. 831 (1919). See *Wilson v. Harrold*, 288 Ill. 388, 123 N. E. 563 (1919); *Yates v. Yates*, 178 N. W. (Neb.) 262 (1920); *Beaty v. Calliss*, 128 N. E. (Ill.) 547 (1920). See *Blackledge v. Simmons*, 105 S. E. (N. C.) 202 (1920).

⁹⁰ *Nobles v. Nobles*, 177 N. C. 243, 98 S. E. 715 (1919).

⁹¹ *Turner v. Monteiro*, 103 S. E. (Va.) 572 (1920); *Burkley v. Burkley*, 109 Atl. (Pa.) 687 (1920).

⁹² 100 S. E. (W. Va.) 738 (1919).

⁹³ 140 Ark. 509, 215 S. W. 694 (1919).

the widow.⁹⁴ A deed of land to a daughter for life, remainder to her "nearest relatives" included, on the authority of an earlier Kentucky case, not only the brother of the devisee but also children of her sister who died after the conveyance.⁹⁵ In England the law seems otherwise. There the next of kin by blood will take, excluding those who under the Statute of Distributions would take by representation. A brother, therefore, would not have to share with the children of a deceased brother.⁹⁶ The theory is that the term unlike "relations" is perfectly clear and not susceptible of the technical construction of exact reference to the Statute of Distributions. And in England it seems to be immaterial that the subject matter is either realty or personalty.⁹⁷ But the term "relations" is susceptible of very broad meaning, including persons of every degree of consanguinity, however remote. To prevent such gifts from being void for uncertainty the courts have applied them to persons who would take under the statute by intestacy as next of kin or as representatives of next of kin.⁹⁸ And there is a recent *dictum* in Missouri to this effect.⁹⁹

II. "If property is limited to the 'issue of A,' issue primarily means the descendants or issue in every generation from A."¹⁰⁰ Of course this broad meaning can be restricted to children if the context so justifies. Now, if this broad interpretation be taken, a further question arises whether the meaning is to be all descendants per capita or only those descendants who have no ancestors living and who stand in the place of their deceased ancestor per stirpes. Suppose A in the above limitation has two children living at the time of distribution and each of these two children has a living child. Do the four descendants of A take each one-quarter, or do the children of A each take one-half? This is a case where evidently the testator has had no thought. Had the contingency been called to his attention, he would have undoubtedly provided for it. There

⁹⁴ *Lewis v. Arnold*, 105 Atl. (R. I.) 568 (1919); 2 JARMAN, WILLS, 6 Eng. ed., 1633.

⁹⁵ *Holt v. Rudolph*, 184 Ky. 161, 211 S. W. 855 (1919). Compare *Barrett v. Egbertson*, 111 Atl. (N. J.) 326 (1920).

⁹⁶ *Marsh v. Marsh*, 1 Bro. C. C. 293 (1783); *Smith v. Campbell*, 19 Ves. 400 (1815). But see *dicta* in *Edge v. Salisbury*, 1 Ambler, 70 (1749); *Re Nash*, 71 L. T. R. 5 (1894).

⁹⁷ *Pyot v. Pyot*, 1 Ves. Sen. 335 (1749).

⁹⁸ 2 JARMAN, WILLS, 6 Eng. ed., 1627, 1628. THEOBALD, WILLS, 7 ed., 323.

⁹⁹ *Rauch v. Metz*, 212 S. W. (Mo.) 353, 355 (1919); compare *In re Keighley*, [1919] 2 Ch. 388.

¹⁰⁰ KALES, FUTURE INTERESTS, 2 ed., § 575.

is nothing for the court to do but adopt the primary meaning of the word "issue" which is to include all descendants of A. Authority sanctions this view, and there are many cases holding that all descendants take per capita even though some compete with their living ancestors.¹⁰¹

Massachusetts has adopted a different construction. In *Jackson v. Jackson*¹⁰² the gift was to the testator's son's wife for life and at her death to her husband "if then living, and if not, to her issue. And if she should survive her said husband and should have no issue, I give this \$10,000 at her death to all my children then living, and the issue of any deceased child; such issue to take as by right of representation the shares of their respective parents." The son's wife survived the husband and died leaving two sons, a daughter, and a daughter of a deceased daughter. There were also five children of one of the sons. The court divided the gift among the sons, the daughter and the daughter of the deceased daughter to the exclusion of the five grandchildren by one of the living sons. In so holding the court assumed that the word "parents" at the end of the quotation did not apply to "issue" used in the first sentence; and it said: "when by a will personal property is given in trust to pay the income to a person during life, and on the death of such person to pay the principal sum to his issue then living, it is to be presumed that the intention was that the issue should include all lineal descendants, and that they should take per stirpes, unless from some other language of the will a contrary intention appears." It has been said that it is impossible to tell whether this is or is not *dictum*.¹⁰³ But in any event the case is one with which the Massachusetts conveyancer must seriously reckon.¹⁰⁴

In 1896 the Rhode Island court fell in line with the weight of

¹⁰¹ *Maddock v. Legg*, 25 Beav. 531 (1858); *Freeman v. Parsley*, 3 Ves. Jr. 421 (1797); *Cook v. Cook*, 2 Vern. 545 (1706); *Price v. Sisson*, 2 Beas. (N. J. Eq.) 168 (1860); *Soper v. Brown*, 136 N. Y. 244, 32 N. E. 768 (1892); *Schmidt v. Jewett*, 195 N. Y. 486, 88 N. E. 1110 (1909); *Matter of Farmer's Loan & Trust Co.*, 213 N. Y. 168, 173, 107 N. E. 340 (1909); *Wistar v. Scott*, 105 Pa. 200 (1884); *Ridley v. McPherson*, 100 Tenn. 402, 43 S. W. 772 (1897).

¹⁰² 153 Mass. 374, 378, 26 N. E. 1112 (1891).

¹⁰³ KALES, *FUTURE INTERESTS*, 2 ed., § 582.

¹⁰⁴ *Hall v. Hall*, 140 Mass. 267, 2 N. E. 700 (1885); *Dexter v. Inches*, 147 Mass. 324, 17 N. E. 551 (1888); *Coates v. Burton*, 191 Mass. 180, 77 N. E. 311 (1906). Compare *Silsbee v. Silsbee*, 211 Mass. 105, 109, 97 N. E. 758 (1912).

authority. In *Pearce v. Rickard*¹⁰⁵ the limitations were to A for life, and then to the issue of A alive at her death. At A's death four of her children survived her, one of whom had three and another four children. The trust fund was divided by the court into eleven shares, all sharing per capita. The effect of this decision, however, was soon abrogated by a statute applying to devises or bequests to one for life and thereafter to his issue.¹⁰⁶

In *Rhode Island Hospital Trust Co. v. Bridgham*¹⁰⁷ the testator after devising all the residue of his estate, which consisted only of personal property, to the trust company on trust for his wife for life, proceeded thus: "And upon her death, I give, devise and bequeath all such rest, residue and remainder of my estate, in fee simple, absolutely and forever, to my brother, Joseph Bridgham, and his issue." The wife and brother, Joseph Bridgham, predeceased the testator. Joseph left four children, and three grandchildren who were children of one of these living children. The court held that Joseph and his issue took a fee simple as purchasers, and then proceeded to construe the word "issue." It recognized the logical and grammatical value of the rule of most jurisdictions (which had been approved in *Pearce v. Rickard*), but at the same time pointed out that some judges who had applied it had felt that a per capita distribution between child and grandchildren undoubtedly defeated the wishes of many testators. As there was no gift for life to the ancestor of the issue, the statute did not apply to the Bridgham Will. The court then took the interesting position that it was desirable that the few limitations not falling within the act, which applied to devises to issue in the form usually drawn, should be treated in the same way as those which came within it. It preferred, too, the rule of *Jackson v. Jackson*, as furthering the intention of most testators. And so the estate was divided equally between the children of Joseph to the exclusion of his grandchildren, and the last remnant of *Pearce v. Rickard* was swept away.

¹⁰⁵ 18 R. I. 142, 26 Atl. 38 (1893).

¹⁰⁶ "Whenever a devise or bequest is made to one for life and thereafter to his issue, in any will hereafter made, such issue shall be construed to be the children of the life tenant living at his decease, and the lineal descendants of such children as may have then deceased, as tenants in common, but such descendants of any deceased child taking equally amongst them the share only which their deceased parent, if then living, would have taken." RHODE ISLAND, GEN. LAWS, (1909), c. 254, § 11.

¹⁰⁷ 106 Atl. (R. I.) 149 (1919).

The decision is an example of the reflex action of the legislature on the courts seen in other branches of the law.¹⁰⁸ Indeed it is almost an instance of a judge using an act of the legislature as a judicial precedent.

The New York cases, which take the orthodox view, were applied to let in grandchildren per capita with children in *Petry v. Petry*¹⁰⁹ in the Appellate Division of the Supreme Court of New York not long since. But the judge clearly stated his personal dislike of those decisions, and expressed the hope that the Court of Appeals would establish the rule of *Jackson v. Jackson*.

But is it not wiser "not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact?"¹¹⁰

In two recent lower court cases "issue" was held to mean "children" by reason of the construction of the whole will.¹¹¹

III. Where property is given to "survivors" or to persons "if living," and several periods are possible to which to refer the survivorships or lives, the question arises, What period is to be taken if none is stated? The modern English rule is given in *Cripps v. Wolcott*,¹¹² that in bequests of personal property the words are *prima facie* to refer to the period of distribution and not to the death of the testator. The law was formerly otherwise.¹¹³ *Cripps v. Wolcott* is followed if real estate is involved.¹¹⁴ Accordingly, if a life estate intervenes, those who survive the life tenant are entitled.¹¹⁵ The older English rule, however, is said to be law in Pennsylvania in a recent case.¹¹⁶ Whatever the rule, if the testator's intent to refer to a particular period is apparent on the face of the will, that controls.¹¹⁷

¹⁰⁸ 26 HARV. L. REV. 262, 264, note.

¹⁰⁹ 186 App. Div. 738, 175 N. Y. Supp. 30 (1919).

¹¹⁰ Mr. Justice Holmes in *Eaton v. Brown*, 193 U. S. 411 (1904).

¹¹¹ *New York Life Ins. Co. v. Phelps*, 106 Misc. 687, 176 N. Y. Supp. 618 (1919); *In re Durant's Estate*, 109 Misc. 62, 178 N. Y. Supp. 111 (1919). And see *Metro-politan Trust Co. v. Harris*, 108 Misc. 34, 177 N. Y. Supp. 257 (1919). For a special construction of "heirs," see *In re Munroe*, 107 Misc. 408, 177 N. Y. Supp. 783 (1919).

¹¹² 4 Madd. 11 (1818).

¹¹³ 2 JARMAN, WILLS, 6 Eng. ed., 2120-2132.

¹¹⁴ *Re Gregson's Trusts*, 2 DeG. J. & S. 428 (1864).

¹¹⁵ *Cripps v. Wolcott*, *supra*; *Temple v. Scott*, 143 Ill. 290, 32 N. E. 366 (1892).

¹¹⁶ *Kohl v. Kepler*, 110 Atl. (Pa.) 239 (1920).

¹¹⁷ Compare *Thompson v. Humphrey*, 179 N. C. 44, 101 S. E. 738 (1919).

IV. If there be a gift by will to A absolutely with a further gift over if A dies without children or issue, there seems to have been an inordinate amount of litigation over the question whether the contingency is to be referred to the death of A in the testator's lifetime or to A's death at any time. Many of the controversies are no doubt due to wills containing special words which are urged by counsel to control the general rule of the particular jurisdiction. In the absence of evidence on the will to the contrary England has wisely held that the contingency is to be taken at its face value and death of A at any time is meant.¹¹⁸ In this country, even when the will presents the contingency in its simple form without aid from other parts of the document, the authorities are divided. Illinois follows England.¹¹⁹ A recent New York case indicates that there the presumption is that death before the testator is meant, but that it will take little on the document to force the other construction.¹²⁰ In Minnesota the same question arose in 1919. The testator gave the residue to his wife and three children "share and share alike, provided, however, that if either of my children shall die without leaving a living child or children, then the share of such child shall become the property of the survivor or survivors." The court said that it would have been inclined to follow the rule which fettered the condition to dying in the testator's lifetime, had it not been that a contrary intention appeared on the face of the will. And so it found that death at any time was meant.¹²¹ The presumption opposed to the English rule is often supported on the ground that it favors early vesting of estates. When the gift over on the death of the first taker is to survivors the case is complicated by the problem discussed above. If "survivors" by reason of special context or in contravention of the general rule is to be referred to survivors at the testator's death, then the inference arises that the word "die" should likewise be there referred.¹²² This point was not discussed by the Minnesota court.

¹¹⁸ *Edwards v. Edwards*, 15 Beav. 357 (1852).

¹¹⁹ *Blackstone v. Althouse*, 278 Ill. 481, 116 N. E. 154 (1917). See *Morris v. Phillips*, 287 Ill. 633, 639, 122 N. E. 831 (1919).

¹²⁰ *Erwin v. Waterbury*, 186 App. Div. 569, 174 N. Y. Supp. 677 (1919); *Washbon v. Cope*, 144 N. Y. 287, 297, 39 N. E. 388 (1895); *Matter of Cramer*, 170 N. Y. 271, 63 N. E. 279 (1902). The authorities are collected in 25 L. R. A. (N. S.) 1045.

¹²¹ *In re Peavey's Estate*, 144 Minn. 208, 175 N. W. 105 (1919).

¹²² KALES, FUTURE INTERESTS, 2 ed., § 531.

V. A line of cases from *Doe d. Garner v. Lawson* (1803)¹²³ to *In re Hutchinson* (1919)¹²⁴ places a beacon on a shoal for the English conveyancer. In the latter case after a life interest to the wife in the whole of his estate the testator gave the whole of the residue in trust for his three daughters and their children in equal shares with cross remainders, and then "on failure of all the trusts hereinbefore declared of the residue of my personal estate, such residue shall be in trust for *such person or persons as on the failure of such trusts* shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, such persons if more than one to take distributively according to the said statutes."¹²⁵ The Court of Appeal constrained by authority¹²⁶ held that the class of persons called "next of kin" was to be determined at the death of the testator, and not at the time of the failure of the trusts. But on appeal the House of Lords,¹²⁷ five judges agreeing, distinguished the prior cases, reversed the order of the Court of Appeal, and held that the persons who would be the next of kin of the testator, had he died at the date of the failure of the earlier trusts, were entitled.¹²⁸

Nor is the Massachusetts lawyer less likely to err. For although in *Carr v. New England Anti-Vivisection Society*,¹²⁹ the court held, in a devise to a wife for life and upon her death "to my heirs at law then living, said heirs to take the same as by the statute of descent and distribution," that those should take who would have been his heirs at law had he died at the time of the termination of the life estate; yet in *Dove v. Torr*¹³⁰ (1879) not cited in the Carr

¹²³ 3 East, 278 (1803).

¹²⁴ [1919] 2 Ch. 17 (C. A.).

¹²⁵ Italics ours.

¹²⁶ *Bullock v. Downes*, 9 H. L. C. 1 (1860); *Mortimer v. Slater*, 7 Ch. D. 322, 327, 330 (1877); *sub nom.* *Mortimore v. Mortimore*, 4 A. C. 448 (1879); *In re Wilson*, [1907] 2 Ch. 572, 575.

¹²⁷ *Sub nom.* *Hutchinson v. National Refuges for Children*, [1920] A. C. 794.

¹²⁸ Lord Atkinson's opinion contains a review of the cases. Many of them turned on the question whether the word "then" was used as an adverb of time or was equivalent to "in that event."

¹²⁹ 234 Mass. 217, 125 N. E. 158 (1919).

¹³⁰ 128 Mass. 38 (1879). Compare *United States Trust Co. v. Nathan*, 112 Misc. 502, 183 N. Y. Supp. 66 (1920), "descendants" construed to mean descendants at the death of a prior taker, not at the death of the testator. See *Trull v. Tarbell*, 236 Mass. 68, 127 N. E. 541 (1920); *Himmel v. Himmel*, 128 N. E. (Ill.) 641 (1920). In *Bibb v. Bibb*, 86 So. (Ala.) 376 (1920), the court construed the word "heirs" in a devise

case, Chief Justice Gray held that heirs of the testator at the time of his death were designated in a clause which gave the residue of realty to daughters and the survivor of them till death or marriage and that "after the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." There are, indeed, other slippery words beside "issue!"

VI. If a testator in a will gives no indication whether he means the words "issue," "heirs," or "children" to include an adopted child, a case of peculiar difficulty arises. Generally the testator has never thought at all of this situation. Indeed if he had, it is hardly possible that he would not have clearly expressed himself. The person claiming by adoption in this case where the testator has no real intent must show first that by the adoption act he was given the requisite status of an "heir," "child," or "issue" by birth of the adopting parent; and secondly, that the word used in the instrument was so comprehensive as to include the person who obtained the necessary status by any means. The questions are questions of construction, — the first of a statute, the second of a deed or will.¹³¹

In *Muriel v. Gruenewald*,¹³² by will the testator gave a life estate to his wife, and after her death the property was to be divided among his children; should any of the children die before his wife, in that event the share that would fall to each child was to go to his (that child's) children. A daughter of the testator died before her mother, leaving an adopted child, who was allowed by the Illinois court to take under the will. Acts similar to the Illinois statute have been held to give the adopted person the status of a child by birth.¹³³ The word "children" in a will *prima facie* in-

of real estate, after a life estate to the testator's daughter, or trust for the use of the "heirs" of the trustee to mean heirs at the death of the trustee.

¹³¹ KALES, FUTURE INTERESTS, 2 ed., § 584.

¹³² 289 Ill. 468, 124 N. E. 605 (1919). The Illinois adoption act contains the following provision: "A child so adopted shall be deemed, for the purpose of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock." ILLINOIS, ANNOT. STAT. (1913), § 197.

¹³³ *Bray v. Miles*, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899); *Sewall v. Roberts*, 115 Mass. 262 (1874) (the Massachusetts Act has since been amended);

cludes a child adopted by the testator.¹³⁴ It is and should be immaterial that the adopted child is adopted by some one other than the settlor or testator in the absence of special legislation on the point.¹³⁵ The mind of the adopting parent and the stranger is alike in both cases. *Muriel v. Gruenewald* settles the point for Illinois; though an earlier case had indicated that little stress should be laid on this circumstance.¹³⁶

The Illinois statute was copied from an early act in Massachusetts. But the law in Massachusetts was substantially changed and the rights of the adopted child narrowed in 1876.¹³⁷ In *Young v. Stearns*,¹³⁸ by will made in 1870 the testatrix left all her estate to her husband for life and after his death "the estate to go to my lawful heirs." In 1871 she and her husband adopted a daughter, who married and had two children. The testatrix died in 1897, and her husband also died. As earlier decisions¹³⁹ had given full effect to the clause of section 8 of the statute re-

Hartwell v. Tefft, 19 R. I. 644, 35 Atl. 882 (1896). Compare *Butterfield v. Sawyer*, 187 Ill. 598, 58 N. E. 602 (1900); *Rauch v. Metz*, 212 S. W. (Mo.) 353 (1919); *Lichter v. Thiers*, 139 Wis. 481, 121 N. W. 153 (1909). Compare 7 CALIFORNIA L. REV. 355.

¹³⁴ *Russell v. Russell*, 84 Ala. 48, 3 So. 900 (1887) (*semble*); *Virgin v. Marwick*, 97 Me. 578, 55 Atl. 520 (1903); *Von Beck v. Thomsen*, 44 App. Div. 373, 60 N. Y. Supp. 1094 (1899) (affirmed in 167 N. Y. 601, 60 N. E. 1121 (1901)).

¹³⁵ *Bray v. Miles*, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899); *Sewell v. Roberts*, 115 Mass. 262 (1874); *Rauch v. Metz*, 212 S. W. (Mo.) 353, 357 (1919); *Hartwell v. Tefft*, 19 R. I. 644, 35 Atl. 882 (1896). But see *Woodcock's Appeal*, 103 Me. 214, 68 Atl. 821 (1907).

¹³⁶ *Butterfield v. Sawyer*, 187 Ill. 598, 58 N. E. 602 (1900).

¹³⁷ The Massachusetts statute is as follows: Section 7. "As to the succession of property, a person adopted . . . shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him" and in case of intestacy of the adopted child, what he acquired from his new parent should be distributed according to the statutes as if he had been born in wedlock to his adopting parents. Section 8. "The term child, or its equivalent, in a grant, trust-settlement, entail, devise or bequest, shall be held to include a child adopted by the settlor, grantor or testator, unless the contrary plainly appears by the terms of the instrument; but when the settlor, grantor, or testator is not himself the adopting parent, the child by adoption shall not have, under such an instrument, the rights of a child born in lawful wedlock to the adopting parent," unless a contrary intention appears. STATS. (1876) c. 213, §§ 8 & 9; PUB. STATS. (1882) c. 148, §§ 7 & 8; REV. LAWS (1902), c. 154, §§ 7 & 8.

¹³⁸ 234 Mass. 540, 125 N. E. 697 (1920).

¹³⁹ *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729 (1887); *Blodgett v. Stowell*, 189 Mass. 142, 75 N. E. 138 (1905).

quiring the adopted child to show clearly that it was referred to in a devise to children by some one other than the adopting parent, the rights of these children were not free from doubt. But the Massachusetts court held that the two children of the adopted daughter took. The court reasoned thus: It had been said in *Wyeth v. Stone*¹⁴⁰ that if by will property was given by terms such as "issue" or "heirs" which embraced a child born in wedlock, section 8 applied to the construction of the instrument; by "lawful heirs" the testatrix meant to include the adopted child itself; by the laws of inheritance¹⁴¹ land descends to children "and to the issue of any deceased child by right of representation;" the legislature meant to put "an adopted child on the same footing as a child born in wedlock to the adopting parents;" the two children took the estate to which their mother, the adopted daughter, if living would have succeeded. That the child was adopted after the will is immaterial.¹⁴² Amendments to adoption acts may apply to children adopted prior to the passage of such amendments.¹⁴³

VII. In *Love v. Love*¹⁴⁴ the testator, who died in 1873, left his lands to his wife for life and "at her death to my youngest son, Calhoun Love, and his heirs lawfully begotten in fee simple forever, but in case my said son shall die without issue, the said lands mentioned above are to revert back and be equally divided between his brothers and their heirs forever." The widow died in 1893. Calhoun Love never married, but he had an illegitimate child born in 1894, who in 1908 was legitimated by proceedings in court under the statute in North Carolina. Calhoun Love died in 1919 leaving this child. It was held that he died without issue. The North Carolina statute¹⁴⁵ was narrowly construed not to make by legitimation the adopted child kin of the kindred of the adopting parent; but to create simply a personal status between father and son with

¹⁴⁰ 144 Mass. 441, 443-444, 11 N. E. 729 (1887).

¹⁴¹ REV. LAWS (1902), c. 133, § 1.

¹⁴² *Butterfield v. Sawyer*, 187 Ill. 598, 58 N. E. 602 (1900); *McGunnigle v. McKee*, 77 Pa. 81 (1874); *Johnson's Appeal*, 88 Pa. 346 (1879).

¹⁴³ *In re Frost's Will*, 192 App. Div. 206, 182 N. Y. Supp. 559 (1920).

¹⁴⁴ 179 N. C. 115, 101 S. E. 562 (1919).

¹⁴⁵ "The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock." NORTH CAROLINA REV. STATS., § 264.

the right of the child to inherit from the father these properties which the latter might give his child during his lifetime, and did not make him heir general so that he could take "an estate by limitation, as heir of heirs;" and therefore he was not "issue." The court also laid stress on the words "heirs lawfully begotten," which is the stronger ground upon which to support the case.

In *Grantham v. Jinnette*,¹⁴⁶ the testator, a bastard, devised his property after a life estate to his wife to his "legal heirs." It was said that it could not be shown that he meant by that term two sons of his mother's sister who under the statute of descents from illegitimates were not qualified to take; for here the words were clear, and these relatives did not come within the designation.

A power of appointment to "my people" was held well exercised by appointing to a child of an illegitimate daughter of the donor's mother.¹⁴⁷

VIII. "Or" has been construed "and" to effectuate the intention of the testator not to die partially intestate in two cases;¹⁴⁸ and "both" as "either" in another.¹⁴⁹

Joseph Warren.

HARVARD LAW SCHOOL.

[To be concluded.]

¹⁴⁶ 177 N. C. 229, 98 S. E. 724 (1919).

¹⁴⁷ *In re Keighley*, [1919] 2 Ch. 388.

¹⁴⁸ *Hardy v. Smith*, 123 N. E. (Ind. App.) 438 (1919); *Dunbar v. Hammond*, 234 Mass. (N. E.) 554 (1920). See THEOBALD, WILLS, 7 ed., 703-705; Wickersham's Estate, 261 Pa. 121, 104 Atl. 509 (1918).

¹⁴⁹ *Struss v. Fidelity Trust Co.*, 182 Ky. 106, 206 S. W. 177 (1918).

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TO OLIVER WENDELL HOLMES, LL. B. '66, the Editors of the HARVARD LAW REVIEW dedicate this number, on the happy occasion of his eightieth birthday.

LETTERS OF CREDIT. — A buyer procures a bank to issue an irrevocable or confirmed letter of credit in favor of the seller.¹ Prior to, or subsequent to, or simultaneous with the issue of the letter by the bank the buyer and the seller enter into their contract for the sale of the goods. What relation does the sales contract bear to the letter of credit?

In order to determine upon what theory a special, irrevocable, commercial letter of credit² can be sustained as a binding obligation upon

¹ See YORK, FOREIGN EXCHANGE, 137; HOUGH, PRACTICAL EXPORTING, 464; Omer F. Hershey, "Letters of Credit," 32 HARV. L. REV. 1.

² Commercial letters of credit are of two types. The first type is the general letter which is addressed either to the world at large or to the person to whom the credit is to be given for the purpose of procuring a credit from some third person. *Russell v. Wiggin*, 2 Story (U. S.) 213 (1842); *Lawrason v. Mason*, 3 Cranch (U. S.) 492 (1806); *Bissell v. Lewis*, 4 Mich. 450 (1857). See STORY, BILLS OF EXCHANGE, 4 ed., § 462. The second type is the special letter which is addressed to the particular person who is to advance the money, or to give the credit, or to furnish the goods to a designated third person. *Bank of Seneca v. First National Bank of Carthage*, 105 Mo. App. 722, 78 S. W. 1092 (1904). The bank is sometimes spoken of as the issuer, the buyer as the holder, and the seller as the addressee. See Omer F. Hershey, "Letters of Credit," 32 HARV. L. REV. 1. The term "holder" is a misnomer. It originated at a time when general commercial letters were more usual than special letters. The term is also aptly used in connection with travelers' letters of credit. At the present time the special letter sent directly to the seller has almost entirely supplanted the general

the bank in favor of the seller four analyses may be considered.³ 1. The letter may be the notification of a contract made between the buyer and the bank for the benefit of the seller.⁴ It is, however, more in accord with the facts, as well as commercially more desirable, to regard the letter as a direct promise to the seller. 2. The letter may be a representation by the bank that it has received money, or the equivalent, to the use of the seller which it is estopped to deny after the seller has acted in reliance thereon.⁵ An estoppel, however, depends upon the facts of the particular case.⁶ The making of the sales contract can be the only action taken in reliance upon the letter, and frequently the sales contract is made prior to its issue. Moreover, the bank seldom receives funds in advance from the buyer. It is making a promise, not representing a fact. The essence of the transaction is a future credit. Nor is the seller misled, for the custom of business is as well known to him as it is to the bank and to the buyer.⁷ Hence, the elements of an estoppel are wanting. 3. The letter may be an offer from the bank to the seller which becomes a binding obligation upon acceptance by the seller in the terms of the offer.⁸ To this analysis there are three fundamental objections. The bank is not bargaining for the purchase or sale of goods. Consequently there is no consideration in fact. Furthermore, unless the sales contract is made subsequent to, or simultaneous with the issue of the letter, performance by the seller cannot amount to consideration in law. Moreover, the letter, if regarded as an offer, is an offer for a unilateral contract. Acceptance can only be the performance of the acts requested. Consequently, since the specified acts require time for

letter. Moreover, the term "holder" is confusing, because of its use in connection with negotiable instruments. It is better, it is submitted, to use the terms "buyer," "seller," and "bank."

³ It has been suggested that the most satisfactory doctrine would be that irrevocable letters of credit should require no consideration. See Omer F. Hershey, "Letters of Credit," 32 HARV. L. REV. 1. One objection is that these letters are not formal contracts. Another objection is that the common law requirement for consideration in simple contracts has become fundamental. Indeed, consideration is required for negotiable instruments. *Holliday v. Atkinson*, 5 B. & C. 501 (1826). To require no consideration, and to allow the issuing bank to set up no defence based upon the conduct of the buyer would furnish a simple rule. But this is more within the province of the legislature than of the courts.

⁴ *Carnegie v. Morrison*, 2 Metc. (Mass.) 381 (1841).

⁵ This is the view strongly advocated by Mr. Hershey. His principal authority is *Johannessen v. Munroe*, 158 N. Y. 641, 53 N. E. 535 (1899). The facts of the case do not support the learned writer. The case was argued on the theory that the consideration for the letter was furnished to the bank by the buyer. The facts also show a novation. The court, it is true, based its decision upon estoppel. But the estoppel arose, not because of the letter of credit, but because of certain oral representations made by the bank to the seller. The court particularly stressed the peculiarities of the facts. Mr. Hershey's combined doctrine of money had and received to the use of the seller and estoppel is based upon certain continental legal doctrines which are foreign to our law.

⁶ *Low v. Bouverie*, [1891] 3 Ch. 82.

⁷ See *Morgan v. Larivière*, L. R. 7 H. L. 423 (1875).

⁸ *Bank of Seneca v. First National Bank of Carthage*, *supra*; *Cheever v. Schall*, 87 Hun (N. Y.) 32 (1895); *Union Bank of Louisiana v. Coster*, 3 N. Y. 203 (1850); *Lawrason v. Mason*, *supra*. See 1 WILLISTON, CONTRACTS, § 32. The offer theory originated with travelers' letters and with general letters. It has been the orthodox theory applied indiscriminately to all letters of credit. Special letters differ in analysis from general letters, and the offer theory should be confined to the latter.

performance, and since the offeror can revoke the offer at any time before it has been accepted,⁹ the offer theory destroys the manifest intention of the parties that the letter of credit shall be irrevocable. 4. There is, however, a common-law analysis which is in accord with the facts, complies with the conception of the parties, and gives effect to their intention that the letter shall be a binding obligation from the moment of issue. What the parties have in mind is a bilateral contract between the buyer, the bank, and the seller with the consideration for the bank's promise to the seller moving from the buyer in the form of his promise to the bank to reimburse.¹⁰ Since the letter is a bilateral contract, as soon as it is issued the seller obtains executory rights against the bank. The acts which he is to perform are not the consideration for, but are conditions of the bank's promise. The last analysis which is here advanced seems to be the view of the best considered and most recent cases upon letters of credit.¹¹

It has recently been held that the sales contract is wholly independent of the letter of credit and that defences arising under the sales contract have no effect upon the obligation of the bank to the seller under the letter.¹² These cases must be taken as definitely abandoning the orthodox offer theory, and as adopting the analysis that a letter of credit is a direct promise to the seller supported by consideration moving to the bank from the buyer. The courts were, however, so intent upon supporting the validity of the letter that they overlooked the fact that in certain cases the sales contract would have a material relation. It should be possible both for the buyer and the bank to protect themselves. If performance of the sales contract in a specified manner is expressly made a condition of the letter the bank would be able to insist upon the condition; or if shipments and the drawing of drafts in a specified manner are expressly made conditions of the sales contract the buyer could take advantage of the conditions, not because he would be relying on an independent contract, but because he would be insisting upon his own.¹³

⁹ See 1 WILLISTON, CONTRACTS, §§ 60, 60b.

¹⁰ Upon principle there is no objection to this type of contract. See 1 WILLISTON, CONTRACTS, § 114. In England, however, it is doubtful, on the authorities, whether there can be a contract with the consideration moving from one other than the promisee. *Thomas v. Thomas*, 2 Q. B. 851 (1842); *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 847. But the latter case dealt with a contract for the benefit of a third person, and not with a contract where the consideration is furnished by one other than the promisee. It is submitted, therefore, that the question is still open in England, in spite of strong *dicta*. In the United States it is well settled that consideration moving from one other than the promisee is sufficient to support a promise made directly to the promisee. *Hamilton v. Hamilton*, 127 App. Div. 871, 112 N. Y. Supp. 10 (1908); *Palmer Savings Bank v. Insurance Company of North America*, 166 Mass. 189, 44 N. E. 211 (1896); *Rector of St. Mark's Church v. Teed*, 120 N. Y. 583, 24 N. E. 1014 (1890); *Bell v. Sappington*, 111 Ga. 391, 36 S. E. 780 (1900); *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660 (1891); *Schmucker v. Sibert*, 18 Kan. 104 (1877); *Van Eman v. Stanchfield*, 10 Minn. 255 (1865). See *Lawrence v. Fox*, 20 N. Y. 268 (1859).

¹¹ *Frey & Son v. Sherburne & Co.*, 184 N. Y. Supp. 661 (1920); *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (1920); *Sovereign Bank of Canada v. Bellhouse, Dillon & Co.*, Q. R. 23 K. B. 473 (1911).

¹² *Frey & Son v. Sherburne & Co.* and the *National City Bank*, *supra*; *American Steel Co. v. Irving National Bank*, *supra*. See RECENT CASES, p. 500, *infra*.

¹³ The court admitted that the buyer would have an action at law against the seller for breach of contract. It is difficult to see why he should not have an injunction in

The elimination of the buyer-bank side of the triangle from the obligation of the bank to the seller is a more difficult problem. Should the bank be able to set up against the seller equitable defences arising because of the conduct of the buyer in procuring the letter? Since the very purpose of the letter of credit is to assure the seller, the bank should be precluded from doing so, unless the seller after receiving the letter has not changed his position. Upon the offer theory it is impossible to protect the seller. On the estoppel theory it is impossible to protect the bank. On the better analysis that the letter is a bilateral contract between the bank, the buyer, and the seller with the consideration furnished by the buyer for the bank's promise to the seller, it is possible in certain cases to cut off in favor of an innocent seller equities of the bank. On the one hand it may be argued that the seller, regardless of whether he has changed his position or not, is a donee of the bank's promise or else is sufficiently identified with the buyer to be affected in all cases by the latter's conduct.¹⁴ On the other hand it may be said that, regardless of whether the seller has changed his position or not, the whole transaction between seller and buyer, buyer and bank, and bank and seller should be treated as one transaction, and that, although the sales contract and the letter of credit are separate contracts, nevertheless the innocent seller, having given value in the same transaction, is not a donee, and is therefore in all cases to be preferred to the bank.¹⁵ It is submitted that the better solution is to make the question of whether the seller or the defrauded bank is to be preferred depend upon the seller's change of position in the particular case. The seller has received a legal obligation of the bank. The only question is whether it is conscientious for him to enforce a clear legal right. He is innocent, but he is a donee. If he has done nothing to change his position before the bank discovers the defense the bank should be permitted to avoid the obligation. But if the seller has changed his position in good faith it is not inequitable for him to enforce his legal right, and the bank should be precluded from setting up its defense.

IS APPRECIATION IN VALUE OF PROPERTY INCOME? — A taxpayer purchases property for \$10,000. The property rises in value to \$15,000. It is settled that so long as the taxpayer retains the property this increase in value cannot be taxed as income.¹ It is likewise settled that even if he does sell he cannot be taxed on that portion of the increase which accrued prior to March 1, 1913 (the effective date of the Sixteenth Amendment).² But the increment in value accruing after March 1,

the ordinary case. Certainly it might be disastrous to the buyer to be compelled to reimburse the bank and then bring an action at law against the seller.

¹⁴ *Green v. Turner*, 86 Fed. 837 (1898); *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619 (1891); *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. 448 (1890). See 1 WILLISTON, CONTRACTS, § 394. See also 3 WILLISTON, CONTRACTS, § 1518.

¹⁵ See *Price v. Neal*, 3 Burr. 1354 (1762). See also 1 HARV. L. REV. 1; 4 HARV. L. REV. 297.

¹ See *Eisner v. Macomber*, 40 Sup. Ct. Rep. 189, 193, 197 (1920).

² *Lynch v. Turrish*, 247 U. S. 221 (1918). But a dividend paid out of surplus accruing to a corporation before March 1, 1913, is taxable as income to the stockholder. *Lynch v. Hornby*, 247 U. S. 339 (1918).

1913, has in the past been taxed as income for the year in which the sale is made.³ In a recent case,⁴ however, a Federal District Court held that such appreciation in value is not income and that an Act of Congress taxing it as income is unconstitutional.⁵

To support its holding the court argued that judicial decisions had, at the time of the adoption of the Sixteenth Amendment, established a definite meaning of the word "income" for purposes of constitutional and statutory construction which excluded capital increment even when realized by a sale. To sustain this proposition the court cited *Gray v. Darlington*,⁶ a case construing the Income Tax Act of 1867,⁷ and a number of state decisions holding that increase of value when realized by sale of an investment is accretion to capital and not income as between life tenant and remainderman.⁸ That *Gray v. Darlington* did not establish a definite meaning of the word income is shown conclusively by the fact that on May 20, 1918,⁹ the Supreme Court distinguished the case in deciding that capital increment may be income, while two weeks later the same court cited the case as holding that capital increment can never be income.¹⁰ That the cases of life tenant and remainderman presented no question of constitutional or statutory construction is obvious. That they established no definite meaning of the word "income" can be demonstrated. In all of the cases the court recognized that the problem involved was not to define "income" but to determine whether the profit was the kind of income which the settlor intended to give to the life tenant.¹¹ The cases cited by the court refute its contention.

In support of its conclusion that increment in value cannot be constitutionally taxed as income even when realized by sale, the court cited three Supreme Court decisions as binding authorities: *Gray v. Darlington*,¹² *Lynch v. Turrish*,¹³ and *Eisner v. Macomber*.¹⁴ The Income Tax Act of 1867 levied a tax "to be paid annually upon the gains, profits and

³ See MONTGOMERY, INCOME TAX PROCEDURE (1920), 334. The British Income Tax Act, 16 & 17 VICT., c. 34, has been construed to make appreciation in the value of capital assets taxable as income only if the taxpayer deals in such assets in the course of his trade or business. *Stevens v. Hudson's Bay Co.*, 101 L. T. R. 96 (1909); *Tebrau (Johore) Rubber Syndicate, Ltd. v. Farmer*, 1910 Sc. Cas. 906 (1910).

⁴ *Brewster v. Walsh*, 268 Fed. 207 (Conn.). See RECENT CASES, p. 564, *infra*.

⁵ The Income Tax Law of 1916. 39 STAT. AT L. 757.

⁶ 15 Wall. (U. S.) 63 (1872).

⁷ See 14 STAT. AT L. 477, 478.

⁸ *Boardman v. Mansfield*, 79 Conn. 634, 66 Atl. 169 (1907); *Carpenter v. Perkins*, 83 Conn. 11, 74 Atl. 1062 (1910); *Outcalt v. Appleby*, 36 N. J. Eq. 73 (1882); *Parker v. Johnson*, 37 N. J. Eq. 366 (1883); *Matter of Gerry*, 103 N. Y. 445; 9 N. E. 235 (1886); *Thayer v. Burr*, 201 N. Y. 155, 94 N. E. 604 (1911); *Graham's Estate*, 108 Pa. St. 216, 47 Atl. 1108 (1901); *Neel's Estate* (No. 2), 207 Pa. St. 446, 56 Atl. 950 (1904); *Lauman v. Foster*, 157 Iowa 275, 135 N. W. 14 (1912); *Slocum v. Ames*, 19 R. I. 401, 36 Atl. 1127 (1896); *Jordan v. Jordan*, 192 Mass. 337, 78 N. E. 459 (1906); *Mercer v. Buchanan*, 132 Fed. 501 (1904).

⁹ See *Hays v. Gauley Mt. Coal Co.*, 247 U. S. 189, 192 (1918).

¹⁰ See *Lynch v. Turrish*, 247 U. S. 221, 231 (1918).

¹¹ See especially *Matter of Gerry*, note 8, *supra*, 449, 236. For a clear and accurate analysis of the true problem involved see the statement of Lindley, L. J., in *In re Armitage*, [1893] 3 Ch. D. 337, 346.

¹² See note 6, *supra*.

¹³ See note 2, *supra*.

¹⁴ See note 1, *supra*.

income of every person . . . derived from any kind of property." Profits realized within the year from sales of real estate purchased within the year or within two years previous were specifically made taxable. In *Gray v. Darlington* the court, emphasizing the provision as to realty, held that a profit on bonds purchased in 1865 and sold in 1869 was not income for the year 1869 within the meaning of the Act. The court specifically stated that profits arising from a transaction begun and completed within the same year would be income for that year;¹⁵ it also treated the provision as to realty as constitutional. In view of these facts it is submitted that, in spite of certain loose language, the case is simply one of statutory construction and does not contain even a *dictum* on the constitutional question for which it was cited. *Lynch v. Turrish* correctly decided that capital increment accruing before March 1, 1913, cannot be taxed as income. But Mr. Justice McKenna, after disposing of the case, added to his opinion a *dictum* to the effect that *Gray v. Darlington* had decided that capital increment can never be taxed as income.¹⁶ It is submitted that this statement was unwarranted and cannot be supported. *Eisner v. Macomber* is important only for its *dicta*.¹⁷ The court said,¹⁸ "Income may be defined as the gain derived from capital, from labor, or from both, provided it be understood to include profit gained through a sale or conversion of capital assets." Accepting this definition literally it is decisive against the contention of the court in the principal case. That Mr. Justice Pitney meant what he said is shown by his *dictum* that the proceeds of stock distributed as a dividend may be taxed as income when the stock is sold.¹⁹ His subsequent statement that "enrichment through increase of capital investment is not income in any proper meaning of the term" was given in reply to the government's contention that such increase is income even before severed from capital and converted into cash.²⁰ It simply states that unsevered and unrealized capital increment cannot be treated as income. One other case, not cited by the court, should be mentioned, *Hays v. Gauley Mt. Coal Co.*²¹ Conceding that it does not arise under an income tax act it nevertheless holds that "income" may be used in a sense broad enough to include capital increment.²²

From these authorities three conclusions seem justified. First, the Supreme Court has made a number of loose and inconsistent statements some of which must necessarily be repudiated. Second, the court has used the word "income" in a sense broad enough to include capital increment. Third, the constitutional question has not been decided.

The case accordingly should be decided on principle. The situation, briefly stated, is this. Economists have not agreed upon a definition of

¹⁵ See note 6, *supra*, 65.

¹⁶ See note 2, *supra*, 231. Mr. Justice Brandeis and Mr. Justice Clarke concurred only in the result.

¹⁷ The case holds that an Act of Congress taxing stock dividends as income is unconstitutional.

¹⁸ See note 1, *supra*, 193.

¹⁹ See note 1, *supra*, 195.

²⁰ See note 1, *supra*, 196.

²¹ See note 9, *supra*. The case holds that capital increment must be included in determining "gross income" under the Corporation Tax Act of 1909.

²² See Edward H. Warren, "Taxability of Stock Dividends as Income," 33 HARV. L. REV. 885, 896.

the word "income."²³ Courts had not at the time of the adoption of the Sixteenth Amendment nor have they to-day adopted a definite construction of the term.²⁴ The Supreme Court has recognized that the word must be defined as used in common speech.²⁵ Finally Congress, a coördinate branch of the federal government, has expressly enacted that capital increment is income.²⁶ This last factor should be decisive. It is a settled principle of constitutional construction that a legislative interpretation of the Constitution is entitled to the greatest respect and that no act of Congress will be declared unconstitutional if it is consistent with any reasonable interpretation of the Constitution.²⁷ It is submitted that a definition of income to include all increases in the taxpayer's financial resources which come to him from his labor or from his property is not so broad as to be deemed unreasonable. It follows that to declare unconstitutional an act of Congress taxing capital increment as income when realized by sale is not only to infringe upon a well established rule of constitutional construction but to strike a blow at the foundation of our institutions as well. The attitude of the majority of the court in *Eisner v. Macomber* in riding rough-shod over Congress' interpretation of the Sixteenth Amendment raised a storm of criticism;²⁸ a declaration that capital increment cannot be taxed might well be followed by a constitutional amendment recalling the decision.²⁹

REPEAL OF TAX EXEMPTIONS, AND THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION. — A legislative enactment exempting property from taxation *in futuro* may constitute a contract, with the result that a repeal of the exemption by a subsequent legislature would violate the contract clause¹ of the Federal Constitution.² More than half a century

²³ See SELIGMAN, *THE INCOME TAX*, 2 ed., 19. For an excellent analysis taking the view that capital increment is income provided there is separation and realization, see Edwin R. A. Seligman, "Are Stock Dividends Income?" 9 AM. ECON. REV. 517. This seems to have been Mr. Justice Pitney's theory in *Eisner v. Macomber*, note 1, *supra*.

²⁴ In Massachusetts capital increment is taxable as income. *Trefry v. Putnam*, 227 Mass. 522, 116 N. E. 904 (1918). *Contra*, *State ex rel. Bundy v. Nygaard*, 163 Wis. 307, 158 N. W. 87 (1916).

²⁵ See note 1, *supra*, 193.

²⁶ See Income Tax Act of 1913, 38 STAT. AT L. 167; Income Tax Act of 1916, 39 STAT. AT L. 757; Income Tax Act of 1918, 40 STAT. AT L. 1065.

²⁷ See *Ware v. Hylton*, 3 Dall. (U. S.) 199, 237 (1796); *Cooper v. Telfair*, 4 Dall. 14, 18 (1800); *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 128 (1810); *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 270 (1827); *Sinking Fund Cases*, 99 U. S. 700, 718 (1878). See COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 252. See James B. Thayer, "The American Doctrine of Constitutional Law," 7 HARV. L. REV. 129, 138.

²⁸ See Thomas Reed Powell, "Stock Dividends, Direct Taxes, and the Sixteenth Amendment," 20 COL. L. REV. 536, 538.

²⁹ The desirability of a tax on capital increment has been pointed out. See Edward H. Warren, note 22, *supra*, 900. See also Charles E. Clark, "Some Income Tax Problems," 29 YALE L. JOUR. 735, 738.

¹ See UNITED STATES CONSTITUTION, Art. I, Sec. 10, § 1, "No State shall . . . pass any . . . law impairing the obligation of contracts."

² See cases in note 12, *infra*.

has elapsed since Samuel Freeman Miller, a distinguished justice of the United States Supreme Court, predicted that this proposition would eventually be abandoned.³ Yet undeniably this doctrine has not to this day been dislodged. On the whole, it does seem that it would have been better to have recognized squarely that no legislature had any power to bargain away the unlimited scope of its successors' taxing prerogative. At any rate such an enactment, if a contract at all, should never have been deemed within the limitation imposed by the contract clause. Though *stare decisis* militates powerfully against an overthrow of this doctrine, the fulfillment of Mr. Justice Miller's forecast may yet be seen.

If constant hedging is in any way indicative of the unsoundness of a rule of law, witness the ways which have been found to restrict and delimit the application of the general proposition. In the first place, any one who resists a repeal of a legislative tax exemption, will have to cope with an unusually rigorous construction of the alleged exemption — every intendment being in favor of the existence of the taxing power.⁴ A curtailment of the right to tax will in no wise be presumed. "The language in which the surrender is made must be clear and unmistakable."⁵ Secondly, a not infrequent device is to demonstrate that the legislative enactment granting the tax exemption was not a contract at all, not a bargain in any sense, but a spontaneous concession granted by the legislature — a law belonging to that class denominated *privilegia favorabilia*.⁶ Thirdly, the governmental prerogative has been vindicated in a host of cases by the holding that the exemption was personal and non-assignable⁷ — the later cases going to a remarkable extent in this regard. Fourthly, at the time of the award of the exemption, a general statute making all laws repealable may have been in existence. Such a statute has been held to preclude an unimpaired obligation to continue the tax exemption.⁸ And of course the existence of a constitutional inhibition as to tax exemption legislation will invalidate any contract

³ In the dissenting opinion to *Washington University v. Rouse*, 8 Wall. (U. S.) 439, 444 (1869).

⁴ See *Covington v. Kentucky*, 173 U. S. 231, 239 (1898); *Chicago R. R. Co. v. Guffey*, 120 U. S. 569, 575 (1886); *C. & O. Ry. Co. v. Miller*, 114 U. S. 176, 181 (1884); *Memphis Gas Co. v. Shelby County*, 109 U. S. 398, 400 (1883); *Tucker v. Ferguson*, 22 Wall. (U. S.) 527, 575 (1874); *Ohio Ins. Co. v. Debolt*, 16 How. (U. S.) 416, 435, 436 (1853); *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 561 (1830).

⁵ See *Erie R. R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492, 498 (1874).

⁶ *Grand Lodge v. New Orleans*, 166 U. S. 143 (1897); *West Wis. R. R. Co. v. Supervisors*, 93 U. S. 595 (1876); *Tucker v. Ferguson*, *supra*; *Salt Co. v. Saginaw*, 13 Wall. (U. S.) 373 (1872); *Christ Church v. Philadelphia*, 24 How. (U. S.) 300 (1860).

⁷ *Jetton v. University of the South*, 208 U. S. 489 (1907); *Rochester Ry. Co. v. Rochester*, 205 U. S. 236 (1906); *Phoenix Ins. Co. v. Tenn.*, 161 U. S. 174 (1896); *R. R. Co. v. Missouri*, 152 U. S. 301 (1894); *R. R. Co. v. Alsbrook*, 146 U. S. 279 (1892); *Picard v. R. R. Co.*, 130 U. S. 637 (1889); *C. & O. Ry. Co. v. Miller*, *supra*; *Memphis R. R. Co. v. Commissioners*, 112 U. S. 609 (1884); *R. R. Co. v. County of Hamblen*, 102 U. S. 273 (1880); *Morgan v. Louisiana*, 93 U. S. 217 (1876); *Armstrong v. Athens County*, 16 Pet. (U. S.) 281 (1842). But *cf.* *New Jersey v. Wilson*, 7 Cranch (U. S.) 167 (1812).

⁸ *Covington v. Kentucky*, *supra*; *Citizens' Bank v. Owensboro*, 173 U. S. 636 (1898); *Louisville Water Co. v. Clark*, 143 U. S. 1 (1891); *R. R. Co. v. Maine*, 96 U. S. 499 (1877); *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454 (1872).

ab initio.⁹ In the latest case before the United States Supreme Court, *People on the relation of Troy Union Railroad Co. v. Mealy*,¹⁰ the constitutionality of the repeal was sustained, the court making use of the second and fourth devices just mentioned. But in many cases, litigants have run the gauntlet of these obstacles,¹¹ and have successfully prevented the imposition of a tax¹²—a result often accompanied by a vigorous and vehement dissent.¹³

The soundness of a doctrine prohibiting repeals of State tax exemptions may be tested by decisions on the analogous problems of contracts bargaining away the police power or the power of eminent domain. A contract in express language and in unmistakable terms not to exercise one of these two powers is a rarity; sharply in contrast to the frequency of express promises not to tax. However, cogent arguments can be, and often have been, made to the effect that a charter contains an undoubtedly implied promise that it will not be destroyed or impaired by the exercise of the police power or the power of eminent domain. Yet the Supreme Court has uniformly held that these powers¹⁴ are such vital attributes of sovereignty that no implications conducing to the restriction of these powers will be indulged in. Much of the language in these police power and eminent domain decisions would indicate that these two governmental prerogatives cannot be hampered by any con-

⁹ For examples of constitutional inhibitions, see *Keokuk, etc. R. R. v. Missouri*, 152 U. S. 301, 310 (1893); *Yazoo, etc. Ry. v. Adams*, 180 U. S. 1, 9 (1900).

¹⁰ U. S. Sup. Ct., Oct. Term, 1920, No. 63. For the facts in this case, see RECENT CASES, p. 554, *infra*.

¹¹ See for other ways of upholding the government's side of the case: *Memphis City Bank v. Tenn.*, 161 U. S. 190 (1896); *Given v. Wright*, 117 U. S. 648 (1885).

¹² *Wright v. Central of Ga. R. R. Co.*, 236 U. S. 674 (1914); *Wright v. Ga. Banking Co.*, 216 U. S. 420 (1909); *Stearns v. Minnesota*, 179 U. S. 223 (1900); *Asylum v. New Orleans*, 105 U. S. 362 (1881); *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430 (1869); *Washington University v. Rouse, supra*; *McGee v. Mathis*, 4 Wall. (U. S.) 143 (1866); *Dodge v. Woolsey*, 18 How. (U. S.) 331 (1855); *Piqua Bank v. Knoop*, 16 How. (U. S.) 369 (1853); *Gordon v. The Tax Appeal Court*, 3 How. (U. S.) 133 (1845); *N. J. v. Wilson, supra*.

¹³ Dissenting opinions of Miller, J., in *Washington University v. Rouse, supra*, in which Chase, C. J. and Field, J. concurred; of Campbell, J. in *Dodge v. Woolsey, supra*, in which Daniel, J. and Catron, J. concurred; of Catron, J. in *Piqua Bank v. Knoop, supra*. See also a series of opinions in 1 Oh. St., to wit, *Debolt v. Ohio Life Ins. Co.*, 1 Oh. St. 563 (1853); *Mechanics' & Traders' Branch v. Debolt, id.*, 591; *Knoop v. Piqua Branch, id.*, 603; *Toledo Bank v. Bond, id.*, 623.

The remarks of Mr. Justice Miller merit quotation: "We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. . . . No civilized community has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

¹⁴ As to the police power: *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746 (1883); *Stone v. Mississippi*, 101 U. S. 814 (1880); *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (1878); *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877).

As to the power of eminent domain: *Cincinnati v. R. R. Co.*, 223 U. S. 390 (1911); *Offield v. R. R. Co.*, 203 U. S. 372 (1906); *Long Island Co. v. Brooklyn*, 166 U. S. 685 (1896); *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507 (1848).

tract at all; and indeed in *Pennsylvania Hospital v. Philadelphia*,¹⁵ a rather recent case in the United States Supreme Court, the court unhesitatingly concluded that a subsequent exercise of the power of eminent domain was not defeated by an existing *express* promise not to exercise that power. That the decision in this case reaches a correct result is undeniable. But just why a contrary result would have been reached, if it was an express promise not to exercise the taxing power, is somewhat difficult to see. On the decisions, one could deduce the Supreme Court's attitude to be that the taxing prerogative is of less importance than that of eminent domain,¹⁶ in fact of such less importance that a State can cripple itself in regard to one and not as to the other. Indeed some attempt to distinguish them has been made¹⁷ — but of an exceedingly unconvincing nature. In short, one cannot help but feel that the correct method of dealing with this problem is decisively to refuse to throw the protective mantle of the contract clause over any curtailment *in futuro* of the taxing power. And may the suggestion be ventured that in any reëxamination of the question, *Pennsylvania Hospital v. Philadelphia* will play a large part.

JURISDICTION TO IMPOSE A PERSONAL TAX ON ONE NOT DOMICILED BUT PRESENT WITHIN THE STATE. — It is frequently stated as a principle of law, firmly grounded in natural justice and in the authorities, that jurisdiction to impose a personal tax depends on domicil.¹ But whether the duty to pay taxes is incident to the reliance upon a sovereign for protection² or arises from the obligation of the members of a community

¹⁵ 245 U. S. 20 (1917). It is submitted that the language used by Chief Justice White is applicable to the bargaining away of the taxing power.

¹⁶ Mr. Justice Field in *Tomlinson v. Jessup*, *supra*, 458, said: "There is no subject over which it is of greater moment for the State, to preserve its power than that of taxation." Mr. Justice Hunt in *Erie R. R. Co. v. Pa.*, *supra*, 499, termed taxation "the highest attribute of sovereignty." Mr. Justice Catron in his dissenting opinion in *Piqua Bank v. Knoop*, *supra*, 400, said: "The political necessities for money are constant and more stringent in favor of the right of taxation; its exercise is required to sustain the government. But in the essential attributes of sovereignty the right of eminent domain and the right of taxation are not distinguishable." And in *Debolt v. Ohio Ins. Co.*, *supra*, 580, the court said: "This power [of taxation] is not to be distinguished, in any particular material to the present inquiry, from the power of eminent domain. Both rest upon the same foundation — both involve the taking of property — and both, to a limited extent, interfere with the natural right guaranteed by the Constitution, of acquiring and enjoying it."

¹⁷ See *Stone v. Mississippi*, *supra*, 820.

Cooley in his work on CONSTITUTIONAL LIMITATIONS, 7 ed., 400, while admitting that the government cannot bargain away any of its inherent powers, and by no means approving of the doctrine as to tax exemptions, suggests the latter to be reconcilable with the police power and eminent domain cases on the ground that the consideration for such an exemption compensates for the loss in taxes.

¹ See *Boreland v. City of Boston*, 132 Mass. 89, 96 (1882). See Wharton, "Law of Domicil," BOOK OF MONOGRAPHS (1880), 4; JACOBS, LAW OF DOMICIL, § 51; WHARTON, CONFLICT OF LAWS, 3 ed., § 80.

Liability to share municipal burdens seems, in Roman law, to have depended on domicil. See 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., 33; JACOBS, DOMICIL, § 8.

² This is the generally accepted legal theory of the incidence of the duty. See Union

to share its necessary burdens,³ why is it "naturally" confined to those within the community to whom the artificial rules of common-law domicile⁴ apply? Again, is it clear on the authorities that the duty is so limited? Most of the few cases in which the point has been considered involve primarily the interpretation of statutes. They have uniformly construed taxes levied on "inhabitants"⁵ or "residents"⁶ as applying only to those domiciled within the state, and there are *dicta* that over such alone does the state have authority to impose a personal tax.⁷ But there are also *dicta*⁸ and at least one decision⁹ *contra*. The question is nicely raised in a recent federal case where an Alaska poll tax imposed on a non-resident employed for a few weeks within the territory and admittedly not domiciled there, was held valid.¹⁰ Is this decision to be supported?

There is a fundamental conflict in juristic thought as to the basis of jurisdiction. On the one hand it is claimed that the sovereign's jurisdiction depends on *right* which is determined by private international law. The competency of a jurisdictional act is to be gauged not by the ability of the sovereign to make it effective within its territory but by that conformity to international principles of jurisdiction which will secure its recognition as valid in the courts of other civilized nations.¹¹ The legal validity of the act is a function of its accord with those rules of international jurisdiction which have come to be recognized and accepted by all civilized states and which no sovereign may dispute so long as it

Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202 (1905). See also C. E. Carpenter, "Jurisdiction over Debts," 31 HARV. L. REV. 905, 918.

³ This conception of the *rationale* of taxation dominates economic and progressive legal thought. See GRAY, LIMITATIONS ON THE TAXING POWER, § 22; MILL, POLITICAL ECONOMY, 5 ed., c. 2, § 2; Report of the Massachusetts Tax Commission, 10 (1885).

⁴ In Roman law one might be domiciled in two places in each of which his residence was equally established, using each as a center of business relations. See Wharton, "Law of Domicil," BOOK OF MONOGRAPHS, (1880) 18; 3 SAVIGNY, ROMISCHE RECHT, § 354. This is true also in many European countries to-day with respect to the domestic law of domicil. But local law does not affect international domicil. See WHARTON, CONFLICT OF LAWS, 3 ed., § 77½. Double domicil has been repudiated in the Common Law. Abington v. North Bridgewater, 23 Pick. (Mass.) 170 (1839). There are, however, strong *dicta* asserting its possibility. See Pollock, C. B., in *In re Capdeville*, 2 Hurl. & Colt. 985, 1018 (1864). See also 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., 47, 48. It is clear that there is nothing inherently natural or necessary in the established doctrines of common-law domicil the definition of which has led to endless conflict in the authorities. See JACOBS, DOMICIL, § 57; DICEY, DOMICIL, Appendix, note 1.

⁵ State v. Ross, 23 N. J. L. 517 (1852); Boston Investment Co. v. City of Boston, 158 Mass. 461, 33 N. E. 580 (1893).

⁶ The Chinese Tax Cases, 14 Fed. 338 (1882); Mygatt v. Supervisors of Chenango Co., 11 N. Y. 563 (1854).

⁷ See State v. Ross, *supra*, 521; Commonwealth v. Standard Oil Co., 101 Pa. St. 119, 146 (1882). The process by which these courts have reached their conclusions seems rather psychological than logical. Personal taxes being usually imposed on the basis of domicil, courts in interpreting new statutes endeavor to construe them as applying the customary criterion. Through this process the idea naturally but illogically arises that only such statutes as might be so construed could be valid, that domicil *must* be the criterion of the right to impose a personal tax.

⁸ See Chinese Tax Cases, *supra*, 344, 345; Cantrell v. Pinkney, 8 Ired. (N. C.) 436, 440 (1848).

⁹ State v. Johnston, 118 N. C. 1188, 23 S. E. 921 (1896).

¹⁰ Alaska Packers' Assn. v. Hedenskoy, 267 Fed. 154 (1920). See RECENT CASES, p. 564, *infra*.

¹¹ See WESTLAKE, PRIVATE INT. LAW, 5 ed., 253; J. W. Walsh, "Meaning of the Term Jurisdiction," 40 AM. L. REG. 346.

remains a member of the community of such states.¹² The intranational and international effectiveness of jurisdictional acts depend alike¹³ on conformity to these principles. Acts which contravene them are without legal force not only in foreign states¹⁴ but within the sovereign's own territory.¹⁵ That domicile is essential to personal taxation is such a principle of international jurisdiction. The existence of this principle is evidenced not only by its frequent assertion in the books but also by the fact that personal taxes have been and are regularly imposed on this basis. Furthermore, it is said, it follows from the very nature of the tax, which is levied in return for future benefits and should therefore be imposed only on those who are not merely present but have an "intent to remain," are domiciled, within the state. Taxes laid on any other basis are unjust, exceed the sovereign's jurisdiction; and are altogether void.

In opposition to this viewpoint, it is maintained that the essence of jurisdiction is *power*. Within a sovereign's territory its will is supreme¹⁶ and courts are there bound by its mandates irrespective of their international propriety or effect.¹⁷ Jurisdiction to tax, being thus an incident of the sovereign power to control,¹⁸ naturally extends over all persons within its territory¹⁹ whether domiciled²⁰ therein or not. The only limitation on the taxing power is to be found expressly or impliedly in the state or federal constitutions.²¹ Does the due process clause prevent

¹² See BEALE, *CONFLICT OF LAWS*, § 103. See also 21 HARV. L. REV. 354.

¹³ Dicey distinguishes between the intra-territorial and extra-territorial competency of courts' jurisdiction. See DICEY, *CONFLICT OF LAWS*, Am. ed., 362. This theory would deny such a distinction, the first being determined by the second.

¹⁴ *Rose v. Himely*, 4 Cranch (U. S.) 241 (1808); *Schibsy v. Westenholz*, L. R. 6 Q. B. 155 (1870).

¹⁵ See *Wallace v. United Electric Co.*, 211 Pa. 473, 476, 60 Atl. 1046, 1047 (1905).

¹⁶ See STORY, *CONFLICT OF LAWS*, 8 ed. § 18; DESPAGNET, *PRÉCIS DE DROIT INTERNATIONAL PRIVÉ*, § 10.

¹⁷ See *Railroad Co. v. Collector*, 100 U. S. 595, 598 (1899); *United States v. Erie R. R. Co.*, 106 U. S. 327, 704 (Appendix) (1882); *State ex rel. Beckett v. Collector of Bordentown*, 32 N. J. L. 192, 195 (1867). See also WHARTON, *CONFLICT OF LAWS*, 3 ed., § 1 (a).

It may well be questioned whether there is in international law any principle that jurisdiction in personal taxation depends on domicile. In certain German states, taxes are imposed on temporary residents. See WHARTON, *CONFLICT OF LAWS*, 3 ed., § 80. And in the Swiss Canton of Geneva a capitation tax is specifically laid on those who, though not domiciled within the canton, have lived there for a year. See "Lois du 9 novembre 1887" and "30 mai 1888." See also CERENVILLE, *LES IMPÔTS EN SUISSE*, 124.

¹⁸ See *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 428, 431 (1819); *Shaffer v. Carter*, 40 Sup. Ct. Rep. 221, 224 (1920).

¹⁹ See *Dewey v. Des Moines*, 173 U. S. 193, 203 (1898). See GRAY, *LIMITATIONS ON THE TAXING POWER*, § 44.

²⁰ "Non-resident" is used throughout this note as synonymous with "one who is not domiciled." Strictly the terms are not synonymous. Domicile requires something more than residence, *i. e.*, intent to remain. See WHARTON, *CONFLICT OF LAWS*, 3 ed., § 21 (b).

²¹ See *People v. Mayor of Brooklyn*, 4 Comst. (N. Y.) 419, 425 (1851); *Porter v. R. R. I. & St. L. R. R. Co.*, 76 Ill. 561, 573 (1875). See also 1 COOLEY, *TAXATION*, 3 ed., 49. It has sometimes been claimed that there are certain limitations on the sovereign power, anterior to and independent of the Constitution, arising out of the nature of free government. See *People v. Hurlburt*, 24 Mich. 44 (1872); *Loan Assn. v. Topeka*, 20 Wall. (U. S.) 655, 662 (1874). It has also been said that there are international limitations of the same nature. See *Heathfield v. Chilton*, 4 Burr. 2015, 2016 (1767).

a tax on non-residents who are within the state for a substantial though temporary period of time? ²² It should not. The protection and benefits secured from the state furnish a just basis for the obligation to contribute to its support. And the mere fact that there is an unfortunate probability of double taxation is not sufficient to invalidate the tax,²³ for this objection might be urged equally with respect to other well recognized forms of taxation.²⁴ The crucial question is whether the custom of imposing a personal tax only at the place of domicile has become a *principle* of taxation so impressed on our practice and theory that a departure from it would be considered by the courts as a revolutionary innovation.²⁵ This is not the case. The growing tendency is to regard due process as depending not on the form of the tax but on its practical operation and effect.²⁶ And, practically, such a tax is not a far cry from one on non-residents' credits²⁷ or income²⁸ within a

See also WEISS, DROIT INTERNATIONAL PRIVÉ, VI. But these claims, resting on the old "natural law" idea can no longer be maintained. The legislature is supreme within its constitutional sphere of action. *Bertholf v. O'Reilly*, 74 N. Y. 509 (1878); *Orr v. Quimby*, 54 N. H. 590 (1874). See Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383, 392. See also Roscoe Pound, "Courts and Legislation," 77 CENT. L. J. 219, 226, 229.

²² See JUDSON, TAXATION, 2 ed., § 480. The provisions of the Constitution with respect to "commerce" and "privileges and immunities of citizens" invalidate a tax on transients. *Crandall v. Nevada*, 6 Wall. (U. S.) 35 (1867); *State Treasurer v. P. W. & B. R. R. Co.*, 4 Houst. (Del.) 158 (1870). See GRAY, LIMITATIONS ON THE TAXING POWER, § 168(a). So also taxes discriminating against non-residents. *Fraser v. McConway & Torley Co.*, 82 Fed. 257 (1897); *Ward v. Maryland*, 12 Wall. (U. S.) 418 (1870); *Travis v. Yale & Towne Mfg. Co.*, 40 Sup. Ct. Rep. 228 (1920).

²³ There is a presumption against double taxation so that express statutory provision is necessary to establish it. See *Peoples' Bank v. Coleman*, 135 N. Y. 231, 235, 31 N. E. 1022, 1023 (1892); *Lewiston Water etc. Co. v. Asotin Co.*, 24 Wash. 371, 377, 64 Pac. 544, 546 (1901); *Tennessee v. Whitworth*, 117 U. S. 129, 137 (1885). But such a tax is not contrary to the federal constitution. *Ft. Smith Lumber Co. v. Arkansas*, 40 Sup. Ct. Rep. 304 (1920). See *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 367, 368 (1915). And prohibitions of double taxation in state constitutions apply only to cases where the duplicity in taxation arises within the state, not where it is occasioned by the independent taxation of two separate states. *Griggsby Constr. Co. v. Freeman*, 108 La. 435, 32 So. 399 (1902). See 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 80 (a).

²⁴ Double taxation frequently arises through the operation of succession taxes, taxes on intangible property, or income taxes. The only remedy is through exemptions allowed by interstate comity and the operation of a uniform system of tax laws. See JUDSON, TAXATION, 2 ed., § 490.

²⁵ There is a tendency to identify due with customary process in taxation. This has been done with respect to the method of collecting taxes. *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. (U. S.) 272 (1855). So also with respect to personal property outside the state. *Union Refrigerator Transit Co. v. Kentucky*, *supra*. And there are *dicta* that custom should determine jurisdiction for personal taxation. See *Boreland v. City of Boston*, *supra*, 96. See also GRAY, LIMITATIONS ON THE TAXING POWER, § 1122. But surely due process involves a more substantial question than that of "good form."

²⁶ See *Shaffer v. Carter*, *supra*, 226, 227.

²⁷ *United States v. Erie R. R. Co.*, 106 U. S. 327 (1882).

²⁸ Taxes on the income of non-residents, earned within the state, are valid. *Shaffer v. Carter*, *supra*. The tax may be treated as essentially a property tax. See 32 HARV. L. REV. 168. Consequently it has been held that the income of a non-resident so taxed must have been earned within the state so that it may be said to have a *situs* there. *State v. Wisconsin Tax Comm.*, 161 Wis. 111, 152 N. W. 848 (1915). Such taxes have long existed in England. See INCOME TAX ACTS, 1842 & 1853, Schedule D. See also

state.²⁹ Moreover courts hesitate to oppose the legislative will in the field of taxation,³⁰ unless that will be impotent, as where the subject matter of the tax is outside the state's power,³¹ or perverted where there must be something like a confiscation of property.³² A tax based on the power of control over a person who through a reasonably extended presence enjoys the protection of the sovereign, falls within neither of these categories and may well be valid.

The conclusions reached from these two conflicting viewpoints as to the nature of jurisdiction, seem, thus, diametrically opposed. But, in the majority of actual cases, it is believed, the practical result would be the same. For in its determination of what constitutes a "reasonably extended presence"³³ requisite for due process under the *power* theory, a court will be guided largely by those considerations of fairness which furnish the motive for the belief that there *is* an international principle that domicile is necessary to personal taxation. In any event, it would seem that there should be a substantial correspondence between the period of presence required and the period for which the tax is levied. The courts here have a large interpretative function and, as in the case of taxation generally, statutes should be construed strictly, against the state.³⁴ Thus a tax which does not clearly indicate that non-residents are to be included within its provisions should certainly not be so interpreted.³⁵ And one laid on an "annual" basis, even though expressly including non-residents should not be held to apply to those present within the state for a few weeks only.³⁶ The tax imposed in the principal case was open to both these objections and cannot be supported under either theory.

16 HALSBURY, LAWS OF ENGLAND, §§ 1251, 1297. They may be enforced *in personam* if there is a proper service of process. See HALSBURY, *id.*, § 1303.

²⁹ In practical effect and aside from terminology, what substantial difference is there between taxing a man's wealth because of "financial income" secured within the state and taxing it because of other kinds of "income," material and psychic, resulting from his presence there?

³⁰ See *Nicol v. Ames*, 173 U. S. 509, 515 (1898); *United States v. Erie R. R. Co.*, *supra*, 703, 704; *R. R. Co. v. Collector*, *supra*, 599.

³¹ *Augusta v. Kimball*, 91 Me. 605, 40 Atl. 666 (1898).

³² *Cass Farm v. Detroit*, 181 U. S. 396 (1901).

³³ Difficult questions of the interpretation of ambiguous, and of the reasonableness of clearly expressed statutes, might unquestionably arise. But the situation is not a peculiar one and as elsewhere the court must be guided by general considerations of fairness. Thus it must decide as to "reasonable notice" or "reasonable regulations." See *Roller v. Holly*, 176 U. S. 398 (1899); *Kane v. New Jersey*, 242 U. S. 160 (1916).

³⁴ *Gould v. Gould*, 245 U. S. 151 (1917). See *Crocker v. Malley*, 249 U. S. 223, 233 (1918); *Williams v. Singer*, [1918] 2 K. B. 749, affirmed on appeal, [1919] 2 K. B. 108, and in the House of Lords, 123 L. T. R. 632 (1920).

³⁵ *Thomson v. Advocate General*, 12 Clark & Fin. 1 (1845); *Commonwealth v. Standard Oil Co.*, *supra*.

³⁶ It is possible that "annual" might be used in a procedural sense to indicate the time at which the tax will be collected. But the better view is that it is intended to indicate the period of benefit from which arise and to which corresponds the obligation to pay the tax. In fact all modern taxes are laid on such an annual basis. The courts have so interpreted the word in statutes. *Hays v. Pacific Mail S. S. Co.*, 17 How. (U. S.) 596 (1854). See *Chinese Tax Cases*, *supra*, 345. See also Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 586, 598.

WHAT DOES THE WORD *PREFERENCE* MEAN AS USED IN § 60 B, OF THE BANKRUPTCY ACT?—To constitute a voidable preference under section 60 b of the Bankruptcy Act, the transfer must have been made under conditions giving the creditor "reasonable cause to believe that . . . such . . . transfer would effect a preference."¹ A recent federal case in New York² holds that the creditor has not such reasonable cause although he knew the bankrupt to be insolvent, provided he thought the bankrupt would probably again become solvent. The court gives two descriptions of the test to be applied, which are difficult to reconcile. It first³ says, "The only test is the honesty of his purpose;" and then, a few lines below, "the test should be whether the chance was one whose success good judgment would forecast." The first suggestion takes a subjective standard and allows an optimist to retain property that a pessimist could not; while the second, and it would seem the better, adopts an objective standard. There is one line of reasoning that leads to holding both tests clearly wrong as applied to the principal case, on the ground that the transfer at the moment it was made was then and there a preference and that the creditor did not suspect but knew it to be such.

In determining what is meant by a preference in section 60 b, there is no doubt but that section 60 a should control,⁴ its apparent purpose being to define. Section 60 a, as amended in 1903, reads in part: "A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition*, . . . made a transfer of any of his property, and the effect of . . . such . . . transfer⁵ will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." In the principal case the debtor, while insolvent, transferred property to a creditor by way of security,⁶ that is, for the express purpose of enabling the creditor to obtain a greater amount of his debt. All these facts were actually *known* to the creditor, and they present every element of a preference with one seeming exception, namely, that the transfer was made "within four months before the filing of the petition." This fact the creditor obviously could not know. But, it is submitted, this fact should not be considered an element of a preference.

Prior to 1903 there was no doubt but that the transfer at the moment it was made constituted a preference irrespective of the time it oc-

¹ Prior to 1910 this section required that the creditor have "reasonable cause to believe that it was intended thereby to give a preference." While the change in 1910 obviously changed the elements of a voidable preference, there is no ground for holding that it affected the meaning of the word "preference" as used in the clause in question. It follows that the arguments advanced below apply equally, *mutatis mutandis*, to cases arising between 1903 and 1910.

² *Kennard v. Behrer*, 46 A. B. R. 70 (Dist. Ct. N. Y.) (1920). For a statement of the facts in this case, see *RECENT CASES*, p. 552.

³ See *Kennard v. Behrer*, *supra*, 74.

⁴ See *In re F. M. & S. Q. Carlile*, 199 Fed. 612, 617 (1912).

⁵ The full text of this part of the section is: ". . . and the effect of the enforcement of such judgment or transfer will, etc." Since it is hard to see what is meant by the enforcement of a transfer, the word "enforcement" may more reasonably be taken to refer exclusively to the word "judgment."

⁶ By § 1 a (26), the word "transfer" is defined as including a transfer by way of pledge.

curred,⁷ for until that year section 60 a contained no preference to the four months' period.⁸ Did the amendment in 1903 add a new and substantial element to a preference and thus postpone its final determination until the filing of the petition? The leading textbook on the subject is by no means clear that it did.⁹ Several courts, since the amendment, have used language entirely inconsistent with such a view.¹⁰ But the strongest arguments can be drawn from the Act itself. Section 60 b was amended in 1910 and the present version contains the words, "if at the time of the transfer . . . the judgment or transfer *then* operate as a preference." The framers of this clause cannot have regarded a preference as something only determinable by later events. Again, the fact that section 60 a refers to "the" petition indicates strongly that the framers were looking back at the transaction as from after the time proceedings had been commenced. To say that the four months' period was intended to operate rather as a statute of limitations in certain cases,¹¹ than as adding a new element, is a more rational explanation. Finally, section 60 b before the amendment in 1910, required that the creditor have "reasonable cause to believe that it was intended thereby to give a preference."¹² It follows that between 1903 and 1910, if the words in question in section 60 a were taken literally, to avoid a transfer under section 60 b the trustee would have to show that the creditor had reasonable cause to believe that his debtor *intended* that a petition in bankruptcy be filed against him, or by him, within four months. Such a contention is absurd, and does not seem ever to have been made.

An attempt has been made above to support the construction contended for both on the authorities and from the Act¹³ itself. An argument on grounds of policy can also be made. It is admitted that the great service rendered by the Bankruptcy Act is in securing an equitable division of the debtor's estate.¹⁴ Under the doctrine of the principal case a creditor can indulge in guessing the future of a debtor whom he knows to be insolvent, and if his guess is approved gain an advantage over other creditors. To prohibit this would lead to a more equitable division of assets, and would also eliminate *pro tanto* the unfortunate element of the debtor's and creditor's respective beliefs and intentions, which has led to much confusion.¹⁵ In short, if the creditor had reasonable cause to believe the debtor insolvent, the transfer should be voidable.¹⁶

⁷ *In re Jones*, 4 A. B. R. 563 (Dist. Ct. Mass.) (1900). See *In re Steers Lumber Co.*, 110 Fed. 738 (1901).

⁸ See 30 STAT. AT L. 562.

⁹ See REMINGTON ON BANKRUPTCY, 2 ed., 1215.

¹⁰ See *Coder v. Arts*, 213 U. S. 223, 241 (1909); *Lazarus v. Eagan*, 206 Fed. 518, 522 (1912); *Van Iderstine v. Nat'l Discount Co.*, 227 U. S. 575, 582 (1913).

¹¹ And even for this purpose the words are unnecessary in § 60 a. For §§ 60 b and 67 e both contain express four-month limitations, and § 57 g refers only to transfers voidable under those two sections.

¹² See 32 STAT. AT L. 800.

¹³ It is fair to note that the words "would effect a preference" § 60 b, seem to look to the future. But, on the other hand, they may be explained by the fact that every effect is naturally thought of as following its cause, if only by a moment.

¹⁴ See *In re Leslie*, 119 Fed. 406, 410 (1903). See 1 REMINGTON ON BANKRUPTCY, 2 ed., 15 *et seq.*

¹⁵ For some conflicts of authority see the opinion in *Kimmerle v. Farr*, 189 Fed. 295 (1911).

¹⁶ This would constitute virtually a return to the rule adopted in the statute of 1867.

RIGHTS OF UNBORN CHILDREN IN THE LAW OF TORTS. — The child *en ventre sa mère* is far from a nonentity.¹ His status both in criminal law² and in the law of property³ is established. But it is equally well established that the reason he may be the object of homicide is not because he is capable of individual rights, but only because of the state's interest in life, and that the reason he is recognized as a person in property depends on special property rules.⁴ There is no basis, in either case, from which to draw an analogy in determining the problem whether a child may have a right of action in tort for prenatal injury.

Despite broad statements in decisions to the effect that "to all intents and purposes" the child *en ventre sa mère* is a living person,⁵ and despite the favor with which eminent text-writers regard the existence of this right,⁶ no action brought by a child in the past for prenatal injury has progressed beyond the demurrer stage.⁷ Nor has the child's right obtained better recognition when its administrator has sued under statutes similar to Lord Campbell's Act.⁸ Yet, at the same time, the courts have acknowledged that there is a residuum of damage which cannot be accounted for at the suit of either of the child's parents.⁹

It has been said by one writer that there is a recognized duty to abstain from injuring the unborn child quite apart from the duty not to injure the mother,¹⁰ and by a second that every person has a right to bodily integrity at birth.¹¹ But neither theorist will accord the infant his right of action, the former declaring that there is not for every duty a corresponding right and the latter pleading inexpediency. The novelty of such an action leads a third writer to conclude that only by legislative intervention can the residuum of damage be accounted for.¹² But the statutory solution is easier recommended than obtained. The Japanese Code deems a child *en ventre sa mère* already born with regard to claim-

See 14 STAT. AT L. 534. The view that such a return would lead to more debtors being forced into bankruptcy by creditors who cannot rely on security given by the debtor, is unsound. For if the creditor honestly thinks the debtor's chances of becoming solvent are good, it would be very foolish to demand a dividend in bankruptcy when forbearance may lead to being paid in full.

¹ "Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." Buller, J., in *Thellusson v. Woodford*, 4 Ves. 227, 321 (1799).

² See 13 HARV. L. REV. 521.

³ See 20 HARV. L. REV. 651.

⁴ See 12 HARV. L. REV. 209.

⁵ Per Lord Hardwicke in *Wallis v. Hodson*, 2 Atk. 114, 116 (1740). See also *Groce v. Rittenberry*, 14 Ga. 232, 237 (1853).

⁶ See SALMOND, LAW OF TORTS, 5 ed., 394; 1 BEVEN, NEGLIGENCE, 3 ed., 75.

⁷ See *Walker v. Great Northern Ry. Co. of Ireland*, 28 L. R. Ir. 69 (1891); *Nugent v. Brooklyn Heights R. R. Co.*, 154 App. Div. 667, 139 N. Y. Supp. 367 (1913); *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638 (1900); *Dietrich v. Northampton*, 138 Mass. 14 (1884).

⁸ *Gorman v. Budlong*, 23 R. I. 169, 49 Atl. 704 (1898); *Buel v. United Rys. Co.*, 248 Mo. 126, 154 S. W. 71 (1913).

⁹ See *Prescott v. Robinson*, 74 N. H. 460, 463, 69 Atl. 522, 524 (1908); *Nugent v. Brooklyn Heights R. R. Co.*, 154 App. Div. 667, 668, 139 N. Y. Supp. 367, 368 (1913).

¹⁰ See MARKBY, ELEMENTS OF LAW, 4 ed., § 132.

¹¹ See 15 HARV. L. REV. 313.

¹² See 1 UNIV. OF MO. BULL. 42.

ing compensation for damage;¹³ but continental law has not progressed so far,¹⁴ and the attempt to introduce in Missouri¹⁵ a similar provision failed.

The step at which courts and legislatures have alike hesitated has been at last taken by a New York judge, who, in a recent case¹⁶ in which the injury to the mother — and thereby, it is alleged, to the infant — resulted from the defendant's negligence, promptly overruled the defendant's demurrer. Is this "progress *pari passu* with advancing civilization"¹⁷ or is it a leap outstripping both law and medicine? The objections to the step, ordinarily lumped under expediency, resolve themselves into two principal difficulties. Is the unborn infant a person? Can causation be established?

First, as to the infant's personality, the question is whether the infant is part of the mother or a distinct person; in brief, whether the mother or the infant should sue. The most original thought on the subject is the dissent of Justice Boggs in *Allaire v. St. Luke's Hospital*.¹⁸ His recommendation was that whenever a child was so far advanced in prenatal age that, should natural or artificial parturition occur, the child could live separate from its mother, and is thereafter born and lives,¹⁹ such a child has a right of action for any injuries wantonly or negligently inflicted while in its mother's womb. Before such a time the child is clearly only a part of its mother; but thereafter it is something more. This sensible doctrine of Justice Boggs properly limits the time during which injury to one *en ventre sa mère* is actionable to the period of viability.

But the real difficulty lies in proving medical causation. If science cannot trace the deformity in the born child to the injury to the mother before its birth, it is idle for the law to speculate. This difficulty does not arise where there is negligent injury by direct application of force to the child's body before birth — as by the forceps of the *accoucheur*. Under these circumstances it seems unquestionable²⁰ that the infant, when born, should have its right of action. And judges have declared themselves disposed, should a case of wanton and wilful injury to the pregnant mother arise, to afford the later-born child his action.²¹ But

¹³ See JAPANESE CIVIL CODE, art. 721.

¹⁴ See GERMAN CIVIL CODE, § 844; 1 PLANIOL, DROIT CIVIL, 2 ed., §§ 378-380.

¹⁵ See MISSOURI CHILDREN'S CODE COMMISSION, 15 (1917).

¹⁶ *Drobner v. Peters*, 184 N. Y. Supp. 337 (1920). See RECENT CASES, p. 558, *infra*.

¹⁷ See *Drobner v. Peters*, *supra*, 338.

¹⁸ 184 Ill. 359, 368, 56 N. E. 638, 640 (1900). This view is not entirely inconsistent with the authorities which seem to deny a right of action to the child, no matter what his prenatal age. See note 7, *supra*. The Walker and the Nugent cases turned on the question of a contract for carriage. In the Dietrich case the child was not far enough advanced in foetal life to survive its premature birth, and consequently the case is not within Justice Boggs's rule.

¹⁹ If born dead, the right of action will not survive under Lord Campbell's Act to the child's personal representative, because the difficulty of applying Justice Boggs's rule (that is, of determining whether the child was injured while viable) must be really insurmountable.

²⁰ Yet where this point arose, since counsel on both sides conceded the right of action for such injury vested in the mother, no decision was taken. See *Kirk v. Middlebrook*, 201 Mo. 245, 285, 100 S. W. 450, 461 (1907).

²¹ See *Walker v. Great Northern Ry. Co. of Ireland*, *supra*, 74; *Nugent v. Brooklyn Heights R. R. Co.*, 154 App. Div. 667, 668, 139 N. Y. Supp. 367, 368 (1913).

in the case under discussion the alleged injury to the child was indirect and negligent. Even so, it is undeniable that medical science is so far advanced that there are some such injuries which can be unerringly traced by experts into postnatal deformities.²² In another decade who can say that there shall not be many? At least give the infant his place in court. "It is for [him] to make out his case. If he does so, there is no difficulty. If he does not, there is no liability."²³

RECENT CASES

AGENCY—PRINCIPAL'S LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR—INHERENTLY DANGEROUS UNDERTAKINGS.—The defendant employed an independent contractor to erect a brick building abutting on a sidewalk. No barriers or guards were placed to keep the public away. Before the mortar in the front wall had hardened, the wall fell and injured the plaintiff, who was passing on the sidewalk. There was evidence that walls of the kind being built for the defendant are likely to fall before the mortar has dried. *Held*, that the defendant is liable. *Privitt v. Jewett*, 225 S. W. 127 (Mo. App.).

An employer is ordinarily not liable for the torts of an independent contractor. *Bailey v. Troy & Boston R. R. Co.* 57 Vt. 252. But there are exceptions to the rule; as where the thing contracted for is unlawful, or a nuisance. *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767. Again, if the employer owes a duty to the plaintiff, he cannot escape responsibility by delegating its performance. A clear example is where the duty is imposed by statute. *Gray v. Pullen*, 5 B. & S. 970. But the duty may arise differently. Thus where the work to be done is "inherently" dangerous, where injury will probably follow unless precautions are taken, it is said that the employer has a non-delegable duty to see that such precautions are taken. *Bower v. Peate*, 1 Q. B. D. 321; *Penny v. Wimbledon Urban District Council*, [1899] 2 Q. B. 72; *The Snark*, [1899] P. 74; *Johnson v. J. I. Case Threshing Machine Co.*, 193 Mo. App. 198, 182 S. W. 1089. The principal case seems fairly within this exception. Decided cases vary greatly in result. See *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *City of Moline v. McKinnie*, 30 Ill. App. 419. But this is to be expected; for it is apparent that the language of the courts allows wide discretion in particular cases, and makes for a fair decision of individual controversies, rather than for a certain rule of law.

ANIMALS—TRESPASS ON REALTY BY ANIMALS—TRESPASS BY CHICKENS.—Defendant's chickens trespassed on plaintiff's land and did substantial damage. There was no evidence of negligence on defendant's part. Plaintiff's land was enclosed by a lawful fence; the fencing statute, however, made no mention of fowls. *Held*, that the plaintiff can recover. *Adams Bros. v. Clark*, 224 S. W. 1046 (Ky.).

"*Ils ont fait tort quand les bestes vont oustre la terre.*" Y. B. 7 Hen. VII, Mich.

²² It may be asked why need the child be a separate entity from the mother at the moment injury occurs. Let us suppose a severe injury to the mother through the defendant's negligence before the child is conceived. As a result the mother's physical condition, generally or specially, is so permanently altered that the subsequently conceived child is born deformed. Obviously this child can have no right of action. The causation is both too intricate and too remote; the opportunity for intervening causes is medically immeasurable.

²³ See 1 BEVEN, NEGLIGENCE, 3 ed., 75.

pl. 1. The principal case is apparently the first recorded decision to apply this ancient common law doctrine, of absolute liability for trespass to land by domestic animals, to the case of domestic fowls. It has been generally assumed that they were within the rule. See *Cox v. Burbidge*, 13 C. B. (N. S.) 430, 438; *McPherson v. James*, 69 Ill. App. 337, 339. At least two courts have refused to sustain an action for trespass by fowls, but on the ground that the common law rule was not in force in their respective jurisdictions, by virtue of judicial decision or of statute. *Kimple v. Schaefer*, 161 Ia. 659, 143 N. W. 505; *Evans v. McLain*, 189 Mo. App. 310, 175 S. W. 294. Where this abrogation of the common law rule has been effected by means of a fencing statute, the rule is held to remain in force as to classes of animals not mentioned in the statute. *Pacific Livestock Co. v. Murray*, 45 Ore. 103, 76 Pac. 1079. But see *Evans v. McLain*, *supra*. And where the common law rule is in force, in whole or in part, there seems no objection on principle to the inclusion of domestic fowls within it, except the general custom in rural communities of allowing chickens to range at large. The public interest in the preservation of this custom may lead other courts to reach an opposite result.

BANKRUPTCY — VOIDABLE PREFERENCES — DEFINITION OF A PREFERENCE. — At a time when all the parties knew that the bankrupt was insolvent, but believed it probable that he might later become solvent, the bankrupt transferred property to prior creditors by way of security. This occurred within four months prior to the filing of the petition in bankruptcy. The trustee sought to set aside the transfer as a voidable preference under Section 60 b, of the Bankruptcy Act. *Held*, that the transfer cannot be set aside. *Kennard v. Behrer*, 46 A. B. R. 70 (U. S. D. C., N. Y.).

For a discussion of the principles involved in this case see NOTES, p. 547.

BILLS AND NOTES — CHECKS — ACCEPTANCE BY TELEGRAPH. — X had a check drawn on the defendant bank which the plaintiff bank refused to cash. He received a telegram from defendant stating, "We will protect this check," and in other ways definitely identifying it. On the faith thereof, plaintiff cashed the check. Plaintiff now seeks to hold defendant on this alleged acceptance by telegraph. *Held*, that the defendant is liable. *Commercial Bank of Woodville v. First National Bank of Morgan City*, 86 So. 342 (La.).

A check is defined as a bill of exchange payable on demand. See N. I. L., § 185. At common law an oral acceptance of an existing bill was valid. *Lumley v. Palmer*, 2 Stra. 1000; *Pierce v. Kiltredge*, 115 Mass. 374. But this anomaly was abolished by the Negotiable Instruments Law which provides that an acceptance must be in writing, signed by the acceptor. See N. I. L., § 132. In the United States the acceptance need not be on the face of the bill but may be evidenced by an extrinsic writing. See N. I. L., § 134; *Coolidge v. Payson*, 2 Wheat. 66. In England, however, the acceptance must appear on the bill. See *BILLS OF EXCHANGE ACT*, § 17 (1), (2). Acceptances by telegraph have almost uniformly been held valid under the American statute. *In re Armstrong*, 41 Fed. 381; *Selma Savings Bank v. Webster County Bank*, 182 Ky. 604, 206 S. W. 870; *Iowa State Savings Bank v. City National Bank*, 183 Iowa 1347, 168 N. W. 148. For the purposes of the Statute of Frauds a telegram is as much a writing as is a letter. *Ryan v. United States*, 136 U. S. 68; see *Howley v. Whipple*, 48 N. H. 487, 488. The signature need not be in the handwriting of the acceptor; one which he authorizes or adopts is sufficient. *Herrick v. Morrill*, 37 Minn. 250, 33 N. W. 849. Words such as were used in the principal case would seem sufficiently to evidence a contract of acceptance. See *First National Bank v. First National Bank*, 210 Fed. 542. Consequently, if the bill is properly identified, an acceptance by telegraph seems entirely unobjectionable and in accord with the best interests of the business world.

CHATTEL MORTGAGES — RECORDING AND REGISTRY — REMOVAL OF GOODS TO ANOTHER STATE WITH MORTGAGEE'S CONSENT. — A chattel mortgage on property in Arkansas was given to the plaintiff and duly recorded. With the mortgagee's consent the property was moved to Missouri. There the mortgagor, to secure advances, executed a new mortgage to the defendant who took in good faith. Defendant foreclosed, and plaintiff brings replevin. *Held*, that he cannot recover. *Geiser Mfg. Co. v. Todd*, 224 S. W. 1006 (Mo. App.).

A chattel mortgage, duly recorded in the state where the chattel was situated, will normally be valid, even as against bona fide purchasers, in any other state to which the property is taken. *National Live Stock Bank v. First National Bank*, 203 U. S. 296. *Langworthy v. Little*, 12 Cush. (Mass.) 109; see Joseph H. Beale, *Progress of the Law*, 33 HARV. L. REV. 15, 16. But in most jurisdictions an exception is recognized, as in the principal case, if the mortgagee consented to the removal of the property. *Jones v. North Pacific Fish Co.*, 42 Wash. 332, 84 Pac. 1122; *Newsum v. Hoffman*, 124 Tenn. 369, 137 S. W. 490. Some jurisdictions, however, refuse to recognize this exception, and give effect to the mortgage regardless of assent to removal. *Cobb v. Buswell*, 37 Vt. 337; see *Greenville Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353, 60 Pac. 249. On the other hand, there are a few states which go to the opposite extreme, and refuse to give effect to the recording, even though the property was removed from the state of record without the mortgagee's knowledge. *Allison v. Teeters*, 176 Mich. 216, 142 N. W. 340; *Bank v. Carr*, 15 Pa. Super. 346. As a practical matter the Missouri court would seem to have chosen wisely in adopting the distinction taken by the weight of authority.

CONFLICT OF LAWS — RECOGNITION OF FOREIGN JUDGMENT — RATE OF INTEREST. — The plaintiff applied in Victoria for leave to issue execution on a judgment obtained in New Zealand, and furthermore claimed interest on the judgment according to the legal rate for New Zealand judgments. *Held*, that the claim be disallowed. *Cathie v. Bond*, [1920] Vict. L. R. 398.

This case raises the question whether in a suit on a foreign judgment interest on that judgment shall be computed according to the law of the forum, or of the place of the original judgment. Some jurisdictions consider such interest as part of the remedy, and therefore governed, both as to its allowance and rate, by the law of the forum. *Hopkins v. Shepard*, 129 Mass. 600; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Wells Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42. Other courts apply the law of the forum, unless it is shown that the foreign jurisdiction provides a rate of interest. See *David v. Porter*, 51 Ia. 254, 256, 1 N. W. 528, 530; *Reynolds v. Powers*, 96 Ky. 481, 485, 29 S. W. 299, 299. Finally, the rule in many states, and the one most consonant with the principle that damages are a matter of substantive law, is that interest is calculated according to the law of the place of the first judgment. *Hudson v. Daily*, 13 Ala. 722; *Cavender v. Guild*, 4 Cal. 250; *Britton v. Chamberlain*, 234 Ill. 246, 84 N. E. 895. The liability resulting from the defendant's failure to pay the judgment should be reckoned according to interest laws of the jurisdiction where that judgment was rendered. *Cf.* STORY, *CONFLICT OF LAWS*, 5 ed., § 307. The principal case repudiates this view. The result is supportable, if at all, on the basis of a local statute. See 6 GEO. V, *ACTS OF PARL., VICTORIA*, No. 2733, § 186.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — REPEAL OF TAX EXEMPTION STATUTE. — At the solicitation of the relator and the city of Troy, the New York legislature in 1853 passed an act providing that for the purposes of taxation the property of the relator should be estimated and assessed at the amount of its capital stock, and no more. This act

was repealed in 1909. Subsequently a very large assessment was used as the basis of taxing the relator. The latter carried the case to the United States Supreme Court on the ground that the repeal was unconstitutional, being a law impairing the obligation of contracts. *Held* that the repeal was constitutional. *People on the Relation of Troy Union R. R. Co. v. Mealy*, U. S. Sup. Ct., Oct. Term, 1920, No. 63.

For a discussion of the principles presented by this case, see NOTES, p. 541, *supra*.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RIGHT TO RESIDE PEACEFULLY IN A STATE — Defendants were indicted in the federal district court for Arizona, under Section 19 of the Criminal Code, which provides for the punishment of any conspiracy to deprive a citizen of "any right or privilege secured to him by the Constitution or laws of the United States." Defendants had rounded up several hundred alleged "Reds," including some who were citizens of Arizona, and some who were citizens of other states, and had "deported" them to New Mexico, under threat of death should they ever return to Arizona. *Held*, that the indictment be quashed. *United States v. Wheeler*, U. S. Sup. Ct., October term, 1920, No. 68.

As the acts complained of were those of individuals, and not of a state, no attempt to sustain the indictment under the Fourteenth Amendment could be successful. *United States v. Cruikshank*, 92 U. S. 542; *Hodges v. United States*, 203 U. S. 1. But it was urged that Article IV, Section 2, of the Constitution extended federal protection to such an invasion of fundamental rights as was here involved. A few decisions appeared to sanction this view. *United States v. Blackburn*, 24 Fed. Cas., No. 14,603; see *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 49; see *Twining v. New Jersey*, 211 U. S. 78, 97. By the weight of authority, however, this provision of the Constitution protects only against state action, and not against action by individuals. *United States v. Harris*, 106 U. S. 629; *Le Grand v. United States*, 12 Fed. 577. Nor does it apply unless there has been discrimination based on state citizenship. *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *La Tourette v. McMaster*, 104 S. C. 501, 89 S. E. 398. A statute attempting to extend the federal protection to situations such as this has been held unconstitutional. *United States v. Harris*, *supra*. The principal case is in accord with the great weight of authority.

CONTRACTS — ANTICIPATORY BREACH — PLACE WHERE CAUSE OF ACTION ARISES. — The defendant corporation was under contract with the plaintiff to manufacture and ship goods in Pennsylvania for transportation to Ohio. It repudiated further performance by a letter mailed in Pennsylvania to the plaintiff in New York. The plaintiff brought this action in New York. Under the code the plaintiff must prove that the cause of action arose in New York, in order to establish the court's jurisdiction. *Held*, that the court has jurisdiction. *Glynn v. Hyde-Murphy Co.*, 184 N. Y. Supp. 462.

A cause of action for a breach of contract arises at the place where there is a failure of the performance promised. *Hibernia National Bank v. Lacombe*, 84 N. Y. 367. This failure must be where the parties intended performance to take place. But the doctrine that repudiation of future performance may be a breach introduces an exception. *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488. For repudiation is a breach at a time and place never contemplated by the contract, unless of course there is an implied promise not to repudiate. Such an implied promise is correctly found in a contract to marry. *Frost v. Knight*, L. R. 7 Ex. 111. But it cannot be found, without distortion, in ordinary commercial contracts. *Daniels v. Newton*, 114 Mass. 530. The principal case strikingly illustrates the inconsistencies which spring from the doctrine of anticipatory breach. Granting that doctrine, it seems correct to require actual

communication to the promisee rather than to hold the breach complete where the promisor sends a message, as was done in *Wester v. Casein Co.*, *supra*. This rule is necessary in view of the cases holding that no repudiation is a completed breach until acted on by the promisee. See *Rubber Trading Co. v. Manhattan Rubber Co.*, 221 N. Y. 120, 116 N. E. 789; *Zuck v. McClure & Co.*, 98 Pa. 541. See 3 WILLISTON, CONTRACTS, § 1332.

CONTRACTS — RESTRAINT OF TRADE — VALIDITY OF RESTRICTION AGAINST COMPETITION IN EMPLOYMENT CONTRACT. — The plaintiff carried on business at K., as a draper, tailor and general outfitter. He entered into a contract with the defendant to employ him as head cutter subject to dismissal upon a month's notice. The defendant agreed that upon the termination of his employment he would not thereafter carry on the trade of tailor, draper, haberdasher or milliner at any place within a radius of ten miles of K. Later the defendant set up business as a tailor in breach of the covenant. The plaintiff prays an injunction according to the tenor of the defendant's covenant. *Held*, that the injunction be denied. *Attwood v. Lamont*, [1920] 3 K. B. 571.

It is generally agreed that a contract unreasonably restraining trade will not be enforced. Accordingly an employer is not entitled to a covenant going beyond what is necessary to prevent the employee from exploiting trade secrets and the good will of the business. *Eastes v. Russ*, [1914] 1 Ch. 468; *Morris v. Saxelby*, [1916] 1 A. C. 688. On the other hand reasonable restraints are valid. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; see *Mumford v. Gelling*, 7 C. B. (N. S.) 305, 319. And even though a contract is wider than is permitted, if it is divisible the courts will enforce the valid portion of it. This is true where the restraint in the aggregate covers an excessive territory. *Smith's Appeal*, 113 Pa. St. 579, 6 Atl. 251; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723. So also where the number of occupations embraced is too great. *Bromley v. Smith*, [1909] 2 K. B. 235. Apparently the principal case would come under this head. But recent English cases have shown great hostility to contracts restricting the freedom of action of discharged employees and have thrown doubt on the rule of severance as applied to such contracts. See *Goldsoll v. Goldman*, [1914] 2 Ch. 603, 613; *Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 724; *Morris v. Saxelby*, *supra*. But cf. *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N. W. 412. The reason for distinguishing between contracts of employees and those of vendors is found in the weakness of the bargaining position of the former. Following this trend of the law the court in the principal case refuses to regard the illegal contract as divisible and refrains from carving out one that the employer might legally have made. The tone of the opinion is paternal. But the equitable rules as to mortgages, fraud and penal bonds show this is no novelty to a court of equity.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — VALIDITY OF DONATIONS BY A CHEMICAL COMPANY TO UNIVERSITIES AND SCIENTIFIC INSTITUTIONS. — The defendant company was incorporated to engage in the manufacture of chemicals. The stockholders by resolution authorized a large donation to the universities and scientific institutions of the country in furtherance of scientific education. It appears as a fact that the donation would increase the supply of scientifically trained men available for the company's employment. The plaintiff seeks to enjoin the donation as *ultra vires*. *Held*, that the proposed donation is valid. *Evans v. Brunner, Mond, & Co.*, [1920] L. J. 432 (Ch. D.).

It is well settled that a corporation has in addition to its main powers such implied and incidental powers as are needful and appropriate to effectuate its express purposes. *People v. Pullman Co.*, 175 Ill. 125, 51 N. E. 664; *Central*

Ohio Gas Co. v. Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711. Though it is not within the implied powers to transfer property without consideration, yet a transaction is not without consideration if it in any way conduces to the advantage of the corporation. See BRICE, *ULTRA VIRES*, 3 ed., 180-1. As to the validity of such transactions, the courts formerly took a narrow view. See *Davis v. Old Colony Ry. Co.*, 131 Mass. 258. But recently a more liberal tendency has become apparent. Thus contributions to relief and pension funds are held valid. *Heinz v. National Bank of Commerce*, 237 Fed. 942; *Maine v. C. B. & Q. R. R. Co.*, 109 Iowa, 260, 70 N. W. 630. An insurance company may maintain a hospital for tubercular employees. *People v. Hotchkiss*, 136 App. Div. 150, 120 N. Y. Supp. 649. And a corporation can properly contribute to the support of the library, church, and schoolhouse of the factory village. *Steinway v. Steinway Sons*, 17 N. Y. Misc. 43, 40 N. Y. Supp. 718. Moreover, in the last analysis the validity of the corporate act depends on all the facts of the business. See 1 MORAWETZ, *PRIVATE CORPORATIONS*, 3 ed., § 362. Therefore, as there was shown a direct relation between the donation and the securing of trained employees, the decision reaches a result that is at once correct and desirable.

DEEDS — DELIVERY, ACKNOWLEDGMENT, AND ACCEPTANCE — DELIVERY TO GRANTEE ON A CONDITION CERTAIN TO HAPPEN. — The testator handed to the plaintiff a closed envelope on which was written, "Only to be opened in the event of my death." The envelope contained an acknowledgment under seal, witnessed by one person, of a debt owed to plaintiff (for which there was in fact no consideration) payable out of a stated fund at the donor's death. *Held*, that the instrument was invalid because testamentary. *In re Carile*, 1920 V. L. R. 427.

When the taking effect of an instrument under seal is conditioned on an event certain to happen, two situations arise. If the condition is oral, it is generally held that the deed becomes immediately effective, irrespective of the grantor's intent. *Chaudoir v. Witt*, 174 N. W. 925 (Wis.); *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799. But if the condition appears on the face of the document, his intent becomes material to its validity as a deed. If he intended that no rights pass with the manual transfer, the intent necessary to constitute a present delivery is absent, and if the grantor dies before the condition happens the instrument is void unless supportable as a will. *Crocker v. Smith*, 94 Ala. 295, 10 So. 258; *Terry v. Glover*, 235 Mo. 544, 139 S. W. 337. But if he intended to pass presently an interest which should become operative *in futuro* the deed is valid though the grantor reserve a life estate. *Hathaway v. Cook*, 258 Ill. 92, 101 N. E. 227; *Jones v. Caird*, 153 Wis. 384, 141 N. W. 228; *Thomas v. Williams*, 105 Minn. 88, 117 N. W. 155. Yet even in such case the deed may contravene the statute of wills if the grantor retains such control over the property that he has the substantial right to dispose of it during his life. *McEvoy v. Boston Five Cents Savings Bank*, 201 Mass. 50, 87 N. E. 465. The court having correctly found in the principal case that delivery was intended to be consummated on the grantor's death, the deed was consequently testamentary and the plaintiff could take nothing.

ESTOPPEL — ESTOPPEL *In Pais* — WHETHER SOVEREIGN MAY BE ESTOPPED. — A statute authorized the Secretary of the Navy to sell certain vessels to the highest bidder, unless otherwise directed by the President. The President directed the Secretary to sell at "such price as he shall approve." Bids were received in response to an advertisement of sale to the highest bidder. By mistake the highest bidder was overlooked and a bill of sale was executed to a lower bidder, the government retaining possession of the vessel. Later the highest bidder claimed the vessel and the United States filed a bill

of interpleader. *Held*, that the highest bidder is entitled to the vessel. *United States v. Levinson*, 267 Fed. 692 (C. C. A.).

It is not an unreasonable interpretation of the facts that the Secretary was by law bound to sell to the highest bidder. Under this view, the case is supportable on the proposition that those who deal with public officers are presumed to know the extent of their authority. See *Filor v. United States*, 9 Wall. (U. S.) 45; *Dement v. Rokker*, 126 Ill. 174, 199. Under a different view, namely, that the President's order allowed the Secretary to select the buyer at his discretion, the case might raise the question whether a sovereign is subject to estoppel *in pais*. While estoppel by deed or by record may be set up against the sovereign, the courts are reluctant to allow equitable estoppel. See 19 HARV. L. REV. 126. In strong enough cases, however, it has been held that considerations of justice between the immediate litigants might override the argument of public policy and estoppel *in pais* be allowed. *Walker v. United States*, 139 Fed. 409. It is submitted that the essence of estoppel is unfairness to one party, and if it is to be allowed against the sovereign at all, it is unsound to distinguish between degrees of unfairness or kinds of estoppel. Only where the application of the doctrine would impair an inherent sovereign attribute of the state should the state be free from its operation. See *Chicago, etc. Ry. Co. v. Douglas County*, 134 Wis. 197, 114 N. W. 511.

FALSE PRETENSES — PROMISE MADE WITH INTENT NOT TO KEEP AS A MISREPRESENTATION OF FACT. — The defendant obtained money from farmers in supposed payment for groceries, by declaring that he would immediately send in their orders to the wholesale grocers whom he represented, for filling and shipment by them. The defendant never sent in the orders, and absconded with the money. Evidence was admitted to show that he had never intended to send them in, and he was convicted of obtaining money by false pretenses. *Held*, that the conviction be reversed. *Helsey v. State*, 193 Pac. 50 (Okla.).

A false statement as to one's intention is a misrepresentation of fact sufficient to serve as the basis of an action for fraud. *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670. Furthermore the making of a promise which the promisor, at the time of making, does not intend to keep, is held to be a misrepresentation of his intention, for the purposes of a civil action. *Langley v. Rodriguez*, 122 Cal. 580, 55 Pac. 406; *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974. For the purposes of the criminal law, some courts have taken the first step, and have declared a misrepresentation of intention to be sufficient basis for a prosecution for obtaining money by false pretenses. *State v. Dowe*, 27 Ia. 273; *State v. Cowdin*, 28 Kan. 269. See *Queen v. Gordon*, 23 Q. B. D. 354, 360. The criminal courts have hesitated, however, to hold that a promise not intended to be kept is a misrepresentation of fact. *Commonwealth v. Althause*, 207 Mass. 32, 93 N. E. 202. But see *Regina v. Jones*, 6 Cox C. C. 467, 469. The reason is, probably, the fear of a tendency to regard every promise subsequently broken, as having been made with an intention not to keep it. But this would seem to be sufficiently guarded against by the requirement, in criminal cases, of proof beyond a reasonable doubt. The civil cases show that a false statement of this sort is as dangerous to the general security of transactions as any other false representation. Only a very narrow interpretation of the criminal statutes has let it go unpunished.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — AGREEMENT TO ARBITRATE ALL DIFFERENCES — EXECUTED AWARD. — A contract provided that all disputes arising under it should be settled by submission to arbitrators. Disputes so arising were submitted and an award granted. In an action to enforce the award the defendant contends that the contract provision and hence the award is invalid as ousting the jurisdiction of the

courts. *Held*, that the award is unenforceable. *Conant v. Arsenault*, 111 Atl. 578 (Me.).

By the overwhelming weight of authority an unexecuted agreement to arbitrate all claims arising out of a contract will be no bar to an action on the contract, as the agreement ousts the jurisdiction of the courts. *Thompson v. Charnock*, 8 T. R. 139; *Bauer v. International Waste Co.*, 201 Mass. 197, 87 N. E. 637; *Williams & Bro. v. Branning Mfg. Co.*, 154 N. C. 205, 70 S. E. 290. This rule seems based on the ancient desire of the courts to get and keep jurisdiction, and has not escaped criticism. See *Scott v. Avery*, 5 H. L. C. 811, 852; *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006, 1007; see also 3 WILLISTON, CONTRACTS, §§ 1719, 1724. Statutes show that public policy now favors such arbitration agreements. See NEW YORK, COD. CIV. PROC. § 2366; ARBITRATION ACT, 52-53 VICT. c. 49. But at all times when the arbitration has been followed by an award, the award has bound the parties and has operated to merge the cause of action, thus barring further claims on the contract. *Burchell v. Marsh*, 17 How. (U. S.) 344; *Kidwell v. Baltimore & O. R. R. Co.*, 11 Gratt. (Va.) 676. This is so even if the arbitrators decide on a pure question of law, a clear ousting of the court's jurisdiction. *Ching v. Ching*, 6 Ves. Jr. 282; *Steff v. Andrews*, 2 Madd. 6. The principal case by denying recovery on an executed award is squarely opposed to reason, authority, and business convenience. The case if followed would mean that the parties could speculate at will on an award, accepting or rejecting it as its result proved favorable or not.

INFANTS — UNBORN CHILDREN — RIGHTS OF UNBORN CHILDREN IN THE LAW OF TORTS. — While the plaintiff was *en ventre sa mère*, his mother fell into a coal hole, negligently left unguarded by the defendant. Thereby the plaintiff was injured for life, and after birth sues for damages. *Held*, that the defendant's demurrer be overruled. *Drobner v. Peters*, 184 N. Y. Supp. 337.

For a discussion of the principles involved in this case, see NOTES, p. 549, *supra*.

INTERNATIONAL LAW — PRIZE — CARGO OF NEUTRAL VESSELS. — A cargo of magnesite was sold to the Dutch claimants by a corporation organized in Holland, but controlled by German shareholders. One half the purchase price was paid, and all risk of loss including loss by capture was to be borne by the purchasers. But if the goods should on inspection prove unsuitable for their business they could refuse to accept them. While en route to Holland in Dutch vessels, the cargo was seized by the British. *Held*, that the cargo is lawful prize. *The Vesta*, [1920] P. 385.

Under the modern English view the character of a corporation is determined by the nationality of its shareholders. *Daimler Co. v. Continental Tyre & Rubber Co.* [1916] 2 A. C. 307; *The Hamborn*, [1919] A. C. 993. Hence in order to defeat the right of prize it was necessary for the vendor to divest itself of all right, title, and interest in the goods. *The Ariel*, 11 Moo. P. C. 119. See 7 MOORE, DIG. INT. LAW, § 1184. Under the contract of sale by which all right to the goods and all risk of loss passed to the buyer, it is difficult to find a beneficial interest reserved in the seller. The mere right of the buyer to disclaim did not reserve an interest in the goods to the seller, since under the agreement there could be no disclaimer unless the goods were unsatisfactory, and then only at the option of the buyer. But even though the court's decision had been correct that an interest in the goods was reserved in the seller, the goods should nevertheless be protected since they were being transported in neutral vessels and were not contraband. See "Declaration of Paris," 7 MOORE, DIG. INT. LAW, § 1195. The only justification for the decision, therefore, is that the goods were made lawful prize by the English Reprisal Orders. See "Orders in Council,"

March 11, 1915, PULLING, MANUAL OF EMERG. LEGIS., Supp. III, 513. These reprisal orders, though entirely legal as against the enemy, are of no more than doubtful binding force upon the Prize Court in so far as they deprive neutrals of their rights under international law. See *The Zamora*, [1916] 2 A. C. 77, 90. If they do thus destroy the rights of neutrals, they are undoubtedly a fit subject for diplomatic protest. See "Note of Secy. of State to Ambassador W. H. Page," Oct. 21, 1915, 10 AM. JOURN. INT. LAW, 73, 84. See also 52 LAW JOURN. 146; PAGE, WAR AND ALIEN ENEMIES, 2 ed., 57.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — PROFESSIONAL BASEBALL. — Action for damages under the Sherman Anti-Trust Act against the professional baseball leagues on the ground that they were, through their contracts with players, acting in restraint of interstate trade. Held, that professional baseball is not trade within the meaning of the Act. *The National League of Professional Baseball Clubs, National Exhibition Co. et al. v. The Federal Baseball Club of Baltimore, Inc.*, 48 Wash. L. Rep. 819 (D. C.).

Congress has power to regulate commerce among the several states. See CONST., Art. I, § 8. Early decisions under the commerce clause, seeking to determine what activities it included, seemed to embody a sale as the essence of interstate commerce. See *Paul v. Virginia*, 8 Wall. (U. S.) 168, 183. The fallacy of that view has been pointed out. See COOKE, THE COMMERCE CLAUSE IN THE FEDERAL CONSTITUTION, §§ 7-9. It has led to one palpably incorrect decision. See *Smith v. Jackson*, 103 Tenn. 673, 54 S. W. 981. The federal power to regulate was crystallized in the Sherman Anti-Trust Act of 1890, which prohibits the restraint of interstate commerce. See 26 STAT. AT L. 209; 3 U. S. S. A. 559. It has always been recognized that federal regulation was not intended to embrace every detail of interstate commercial activity. See *Hooper v. California*, 155 U. S. 648, 655. Thus, under the act, the presentation of grand opera by a company on tour has not been considered interstate commerce. *Metropolitan Opera Co. v. Hammerstein*, 162 App. Div. 691, 147 N. Y. Supp. 532. The same is true of producing plays in various states. *People v. Klaw*, 55 Misc. 72, 106 N. Y. Supp. 341. The true criterion by which to test the act's applicability has been laid down by Judge Learned Hand: Is the interstate feature essential or incidental to the business involved? See *Marienelli v. United Booking Offices*, 227 Fed. 165, 170. That the interstate shipment of players and paraphernalia is perforce interstate commerce does not bring the leagues therefore within the act. In baseball, the game's the thing, not the transportation incidental thereto. *American Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6, accord.

JUDGMENT — SETTING ASIDE AND VACATING JUDGMENTS — NEGLIGENCE OF ATTORNEY. — A statute provides that a court may vacate a judgment taken against a party on account of his "mistake, inadvertence, surprise, or excusable neglect." (BURNS IND. STATUTES, 1914, § 405.) The attorney for the defendant relied on information given him by another attorney and did not appear at the time fixed for trial. The trial was called in his absence and judgment was given by default. Immediately thereafter the defendant appeared, set out a meritorious defense, and applied to have the judgment vacated. The application was overruled. Held, that the judgment be affirmed. *Krill v. Carlson*, 128 N. E. 612 (Ind.).

The majority of the courts in the United States regard the negligence of the attorney as the negligence of the client and refuse to vacate a judgment caused by the negligence of the attorney. *Welch v. Challen*, 31 Kan. 696, 3 Pac. 314; *Kreite v. Kreite*, 93 Ind. 583; *Lindsey v. Goodman*, 57 Okla. 408, 157 Pac. 344. See 1 BLACK, JUDGMENTS, 2 ed., § 341. In at least two jurisdictions,

however, a judgment caused by the attorney's negligence will be vacated if the party has a meritorious defense. See *Gideon v. Dwyer*, 40 N. Y. Supp. 1053; *Gallins v. Globe Rutgers Fire Ins. Co.*, 174 N. C. 553, 94 S. E. 300. And recently jurisdictions that formerly followed the rule of refusing to vacate judgments when the attorney was negligent have created exceptions in extreme cases. See *Patterson v. Uncle Sam Oil Co.*, 101 Kan. 40, 165 Pac. 661; *Southwestern Surety Co. v. Treadway*, 113 Miss. 189, 74 So. 143. Other jurisdictions, where justice demanded it, have gone a long way to vacate judgments by construing the negligence of the attorney as "excusable neglect." *Reilley v. Kinkead*, 181 Ia. 615, 165 N. W. 80; *Citizens Bank v. Branden*, 19 N. D. 489, 126 N. W. 102; *Nelson v. Minder*, 41 S. D. 150, 169 N. W. 549. It seems that, in the interest of justice between the parties, the lower court in the present case might well have construed the doubts in favor of the application and vacated the judgment. See *Miller v. Carr*, 116 Cal. 378, 48 Pac. 324. But in such a case the lower court must be given a wide discretion, and the refusal of the upper court to reverse is therefore justified. See *Rogers v. Cummings*, 11 Ia. 459; *Scott v. Smith*, 133 Mo. 618, 34 S. W. 864. See 1 FREEMAN, JUDGMENTS, 4 ed., § 106.

LETTERS OF CREDIT — VALIDITY — RELATION OF THE BUYER-SELLER CONTRACT TO THE LETTER OF CREDIT. — The defendant issued a letter of credit addressed to a seller payable on performance of a contract between the seller and the buyer. The defendant refused payment on the ground that the sales contract had become impossible of performance. *Held*, that this is no defense to the letter of credit. *American Steel Co. v. Irving National Bank*, 266 Fed. 41 (C. C. A., 2d Circ.).

A buyer and seller entered into a contract for the manufacture and sale of goods, the conditions of which were that the buyer should procure from the National City Bank a letter of credit addressed to the seller, that shipments and payments should be made by instalments, that the seller should draw on the bank upon shipment of each instalment, and that if any shipment should be delayed a specified length of time the buyer had the option of cancelling that instalment. The letter of credit was accordingly procured. Subsequently the seller was unable to supply one shipment, and the buyer exercised his option of cancellation. The buyer sought to enjoin the seller from drawing that particular draft and the bank from paying it. *Held*, that the injunction be denied. *Frey & Son v. Sherburne & Co. and the National City Bank*, 184 N. Y. Supp. 661.

For a discussion of the principles involved in these cases, see NOTES, p. 533, *supra*.

LIMITATION OF ACTION — NEW PROMISE — EFFECT OF ACCOUNT STATED — ACCOUNT STATED BY RETENTION. — A statute requires that a new promise, to take a debt out of the statute of limitations, must be in writing. (MONT. CODE CIV. PROC., § 555.) The defendant became indebted to the plaintiff for goods sold and delivered. Shortly afterwards the plaintiff rendered an account which the defendant retained without objecting. In an action the defendant pleads the statute of limitations. The statutory period has run from the date of the original debt but not from the date of the account stated. *Held*, that the statute is not a defense. *O'Hanlon Co. v. Jess*, 193 Pac. 65 (Mont.).

It is generally held that the retention of an account rendered, without objection, is evidence of an assent thereto, creating an account stated. *Baltimore & Ohio Ry. v. Berkeley Springs Ry.*, 168 Fed. 770; *Locke v. Woodman*, 216 S. W. 1006 (Mo. App.). A distinction should be drawn between an account stated as a computation and one stated as a compromise. The former constitutes a new promise to pay a prior indebtedness. *Chase v. Trafford*, 116 Mass. 529.

The latter constitutes a new contract, complete with present consideration. See 3 WILLISTON, CONTRACTS, § 1862. The statutory requirement that a new promise be in writing should apply only to the former. *Devine v. Murphy*, 168 Mass. 249, 46 N. E. 1066. This distinction is not consistently drawn, but is suggested in several cases. See *Delabarre v. McAlpin*, 101 App. Div. 468, 471, 92 N. Y. Supp. 129, 131. If a new promise must be in writing, it should be entirely immaterial, on principle, whether it was made before the original indebtedness was barred, or after. *Wells v. Moor*, 42 Tex. Civ. App. 47, 93 S. W. 220; *Matter of Goss*, 98 App. Div. 489, 90 N. Y. Supp. 769. But a number of cases agree with the principal case in holding that the requirement does not apply to an account which was stated before the statute had run upon the prior indebtedness. *Fox v. Patachnikoff*, 75 Misc. 113, 132 N. Y. Supp. 840; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371.

MANDAMUS — ACTS SUBJECT TO MANDAMUS — INJUNCTION IMPROPERLY DENIED MAY BE OBTAINED BY MANDAMUS. — The plaintiff's building encroached upon a public street. A judgment was obtained ordering its abatement as a public nuisance. The municipal council passed an ordinance granting title to the street to the plaintiff in exchange for other land. The plaintiff's application for a temporary injunction restraining the execution of the judgment was denied. The plaintiff then applied for a writ of mandamus ordering the lower court to issue the injunction. *Held*, that the writ of mandamus will lie. *State ex rel. Ruddock Orleans Cypress Co. v. Knop*, 86 So. 493 (La.).

Mandamus will not lie if there be any other adequate remedy, such as appeal or writ of error. *Ex parte Virginia Commissioners*, 112 U. S. 177; *People v. Crennan*, 141 N. Y. 239, 36 N. E. 187. A public officer cannot be mandamused to perform duties involving the use of discretion. *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298; *People v. Commissioners*, 149 N. Y. 26, 43 N. E. 418. The Louisiana Code substantially embodies these two principles. See GARLAND'S REVISED CODE OF PRACTICE OF LOUISIANA, Art. 831, 837. It does not appear that the plaintiff's remedy by appeal would have been inadequate. Moreover, the granting or withholding of an injunction by a court is not regarded as a ministerial act. *McMillen v. Smith*, 26 Ark. 613. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 181. The Louisiana courts, however, have ruled persistently that when a plaintiff presents a case plainly calling for injunctive relief, it is but a ministerial act to grant the injunction. *State v. Young*, 38 La. Ann. 923; *State v. Judge*, 40 La. Ann. 206, 3 So. 561; see *State v. Judge*, 36 La. Ann. 578, 580-582. These decisions ignore the fact that the determination of what is the proper law in a particular case necessitates the exercise of judgment — the criterion of a discretionary act. An injunction does not issue mechanically as an automobile license upon the fulfillment of the requirements of a specified statute. It is difficult to support the principal case.

MARRIAGE — VALIDITY — COMMON-LAW MARRIAGE — MISTAKE AS TO EXISTENCE OF PRIOR MARRIAGE BETWEEN THE PARTIES. — A man divorced from his former wife induced her, by a false statement that he had not procured a divorce, to resume marital relations with him. *Held*, that the woman is entitled to a widow's interest in his estate. *Wandall's Estate*, 77 Leg. Intell. 925 (Pa.).

The fundamental principle of all marriage is mutual consent. *Great Northern Railway Co. v. Johnson*, 254 Fed. 683; *Dorgeloh v. Murtha*, 92 Misc. 279, 156 N. Y. Supp. 181. See 1 HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS, 201. But if one party, apparently consenting, thereby induces the other party reasonably to enter a matrimonial relation with him, his lack of actual consent will not invalidate the marriage. *Williams v. Kilburn*, 88 Mich. 279, 50 N. W.

293. So there might be a valid marriage in this case, although the man's actual intent probably was to induce cohabitation without marriage. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, §§ 327, 334. The woman, however, did not consent to get married, for she supposed herself already married to this man. But she did intend to maintain presently and permanently a marital, not an illicit, relation with him. Such consent should be sufficient for a common-law marriage. *Matter of Sheedy*, 189 App. Div. 582, 178 N. Y. Supp. 863. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 301. The same kind of consent is involved where the marital relation continues after the impediment to a previous invalid marriage is removed, and these are generally held valid common-law marriages. *Erwin v. Nolan*, 217 S. W. (Mo.) 837; *Sims v. Sims*, 85 So. (Miss.) 73. See 27 HARV. L. REV. 378. The question is a practical one and the practical answer of the principal case should prevail over logical refinements.

MASTER AND SERVANT — WORKMEN'S COMPENSATION — ILLEGAL EMPLOYMENT — LIABILITY OF CHARITABLE INSTITUTION. — The plaintiff, a minor, was employed by a hospital. While engaged in certain work in violation of a child labor statute, she was injured through the negligence of her employer in failing to provide safe appliances with which to work. She sought to recover under the Workmen's Compensation Act. *Held*, that she may do so. *Wargo v. State Workmen's Insurance Fund*, 68 Pitt. L. J. 661 (Pa.).

It is generally held that one who is illegally employed is not within the Workmen's Compensation Acts. *Kemp v. Lewis*, [1914] 3 K. B. 543; *Messmer v. Industrial Board*, 282 Ill. 562, 118 N. E. 993. *Ide v. Faul & Timmins*, 179 App. Div. 567, 166 N. Y. Supp. 858, *contra*. This rule is followed in Pennsylvania. *Lincoln v. National Tube Co.*, 68 Pitt. L. J. (Pa.) 102. However, the injured person has a remedy at common law, in the ordinary case. *Strafford v. Republic Iron Co.*, 238 Ill. 371, 87 N. E. 358; *Braasch v. Michigan Stove Co.*, 153 Mich. 652, 118 N. W. 366. Hence there is no great injustice in denying compensation. But here the employer was a charitable institution. The older cases allowed no recovery against such an institution for torts, on the ground that the trust property could not be taken to pay a judgment. *Fordyce v. Library Association*, 79 Ark. 550, 96 S. W. 155; *Farrigan v. Pevear*, 193 Mass. 147, 78 N. E. 855. The later authorities, however, hold charitable institutions liable for torts to their employees in the same manner as private employers. *McInerney v. Hospital Association*, 122 Minn. 10, 141 N. W. 837; *Hewett v. Aid Association*, 73 N. H. 556, 64 Atl. 190; *Armendarez v. Hotel Dieu*, 145 S. W. (Tex. Civ. App.) 1030. This seems the better view. See 31 HARV. L. REV. 479. But Pennsylvania has clung to the older doctrine. *Fire Insurance Patrol v. Boyd*, 120 Pa. St. 624, 15 Atl. 553; *Gable v. Sisters of St. Francis*, 227 Pa. St. 254, 75 Atl. 1087. Hence, in the principal case, the plaintiff had no remedy at common law. The court said that, in order to prevent injustice, she would be allowed to recover under the Workmen's Compensation Act, contrary to the usual rule in cases of illegal employment. The result is desirable, although reached in a rather arbitrary way.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — NEGLIGENT EMPLOYER'S RIGHT TO REIMBURSEMENT FROM TORTFEASOR. — The plaintiff was injured in the course of his employment by the concurring negligence of his employer and the defendant. Compensation was awarded him. The Workmen's Compensation Act provided that when a third person was liable to the employee for the injury the employer should be subrogated to the right of the employee against the third person to the extent of the compensation payable. (7 PURDON'S PA. DIGEST, 13 ed., 7785.) The plaintiff claimed his full damages in the interest of himself and his employer. *Held*, that the defendant is liable

for the plaintiff's full damages. *Kerper v. Counties Gas & Electric Co.*, 77 Leg. Intell. 868 (Pa.).

Under the acts as originally framed, a non-negligent employer could not recover from a third party whose negligence caused him to pay compensation to an employee. *Interstate Telephone Co. v. Public Service Electric Co.*, 86 N. J. L. 26, 90 Atl. 1062; see 28 HARV. L. REV. 307. The mischief of this doctrine lay in imposing liability without fault on the employer while the negligent third party escaped. To relieve this situation the so-called subrogation clauses were inserted in the acts. A case where the party seeking reimbursement is himself negligent is not within the reason of this remedy. Moreover, to hold the statute applicable here is to subvert the principle that there can be no indemnity between joint tortfeasors. *Central of Georgia R. R. Co. v. Macon R. R. & Light Co.*, 9 Ga. App. 628, 71 S. E. 1076; *Union Stockyards Co. v. Chicago R. R. Co.*, 196 U. S. 217. The literal words of a statute must be construed in the light of its intent. *Holy Trinity Church v. United States*, 143 U. S. 457; see BLACK, INTERPRETATION OF LAWS, 2 ed., 68. Subrogation should therefore be denied the employer and the employee allowed to recover only his damages minus the *pro tanto* satisfaction of the compensation. *The Emilia S. De Perez*, 248 Fed. 480. Indeed, some of the subrogation clauses expressly exclude cases where the employer was himself negligent. See 1917 HURD'S ILL. REV. STAT., c. 48, § 152b. In England, indemnity from the negligent third person is apparently regarded as an independent right of the employer. See BEVEN, EMPLOYERS' LIABILITY, 4 ed., 696. Accordingly, where the employer is also negligent recovery is denied. *Cory & Son v. France, Fenwick & Co.*, [1911] 1 K. B. 114. But the American authority is in accord with the principal case. *Otis Elevator Co. v. Miller & Paine*, 240 Fed. 376; *Shreveport v. Southwestern Gas Co.*, 145 La. 680, 82 So. 785.

PHYSICIANS AND SURGEONS — LIABILITY OF PHYSICIAN FOR NEGLIGENCE OF ASSISTANT. — Defendant doctor was treating the plaintiff with hypodermic injections. During defendant's absence on vacation his woman office assistant administered the hypodermic, according to his prior instructions. The assistant negligently broke off and left the needle in the plaintiff's arm with serious resulting injury. *Held*, the plaintiff may recover. *Mullins v. Du Val*, 104 S. E. 513 (Ga.).

The line between an agent and an independent contractor is not always easy to draw. In general the test is whether the employer retains control and supervision of the details of the work, or merely can demand the result. See *Harrison v. Collins*, 86 Pa. 153; *Morgan v. Smith*, 159 Mass. 570; MECHEM, AGENCY, § 747. A doctor, for example, has no control over the details of the work of some one he recommends as a substitute when he goes away, and accordingly the substitute is held to be an independent contractor. *Moore v. Lee*, 211 S. W. 214 (Tex.); *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755. The same principle applies to a post-operative hospital nurse or an associate physician during an operation. *Hunner v. Stevenson*, 122 Md. 40, 89 Atl. 418; *Morey v. Thybo*, 199 Fed. 760. But in the principal case the assistant is subject to her employer's control, whether exercised or not, and in carrying out in detail his instructions is an agent. *Hancke v. Hooper*, 7 C. & P. 81.

PROXIMATE CAUSE — UNFORESEEN RESULTS — SUICIDE CAUSED BY INSANITY. — A workman received an injury to his hand. As a result of depression he became insane and committed suicide. *Held*, that his dependents can recover under the Workmen's Compensation Act. *Marriott v. Maltby Maine Colliery Co.* 37 T. L. R. 123 (C. A.).

The case is in conformity with the generally accepted rule that when the immediate cause of an injury is itself directly caused by an act, that act is the

proximate cause of the injury. *Scott v. Shepherd*, 2 Wm. Bl. 892; *Isham v. Dow*, 70 Vt. 588, 41 Atl. 585. A few American courts have refused to follow this rule when the actual result could not have been foreseen. *Ryan v. N. Y. Central R. R.*, 35 N. Y. 210; *Wood v. Pennsylvania R. R.*, 177 Pa. St. 306, 35 Atl. 699. And for this reason some American courts deny recovery for death due to insanity or mental disorder. *Sheffer v. Washington, &c. Ry.*, 105 U. S. 249; *Stevens v. Steadman*, 140 Ga. 680, 79 S. E. 564. But since foreseeability of result is not the proper test of proximate causation these cases must be regarded as unsound. See J. H. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633, 644. See also 27 HARV. L. REV. 394. And a more recent American case properly allowed recovery under a Workmen's Compensation statute for death by suicide due to insanity. *Re Sponatski*, 220 Mass. 526, 108 N. E. 466. Foreseeability properly has a place in proximate causation only when an independent force — *i. e.*, a force not caused by the original force — has intervened. See *Ide v. Boston R. R.*, 83 Vt. 66, 74 Atl. 401; *Gilman v. Noyes*, 57 N. H. 627. See also 33 HARV. L. REV. 650. The true test in the cases where insanity causes death is whether the insane man exercised any volition in bringing about his own death. If he did, the act causing insanity is a remote cause only. *Daniels v. New York, &c. R. R.*, 183 Mass. 393, 67 N. E. 424; *Withers v. London R. R.*, [1916] 2 K. B. 772.

TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — PERSONAL TAX IMPOSED ON NONRESIDENT PRESENT WITHIN THE STATE. — An Alaska statute imposed an "annual" tax of \$5 on "each male person" (with certain exceptions) within the territory and provided that it should be deducted by employers from the wages of employees who were subject to and had failed to pay the tax. Libellant, who was domiciled in California, was for three months during which the tax fell due employed in the fishing industry in Alaska. He did not pay the tax and left the territory. Thereafter respondent, his employer, paid the tax and deducted it from his wages which were payable in California. *Held*, that the tax was valid and the deduction proper. *Alaska Packers' Ass'n. v. Hedenskoy*, 267 Fed. 154.

For a discussion of the principles involved in this case, see NOTES, p. 542, *supra*.

TAXATION — PARTICULAR FORMS OF TAXATION — INCOME TAX — APPRECIATION IN VALUE OF PROPERTY AS INCOME. — A taxpayer sold bonds acquired before March 1, 1913, the effective date of the Sixteenth Amendment, at an advance over the market value of the bonds on that date. In accordance with a provision of the Income Tax Act of 1916 a Collector of Internal Revenue taxed this excess as income for 1916, the year of the sale. *Held*, that such increase in value is not income and that the tax is unconstitutional. *Brewster v. Walsh*, 268 Fed. 207 (Conn.).

For a discussion of this case, see NOTES, p. 536, *supra*.

TORTS — LIABILITY WITHOUT INTENT OR NEGLIGENCE — OPERATION OF DEFECTIVE AUTOMOBILE. — Defendant bought a twelve-year old automobile. His servant inspected the car and started home with it. Because of a latent and undiscovered defect, the steering gear suddenly loosened, the car swerved, and plaintiff was injured. By the finding of the court there was no negligence in the inspection or driving of the car. *Held*, that the plaintiff recover. *Hutchins v. Maunder*, 37 T. L. R. 72 (K. B.).

The rule of *Rylands v. Fletcher* has been liberally interpreted in England and many of the United States. See *Charing Cross Supply Co. v. London Hydraulic Power Co.*, [1914] 3 K. B. 772; *Musgrove v. Pandelis*, [1919] 2 K. B. 43; *Bradford Glycerine Co. v. Mfg. Co.*, 60 Ohio St. 560. But it has been applied only to things which have an inherent tendency to break forth and do damage.

See *The European*, 10 P. D. 99, 101. See also CLERK & LINDSELL, TORTS, 3 ed., 413. Although the principal case attempts to distinguish between "defective" and "sound" automobiles it, in effect, extends this absolute liability to all accidents caused by internal breakage occurring in the operation of all automobiles, though these in themselves are not dangerous instrumentalities. See *Lewis v. Amoruso*, 3 Ga. App. 50, 55, 59 S. E. 338, 340; *Tyler v. Stephan's Adm'x*, 163 Ky. 770, 772, 174 S. W. 790, 791. But see *Ingraham v. Stockamore*, 63 Misc. 114, 116, 118 N. Y. Supp. 399, 401; *Texas Co. v. Veloz*, 162 S. W. (Tex.) 377, 379. Whether this extension, in derogation of the recognized test of liability in affirmative action, is justifiable is largely a matter of policy. The difficulty of proving negligence in increasingly frequent automobile accidents favors it. But the social interest in the free use of the highways might justify considering accidents occurring without negligence, a risk of the highway. See *Nason v. West*, 31 Misc. 583, 586, 65 N. Y. Supp. 651, 652; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 468, 74 N. E. 615, 616. Allied questions, such as vicarious liability for the use of automobiles, have been dealt with by statutes in some states. See 1915 MICH. PUB. ACTS, No. 302, § 29; 1905 TENN. ACTS, c. 173, § 5. It seems preferable to leave such an innovation to the legislature. The actual facts of the principal case may, however, show real negligence and the decision be therefore unobjectionable. See *Ivins v. Jacob*, 245 Fed. 892.

VESTED, CONTINGENT, AND FUTURE INTERESTS — CONTINGENT REMAINDERS — REARRANGEMENT AND PRESERVATION OF ESTATES. — A testator devised lands to trustees to the use of the plaintiff for life, remainder to the plaintiff's first and other sons successively in tail male, remainder to the defendant for life, remainder to the defendant's first and other sons successively in tail male, ultimate remainder to the testator's own right heirs. The plaintiff was also the heir-at-law. By a subsequent codicil the testator revoked the life-estate and "all other benefits" given to the plaintiff. At the testator's death, the plaintiff had had no son. A dispute arose between the plaintiff as heir-at-law and the defendant as to the rents and profits. *Held*, that until the plaintiff has a son the defendant is entitled. *In re Conyngham*, [1920] 2 Ch. 495.

The result of the principal case is to change the contingent equitable interest of the plaintiff's unborn son into an executory devise, and to allow the defendant's estate to take effect at once, subject to that devise. An early case, though concerning limitations created *inter vivos*, in effect refused to do this, because of the court's abhorrence at rearranging the order of estates. See *Carrick v. Errington*, 2 P. Wms. 361, 364 (aff. 5 Bro. P. C. 391). Recently, where legal interests were devised, the court in a much criticized decision refused to accelerate the future limitation, and gave the profits in the interim to the residuary devisee. *In re Scott*, [1911] 2 Ch. 374. See Frederick E. Farrer, "Acceleration of Remainders," 32 L. Q. REV. 392, 407-410. But this was not followed in a case involving equitable interests where the life-tenant renounced. *In re Willis*, [1917] 1 Ch. 365. The result in the principal case is to a great degree rested on this decision. The question, which has apparently not arisen in this country, is one of construction. The court here finds clearly that the testator by his revocation intended to give the plaintiff nothing even as heir-at-law. But though the defendant is therefore entitled to the property at once, there is an interest in preserving the estate in plaintiff's as yet unborn sons. *Gore v. Gore*, 2 P. Wms. 28. Cf. *Astley v. Micklethwait*, 15 Ch. D. 59. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 116, note. And the statutes making contingent remainders indestructible show the legislature favors such a result. See 8 & 9 VICT. C. 106, § 8; 40 & 41 VICT. C. 33. See also 2 WASHBURN, REAL PROPERTY, 6 ed., note, 554-557. Altogether the decision is undoubtedly correct.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES: OBSTRUCTION, POLLUTION, AND DIVERSION — EMBANKMENT TO PREVENT FLOODING. — The plaintiff and defendants owned land on opposite sides of a New Zealand river which frequently overflowed. To protect themselves, the defendants constructed an embankment some distance from the river bank. As a result, additional water was thrown on the plaintiff's land. The plaintiff brought an action for damages and an injunction. *Held*, that the suit be dismissed. *Gerrard v. Crowe*, 37 T. L. R. 110 (Privy Council).

A riparian proprietor cannot erect an embankment which will cause injury to opposite land in times of ordinary floods. *Burke v. Sanitary District*, 152 Ill. 125, 38 N. E. 670; *Menzies v. Breadalbane*, 3 Bli. N. S. 414. But an embankment is justified if it will cause damage only during extraordinary overflows. *Kansas City, M. & B. R. R. Co. v. Smith*, 72 Miss. 677, 17 So. 78; *Nield v. London & Northwestern Ry. Co.*, 10 Exch. 4. Analogous to this qualification is the rule that anyone is justified, although harming others, in protecting himself from the sea, the "common enemy." *The King v. Commissioners of Sewers*, 8 Barn. & Cres. 355. By a combination and extension of the two doctrines it has now been held permissible to build a levee along a river which ordinarily overflows with such violence as to be on principle more nearly like the sea. *Cubbins v. Mississippi River Commission*, 241 U. S. 351. It is true that the common-law idea of "common enemy" was expressly negatived by its originator as to rivers. See *The King v. Trafford*, 1 Barn. & Ad. 874, 888. But European authorities recognize its extension to other waters. See 11 DEMOLOMBE, CODE NAPOLEON, No. 30. And the common-law doctrine, originating in England, is often inapplicable in other continents. See *Lamb v. Reclamation District*, 73 Cal. 125, 131, 14 Pac. 625, 628. This is true of New Zealand, whose rivers are wild and turbulent. See 19 ENCYCLOPEDIA BRITANNICA, 11 ed., 624. The case is interesting as an illustration of the elasticity of common-law doctrines in extending themselves to new situations.

BOOK REVIEWS

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW. London: Henry Frowde and Hodder & Stoughton. 1920. pp. vi, 292.

The announcement of a new periodical on international law is gratifying to persons interested in the subject at any time, but it is particularly welcome at this time to have appearing the first number of a British periodical. With the large number of English leaders in international law, and with the growth of the international law journals on the continent and in American countries — new reviews have appeared within the past eighteen months in Argentina and Mexico — it is a bit curious that no attempt in the same direction has previously been made in England, aside from the International Law Notes which is not exclusively devoted to international law. This first number gives promise that the new annual will contribute very notably to the "wider knowledge and comprehension of the subject," which its editors deem essential at this time.

The editorial committee, consisting of Sir Erle Richards, Prof. A. Pearce Higgins, Sir John Macdonell, Sir Cecil Hurst and E. A. Whittuck, Esq., is in itself a guarantee of the success of the undertaking, and the editor, Cyril M. Picciotto, Esq., has admirably handled the first number. The assertion that "much that was regarded as definitely established must be re-examined in the light of modern developments" is an indication of the spirit in which the plan

is conceived. By providing "scope for well-informed and careful contributions to the science of international law, wherein the fruits of research can be applied to the problems of the day," the British Year Book ought to render a service to the science of international law which will not be confined to the British Empire. The encouragement of such contributions seems the more necessary when one recalls the great losses among the ranks of international lawyers during the past few months — this first number of the Year Book contains biographical sketches of four eminent scholars recently deceased, Professor Oppenheim, Dr. Lammasch, Dr. Lawrence and Dr. Pitt Cobbett.

The leading articles in this volume cover a wide range and deal with some very interesting current problems. Sir Erle Richards' discussion of "The British Prize Courts and the War," is a very able, general account of the problems encountered by the British Navy in its control of the seas and its stifling of German commerce. If one feels that at times the defense of recent British practices is carried too far, it is the theory that the past war was a "super-war, . . . in which neutral influence ceases to be a real power" in which the real explanation is to be found. The seeming defense of reprisals and the effort to explain recent English decisions as a development of the previous law of contraband may leave the reader more grateful for the candid attitude toward such recent decisions as that in *The Consul Corfitzon*, in which the House of Lords upheld the captor's compelling a neutral claimant to produce all his commercial records of transactions with the same shipper since a date seven months before the declaration of war. Perhaps it will be difficult for some readers to share Sir Erle Richards' satisfaction that the control exercised by the Allies was "so nearly according to the existing principles of international law," and the implications of the decision in *The Zamora*, as to the freedom of British Prize Courts from executive control, seem somewhat overemphasized.

The article on "Sovereignty and the League of Nations" is quite barren, and that on the "International Labour Conventions," while valuable for its account of international legislation prior to 1914, is inaccurate and misleading as to the work already accomplished by the International Labor Organization established by the Treaty of Versailles. The discussion of "Submarine Warfare" with the conclusion that "the introduction of the submarine does not call for the making of new laws for naval warfare, but demands the rigid application of those hitherto accepted," is altogether too cramped, and will doubtless prove much less serviceable in the future than the kind of approach to be found in James Parker Hall's excellent article on the same subject in the *International Journal of Ethics*. The account of "Changes in the Organization of the Foreign and Diplomatic Service" is of more local interest, but deals with some of the problems for which interest in the same subject seems to be increasing in America. "The Legal Position of Merchantmen in Foreign Ports and National Waters" is a valuable and refreshing treatment of a topic which has assumed new importance in view of the American Shipping Board's control of so many vessels.

Perhaps the most interesting paper in the series is that on "The League of Nations and the Laws of War." It is notable that throughout the volume there runs a buoyant hope for new developments in international law under the League of Nations, but the writer of this article goes further in envisaging these developments mainly in the law of peace. It seems to be his conclusion that the League has brought in a new factor, in that it has now become possible to draw a jural distinction between normal or private wars and super or general wars; and that in the latter no law will hamper effective belligerent action. The recent refusal of the Assembly of the League of Nations to call a conference to codify international law in the light of experience gained during the past war seems to be in line with the writer's insistence that the laws of war

should be given less prominence in the immediate future than they have had during the past century.

The volume contains a list of international agreements entered into during the year 1919, which though it may not be complete, is quite serviceable. The bibliography is also useful, but it might well have noted more of the official publications such as those listed in the Bulletin of the International Intermediary Institute.

M. O. H.

THE LAW OF REAL PROPERTY. By Herbert Thorndike Tiffany. Chicago: Callaghan & Co. 1920. 3 vols. pp. xxxii, 3666.

The exhaustive character of Mr. Tiffany's first edition of 1903 prevents the present volumes from being essentially a new book. They are in substance a second edition, but one of the first rank.

Not many new topics have been added, but the old ones have been enlarged and improved. The summaries in black-faced type at the beginning of each chapter have disappeared, and the citations are greatly increased. Mr. Tiffany has had the good sense to collect here a great number of references not only to leading articles in the law magazines but to the notes of recent cases contained in those periodicals. In the main the list is very full though we miss a reference to Professor Bordwell's articles¹ in connection with section 15 on Disseisin, and a reference to Mr. Abbott's paper² on Leases and the Rule against Perpetuities in section 183. Professor Hohfield's classifications³ are occasionally mentioned with approval (pp. 1202, 1388). The search for and the arrangement and statement of the decisions have been in the main done with conspicuous ability.

The new edition is the best general book on the American Law of Real Property and with Gray's and Kales' works can be said to have completed the analysis of our law and prepared the way for the next stage of scholarly investigation of it in the direction of its reform and remaking.⁴ The chapter on future estates and interests has been thoroughly revised. Valuable additions have been made to the nature of contingent remainders, to acceleration of remainders, to shifting and springing uses, and to the subject of executory interests. A particularly thorough section in this chapter is section 167 on the power of destruction of an executory interest by the first taker. We also commend the chapters on estates for years, rents, co-ownership, powers and easements. On the other hand, tenure in the United States, section 13, has been handled too briefly. Mr. Tiffany undoubtedly considered that after Mr. Gray's treatment of it⁵ nothing remained to be done. But the subject is worthy of further investigation especially in the states carved out of the Louisiana purchase and the Northwest.⁶

We would have preferred a more widespread expression of the writer's opinion of the legal principles he states so clearly. The hard hitting of a Gray or a Bishop has been of great service to our law, and our law of real property certainly possesses spots where heavy blows may be dealt. For example, we believe that it is Mr. Tiffany's opinion that, contrary to the common statement, there may be a vested remainder after a contingent remainder in fee (section 142). With this view we entirely agree, wishing that Mr. Tiffany had

¹ 29 HARV. L. REV. 374, 501, 731.

² 27 YALE L. J. 878.

³ 23 YALE L. J. 16; 26 YALE L. J. 710.

⁴ Professor M. O. Hudson in 34 HARV. L. REV. 338-340.

⁵ GRAY, PERPETUITIES, 3 ed., §§ 22-28.

⁶ University of Missouri Bulletin, Law Series, 8, p. 3.

not been so modest in his statement of it. And the profession is entitled, when a man of his experience, learning, and ability is dealing with such a highly controversial subject as the remoteness of the exercise of general powers by will only, to know his opinion on the merits of the question (section 334).

The style is easy, well balanced, monotonous, and unrelieved by light touches. It has the great merit of unvarying clearness. The twentieth century American conveyancer may be thankful that the complicated, obscure principles with which he has to deal have been so exhaustively brought to light and so ably presented that he who runs may read.

J. W.

BARNES' FEDERAL CODE: 1921 SUPPLEMENT. Edited by Uriah Barnes. Indianapolis: The Bobbs-Merrill Company. pp. xxiii, 503.

A previous review in these columns has pointed out the merit and great utility of Barnes' Federal Code. (32 HARV. L. REV. 987.) The present supplementary volume embraces all the federal statutes of a general and public nature enacted during 1919 and 1920. It follows faithfully the convenient plan of the original compilation. Since the past two years have been fruitful of important congressional legislation on a variety of subjects, the profession is fortunate in the early appearance of this supplement.

C. M.

1921 SUPPLEMENT TO FEDERAL INCOME TAX, WAR-PROFITS AND EXCESS-PROFITS TAXES INCLUDING STAMP TAXES AND CAPITAL STOCK TAX. By George E. Holmes, of the New York Bar. Indianapolis: The Bobbs-Merrill Company. 1921. xxiv. 539 pp.

Nothing could more convincingly demonstrate the need for simplification in our federal tax system than a perusal of this volume. It is simply a supplement to the 1920 edition of Holmes on Federal Income and Profits Taxes. As such, it aims to summarize with occasional comment Treasury rulings and court decisions during 1920 with reference to the administration of the Income Tax, War-Profits and Excess-Profits Taxes, Stamp Taxes and Capital Stock Tax. It was made necessary by the numerous amendments to Regulations 45, governing the income tax, and the revision of Regulations 50, governing the capital stock tax, and Regulations 55, governing the stamp taxes, as well as by the numerous Treasury rulings and court decisions on specific questions during the year.

The immediate necessity for tapping all available sources of revenue during the war undoubtedly excused the creation of a hastily framed and unscientific system of taxation, but in the two years that have elapsed since the armistice there would seem to be no valid excuse for allowing a system of internal taxation to persist which can call for a 500-page digest of rulings annually. The continuance of such a vexatious system can only result in further impeding the natural process of readjustment inevitable on the close of a great war. However well the war may have been fought, it certainly cannot be said that the government has shown either expedition or efficiency in closing out its war-time activities.

This volume appears to be a thorough and compendious digest of Treasury rulings and court decisions during the past year on the taxes in question. As such, it is a valuable reference book for the shelves of any law office. Its usefulness is considerably augmented by a thoroughgoing topical index, as well as a convenient table of references to the various Treasury regulations, decisions and rulings referred to.

In addition to court decisions it seems to cover quite exhaustively the various Treasury decisions, opinions of the Attorney General, opinions and memoranda of the Solicitor of Internal Revenue, recommendations and memoranda of the Advisory Tax Board and the Committee on Appeals and Review, and the Corporation Trust Company Income Tax and War-Tax Service.

It has of course suitable references to the pages of the 1920 edition which it is designed to supplement. The chapter on War-Profits and Excess-Profits Taxes has, however, been completely revised and rewritten. C. A. M.

BOOKS RECEIVED

EARLY EFFECTS OF THE WAR UPON THE FINANCE, COMMERCE AND INDUSTRY OF PERU. Preliminary Economic Studies of the War. Edited by David Kinley. Washington: Carnegie Endowment for International Peace.

INTERNATIONAL LAW AND THE WORLD WAR. By James Wilford Garner. New York: Longmans, Green and Company.

SECESSION AND CONSTITUTIONAL LIBERTY. By Samuel Bunford. Two volumes. New York: Neale Publishing Company.

CONTRACTS. By Samuel Williston. Volumes III and IV. New York: Baker, Voorhis and Company.

THE STUDY OF ROMAN LAW TO-DAY. By F. de Zulueta. New York: Oxford University Press.

COLLECTED LEGAL PAPERS. By Oliver Wendell Holmes. New York: Harcourt, Brace and Howe.

FREEDOM OF SPEECH. By Zechariah Chafee, Jr. New York: Harcourt, Brace and Howe.

LABOR'S CRISIS. By Sigmund Mendelsohn. New York: The Macmillan Company.

TAFT PAPERS ON THE LEAGUE OF NATIONS. Edited by Theodore Marburg and Horace E. Flack. New York: The Macmillan Company.

THE SOVEREIGNTY OF THE BRITISH SEAS. By Sir John Borroughs. Edited with introductory essay and notes by Thomas Callander Wade. Edinburgh: W. Green and Son, Ltd.

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CORPORATE PERSONALITY IN INCOME TAXATION

I

THE principal difficulties in working out a just and consistent plan of income taxation result from the peculiar status of corporate income. To tax income to the corporation, and also to tax that income to the stockholders as dividend distributions are made from it, is to tax the same income twice. Not to tax corporate income until distributed is to postpone the tax, and perhaps never to tax it at all. To tax incomes realized by individuals carrying on business under the corporate form in one way, and incomes realized by individuals carrying on business in their individual capacity in another way, results in discrimination. This central problem is as yet far from solution, but a number of lesser difficulties resulting from the conduct of business under the corporate form have been relieved by disregarding at various points the doctrine of the separate entity of the corporation. It is the purpose of this article to discuss the instances in which this course has been followed under the present law, and to set forth reasons why the courts should sustain against constitutional attack the right of Congress in framing tax laws reasonably to draw the veil between the corporation and the stockholders. This position is maintained with full realization of the importance of adherence by the courts to the entity theory in working out problems arising from the ordinary operation of corporations.

In dealing with partnerships, except under the excess profits tax provisions of 1917, the firm has consistently been ignored as an income receiving unit. Returns have been required from partner-

ships merely for purposes of information, and the income as determined has been assessed to each partner individually according to his share.¹ Under income tax laws of the Civil War period, corporations were similarly treated. Corporations as such were not taxed, but their income as received was taxed as part of the income of the individual stockholders. In *Collector v. Hubbard*² this method of taxation was readily sustained by the Supreme Court. It is true that the court then found little difficulty with the whole problem of income taxation,³ and that this decision was in a large part overruled by the pivotal Pollock decision by which the taxation of income from property was held to be direct taxation and hence constitutionally permissible only when the tax was apportioned among the states according to population.⁴

In the legislative consideration of the first income tax law framed under the Sixteenth Amendment, made necessary by the Pollock decision, the idea of taxing corporate income directly to the stockholders does not appear to have been discussed. This was perhaps due in part to the fact that corporations had become so numerous and their stock so widely diffused in ownership and so frequently transferred that the carrying out of such a plan as to all classes of corporations would involve forbidding practical difficulties. This law was also influenced by the English law under which the taxation of dividends as income was established. Under the pioneer law of 1913, as under the present law, corporate income was treated as in general that of a distinct taxable person, and corporate dividends as income to the stockholders.

Under the income tax statute as it stands to-day, the treatment of a corporate personality is briefly as follows:

In the normal and predominating case corporate income is taxed to the corporation as such, regardless of distribution to stockholders. Distributions to stockholders out of earnings of profits accumulated since February 28, 1913, when made in cash, are treated as income of the stockholders subject to surtax without regard to the amount of tax paid by the corporation upon the

¹ Act of October 3, 1913, D., 38 STAT. AT L. 168; Revenue Act of 1916, § 8 (e), 39 STAT. AT L. 762; Revenue Act of 1917, § 201, 39 STAT. AT L. 1000; Revenue Act of 1918, § 218, 40 STAT. AT L. 1070.

² 12 Wall. (U. S.) 1 (1870).

³ *Springer v. United States*, 102 U. S. 586 (1880).

⁴ *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429 (1895), 158 U. S. 601 (1895).

income from which they are paid.⁵ The flat normal tax of eight per cent. (or four per cent. upon net income under \$4000) levied upon individuals is, however, treated as offset in the case of dividends by the flat tax paid by the corporation, now ten per cent.⁶ No provision is made for exemption of any portion of a dividend derived from income which was tax exempt to the corporation, as interest from state obligations. The exemption of distributions from earnings or profits accumulated prior to March 1, 1913, rests upon legislative policy rather than constitutional necessity.⁷ The practical effect of this limitation is largely offset, so far as the phraseology of the law is concerned, by the provision that no such income may be deemed to be distributed in dividends until all earnings or profits accumulated since February 28, 1913, have first been distributed. While the law in terms taxes distributions made in the form of the stock of the distributing corporation it is of course now determined that such distributions are not income of the stockholders because the corporation does not thereby part with anything to the stockholders.⁸ Distributions in liquidation or from capital are treated like payments for stock.⁹

Yet with this vigorous adherence in the normal case to the doctrine of the corporate entity there are now notable exceptions. The total exemption from tax to corporations of dividends from other corporations, themselves subject to income tax, is a relaxation from the rigors of the early attitude.

A "personal service corporation" is treated like a partnership.¹⁰ This means that no tax is imposed upon the corporation but the entire net income is taxed as that of the individual stockholders, irrespective of its actual distribution to them. Such a corporation is defined as "one whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation and in which capital . . . is not a material income producing factor."¹¹

⁵ Revenue Act of 1918, §§ 213, 201, 40 STAT. AT L. 1065, 1059.

⁶ Revenue Act of 1918, § 216, 40 STAT. AT L. 1069.

⁷ *Lynch v. Hornby*, 247 U. S. 339 (1918); *Peabody v. Eisner*, 247 U. S. 347 (1918).

⁸ *Macomber v. Eisner*, 252 U. S. 189 (1920).

⁹ Revenue Act of 1918, § 201 (c), 40 STAT. AT L. 1059.

¹⁰ Revenue Act of 1918, § 218 (e), 40 STAT. AT L. 1070.

¹¹ Revenue Act of 1918, § 200, 40 STAT. AT L. 1058, 1059.

In the case of a corporation formed or availed of "for the purpose of preventing the imposition of the surtax upon its stockholders or members through the medium of permitting its gains and profits to accumulate instead of being divided or distributed," the excess profits tax is first imposed upon the corporation, and the income, remaining after the deduction of such tax is taxed to the stockholders although not distributed to them, in the same manner as the income of a personal service corporation.¹²

Perhaps the most striking case of the drawing of the veil is in the case of "affiliated corporations," which are required to file consolidated income and excess profits tax returns in which the income and the invested capital of each are combined into a single return.¹³ Two or more domestic corporations are to be deemed to be affiliated "(1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests." A combined statement made up as thus required may show a materially higher or materially lower tax than that resulting from adding together the taxes shown by separate returns for each of the affiliated corporations.

A further modification of importance is in the treatment of corporate reorganizations by which securities of a different corporation are received in place of other securities. The general rule is that "when property is exchanged for other property, the property received in exchange shall, for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value, if any." This rule is, however, made subject to the exceptions that when

"in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged."¹⁴

¹² Revenue Act of 1918, § 220, 40 STAT. AT L. 1072.

¹³ Revenue Act of 1918, § 240, 40 STAT. AT L. 1081.

¹⁴ Revenue Act of 1918, § 202 (b), 40 STAT. AT L. 1060.

This provision does not contain the clause which appeared in the bill passed by the Senate exempting from possible tax transactions by which individuals received in exchange for property owned by them stock in a corporation organized by them to take over the property,¹⁵ although a vestige of this provision remains in the words "or property" appearing in the last line of the quotation. The Treasury Department has ruled,¹⁶ reversing its original ruling,¹⁷ that in such a case the individuals are liable to tax on any excess of the fair market value of the stock received over the cost to them of the property transferred to the corporation, or its value on March 1, 1913, if the property was then owned by them. This ruling, although according with the position taken by the Treasury Department under earlier laws, and finding some justification in the omission of the express exemption, is entirely inconsistent with the limitation in the law which prevents the corporation so formed from claiming invested capital by reason of the receipt of the property, to an amount beyond its cost to the individuals or value on March 1, 1913, and is inconsistent as well with the usual conception of what constitutes realization of income.

What has prompted the development of the idea of looking through the corporation has been mainly the great increase in the rates of taxation accentuating injustice of discriminations in tax burden referable to differences in the form of organization. Under the 1913 law the discrimination was not onerous. The flat rate upon individuals, like that upon corporations, was one per cent. of the net income. Exempting from normal tax dividends in the hands of individuals furnished a rough justification for collecting such a tax upon the net corporate income. It was true from the outset that a wealthy individual might escape surtax by permitting profits to accumulate for him in a corporation, but he could not get these profits out without the ultimate payment of surtax, and the rates of surtax involved were not high. The 1913 Act,¹⁸ and also the 1916 Act,¹⁹ did contain a provision permitting corporate income to be taxed directly to the individual if the corporation was

¹⁵ H. R. 12,863, 65th Congress, Committee Print — as agreed to in Conference, § 202 (b), Lines 20-22.

¹⁶ Art. 1566, Regulations 45 Rev.; T. D. 2924, Sept. 26, 1919.

¹⁷ Art. 1566, Regulations 45, issued April 17, 1919.

¹⁸ Act of Oct. 3, 1913, A, Subdivision 2, 38 STAT. AT L. 166, 167.

¹⁹ Revenue Act of 1916, § 3, 39 STAT. AT L. 758.

"fraudulently" availed of for making such tax-dodging accumulations. The 1916 Act made no radical change in the treatment of the corporation, although the normal rate was increased to two per cent. for both individuals and corporations, and the maximum surtax rate was increased from six to thirteen per cent. The Treasury Department did not display in its administration of this law any feeling of need to disregard the corporate entity. Under that Act, although not until comparatively late, it crystallized its view that an exchange in reorganization of stock of one corporation for stock in a second corporation owning substantially the same assets, was an income-producing transaction.²⁰

A radical change in the practical aspects of the whole question was effected by the War Revenue Act of October, 1917. In its framework that Act was an amendment of the Act of 1916. The great changes were the addition to the flat tax of a new four per cent. war income tax; the increase in the surtax rates so that they began at much lower points and (when added to existing rates) advanced to a maximum rate of sixty-three per cent.; and the imposing for the first time of a graduated excess profits tax which applied to income of corporations, as well as to other business income. Here were taxes which involved very serious discrimination due to the use of the corporate form, not to be rectified by mere exemption of dividends from normal tax.

Passed in great haste, the Act took little account in its structure of the radically changed content of the law. In the treatment of the corporate form it made but two express changes. The first of these was the inclusion of an extra tax of ten per cent. upon corporate earnings not distributed within six months after the close of the taxable year and not required for the purposes of the business²¹—a tax which proved to be impossible of administration. The second provision was that corporate dividends were to be taxed to the stockholders at rates applicable to the year in which were accumulated the earnings from which the dividends were paid²²—a provision involving great difficulties in its practical application. The class of cases now treated on the personal service basis was

²⁰ BULLETIN No. 5-21, Bureau of Internal Revenue, O. D. 783; HOLMES, *FEDERAL TAXES* (1919), pages 304-308; MONTGOMERY, *INCOME TAX PROCEDURE* (1919), pages 278-281.

²¹ Revenue Act of 1917, § 1206 (2), 40 STAT. AT L. 334.

²² Revenue Act of 1917, § 1211, 40 STAT. AT L. 336.

taken in under the special rate of eight per cent., applicable alike to all businesses in which capital was nominal.²³ Corporate dividends received by corporation stockholders were exempted from the additional taxes imposed by the new Act.

Congress could make the law but the Treasury Department had to administer it. In the effort to do so the Department laid the foundations for those relaxations from the corporate entity theory which are embodied in the present law. The principal contribution of the Department by way of regulation was the idea of the consolidated excess profits tax return for affiliated corporations.²⁴ Once the Department had, with the assistance of its special excess profits tax advisors, faced the problem of working out the application of that tax to a group of affiliated companies, the conclusion was reached that both for the protection of the Department and of the taxpayer consolidation of income and invested capital must be provided for. Resting upon the support in the law that "all the trades and businesses in which it is engaged shall be treated as a single trade or business"²⁵ and that the business truth was that a single business might be carried on through a number of separate corporate forms, the Department provided that in the case of corporations defined by it as affiliated corporations there should be consolidated and not separate returns for the excess profits tax. The Department was early convinced that the method of dealing with nominal capital businesses by imposing an arbitrary rate of eight per cent. did not work satisfactory results. It also perceived the grave injustice caused under the high individual surtax rates by attempting to treat as closed transactions exchanges of securities in reorganizations, but simply passed on its convictions on this point to Congress. In the light of the experience of the Department in the administration of very high income taxes were developed the provisions in the present law under which in certain cases the corporate entity is disregarded. We now have presented to Congress, in the effort to secure further relief from discrimination, proposals for further developments along the same line.

²³ Revenue Act of 1917, § 209, 40 STAT. AT L. 307.

²⁴ Regulations 41, Art. 78 (1918).

²⁵ Revenue Act of 1917, § 201, 40 STAT. AT L. 303.

II

The power to look behind the corporate entity in taxation met verbal challenge at least in the stock dividend decision.²⁶ In delivering the opinion of the majority, Mr. Justice Pitney said:

"But, looking through the form, we can not disregard the essential truth disclosed; ignore the substantial difference between the corporation and the stockholder; treat the entire organization as unreal; look upon stockholders as partners, when they are not such; treat them as having in equity a right to a partition of the corporate assets, when they have none; and indulge in the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized."

As to *Collector v. Hubbard*,²⁷ the court said not only that it was overruled by the Pollock decision in so far as it sustained a tax without apportionment upon the stockholders' interest in accumulated earnings, prior to dividend declared, but also that this difficulty with the decision was not cured by the Sixteenth Amendment, since the stockholders' interest in accumulated income is capital, and the Amendment applies only to income.

Opposed to the declaration of the majority is that of Mr. Justice Brandeis, who said in his dissent:²⁸

"No reason appears, why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court."

The broad declaration in the opinion of the court is hardly to be taken, however, as applicable to a consistent plan for taxing in an appropriate case income of a corporation as it accumulates, as that of the stockholders. As Mr. Justice Brandeis points out, the court had in this case "no occasion to decide the question whether Congress might have taxed the stockholder upon his individual share of the corporation's earnings." Congress plainly had not done so under the statute before the court. It had treated the income of the

²⁶ *Macomber v. Eisner*, 252 U. S. 189, 214 (1920). See note 8, *supra*.

²⁷ See note 2, *supra*.

²⁸ 252 U. S. 189, 231.

corporation as belonging to it and not to the stockholders, and hence as subject to tax to the corporation, and had at the same time attempted to treat a stock dividend as constituting, like a cash dividend, a distribution of those earnings constituting income to the stockholder. The decision turned upon the question of whether a stock dividend could be treated as a distribution by the corporation and was based upon

"the essential and controlling fact . . . that the stockholder has received nothing out of the company's assets for his separate use and benefit." ²⁹

Now the Government contended, on the authority of the Hubbard decision, that Congress might tax stockholders on proportionate shares of the income of the corporation as they accumulated, and made the further proposition that as a matter of convenience it might collect from the stockholder, in respect to these profits, at the time when they became manifest through the stock dividend. This latter proposition found no sanction in the Hubbard decision and was completely answered by showing that the plan of the taxing act before the court was not that of taxing the income of the corporation to the stockholder as it accumulated, but the entirely different plan of taxing it to the stockholder only as it was distributed. The court might have met the point by showing that Congress could not at the same time treat corporate earnings as those of the corporation (as it did under the act in question) and also as those of the stockholder (as it did not). And in fact, notwithstanding the broad expressions above quoted, this seems to be the meaning of Mr. Justice Pitney, who went on to say:³⁰

"We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend — even one paid in money or property — can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it; and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be *separately and additionally taxed with respect to their several shares even when divided . . .*" (italics mine).

²⁹ 252 U. S. 211.

³⁰ *Ibid.*, 214.

The kind of corporation to which Mr. Justice Pitney was expressly addressing himself was one having a very large capital, carrying on a huge business involving the use of this capital and having many stockholders. While the expression in the opinion is broad, the decision is not to be regarded as controlling in a case in which the corporation has consistently and reasonably been treated, for purposes of taxation, as an association of individuals, nor is the Hubbard decision overruled as an authority that this may be done. It seems to be still open to the court to take the view suggested by Mr. Justice Brandeis that Congress, in framing tax legislation, is not necessarily committed to the separate entity theory. Determination to look through form to substance is the underlying attitude displayed in the opinion of Mr. Justice Pitney, and in the future development of the law his exact words will probably be of less importance than the general attitude which prompted them.³¹

III

There has been a vast amount of speculation as to whether a corporation is in truth an artificial person "invisible, intangible, and existing only in contemplation of law," or, less impressively, merely a mode of association of natural persons. Only a compelling taste for legal philosophy would lure a practicing lawyer into the rarefied atmosphere of such discussion. It suffices for his purposes to know that in a number of connections the courts, in dealing with corporations and stockholders, have reached results most readily explained by stating that for a limited purpose the entity was disregarded. Indeed, Mr. Morawetz was led to make his contribution to the modern law of corporations because

"The author was of the opinion that the law relating to private business corporations could not be clearly understood unless the fact was recognized that such a corporation is really an association formed by agreement of its shareholders and that the existence of a corporation as an entity independent of its members is a fiction; and that, while the fiction of a

³¹ The discussion of this point is abbreviated because of the admirable treatment of it by Professor Thomas Reed Powell in "The Stock Dividend Decision and the Corporate Non-Entity," 5 BULLETIN OF THE NATIONAL TAX ASSOCIATION, No. 7, April, 1920. Professor Powell points out that what Mr. Justice Pitney said in the stock dividend decision was that a stockholder's interest in undivided accumulated income was to be regarded as capital, but that what the court was referring to in the Hubbard case was not accumulated income but income in the very process of accumulating.

corporate entity has important uses and cannot be dispensed with, it is nevertheless essential to bear in mind distinctly that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it and not of an imaginary being."³²

If the courts hold Congress in dealing with the corporation in income taxation strictly to the entity theory, they will impose restraints upon the attainment of legislative justice which they have not themselves recognized in seeking judicial justice.

Where questions of title to property or liability for debts are involved it is fundamental that the corporation be treated as a separate entity.³³ Yet even in dealing with such questions it may be found that the affairs of two corporations, or the affairs of the corporation and the stockholders, have become so intermingled that the corporate entity is not regarded.³⁴ If the stockholders of a corporation attempt to use it as a means of perpetrating a fraud a court of equity will take the necessary steps to prevent the fraud, and it is very likely to describe its process as one of disregarding the corporate form and looking through to the action and motives of the individuals who compose the corporation.³⁵ Where a corporation is used for effecting evasion of a statute, a similar result is reached.³⁶ Particularly where illegality is involved we may find the courts holding that the action of all of the stockholders of a

³² MORAWETZ, *PRIVATE CORPORATIONS*, 2 ed. (1886), preface; also §§ 1, 923. See also MACHEN, *MODERN LAW OF CORPORATIONS*, §§ 4, 20, 349, 1312. See also the interesting view as to the nature of corporations, in a letter by Alexander Hamilton, quoted in GERARD HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, page 22. *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868); *Spencer, C. J.*, in *Slee v. Bloom*, 19 Johns. (N. Y.) 456 (1822).

³³ See *In re Watertown Paper Co.*, 169 Fed. 252 (1909); *Martin v. Development Co. of America*, 240 Fed. 42 (1917); *N. Y. Trust Co. v. Carpenter*, 250 Fed. 668 (1918).

³⁴ *In re Rieger, Kapner & Altmark*, 157 Fed. 609 (1907); *Quaid v. Ratkowsky*, 183 App. Div. 428, 170 N. Y. Supp. 812 (1918), *aff'd*, 224 N. Y. 624, 121 N. E. 887 (1918); *Re Muncie Pulp Co.*, 139 Fed. 546 (1905). Cf. *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482 (1913); *Montgomery Web Co. v. Dienelt*, 133 Pa. St. 585, 19 Atl. 428 (1890).

³⁵ *Cuppy v. Ward*, 187 App. Div. 625, 176 N. Y. Supp. 233 (1919); *Bank v. Trebein*, 59 Ohio St. 316, 52 N. E. 834 (1898); *Lusk v. Riggs*, 65 Neb. 258, 91 N. W. 243 (1902); *Higgins v. California, etc. Co.*, 147 Cal. 363, 81 Pac. 1070 (1905); *United States v. Trinidad Coal & Coking Co.*, 137 U. S. 160 (1890); *McCaskill Co. v. United States*, 216 U. S. 504 (1910); *Linn & Lane Timber Co. v. United States*, 236 U. S. 574 (1915).

³⁶ *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257 (1911); *United States v. Milwaukee, etc. Transit Co.*, 142 Fed. 247 (1905); *Attorney General v. Central Railroad Co.*, 50 N. J. Eq. 52, 24 Atl. 964 (1892).

corporation, although not taken in the form appropriate to their capacity as stockholders, constitutes corporate action.³⁷

Even where there is no element of fraud or evasion courts have viewed a corporation as in a particular aspect an association of natural persons rather than as a separate entity. A notable instance is the line of cases under which the federal courts took jurisdiction on grounds of diversity of citizenship of cases involving a corporation as a party.³⁸ Except for a comparatively brief interval, the Supreme Court did not take the view that a corporation is a citizen. The court looked instead to the assumed citizenship of the members of the corporation, and because of their individual citizenship allowed them to bring or defend in their corporate name the action of or against the corporation. This doctrine is still adhered to by the Supreme Court, although limitations, founded upon common sense, are recognized. An interesting instance of looking through the corporate fiction is the decision under which a religious corporation was allowed to hold a verdict for damages from a nuisance maintained near its religious edifice, although a material element of the damage covered by the verdict was purely personal discomfort and annoyance suffered by the members of the corporation, and necessarily not suffered by the corporation as an entity.³⁹

Without attempting to go elaborately into the treatment of the corporate entity in other connections, it is clear that in considering the incidence of taxation the courts have not hesitated to look behind the corporate form. Among recent decisions is *Southern Pacific Company v. Lowe*.⁴⁰ Here it appeared that the plaintiff corporation owned all the stock of a second railroad company, all the property and funds of which it also held under a lease. The plaintiff company was taxed upon a dividend paid to it by the second corporation, the payment having been effected by means of

³⁷ *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 24 N. E. 834 (1890); see also *McCullough v. Sutherland*, 153 Fed. 418 (1907).

³⁸ *Bank v. Deveaux*, 5 Cranch (U. S.), 61 (1809); *Louisville Railroad Co. v. Letson*, 2 How. (U. S.) 497 (1844); *St. Louis, etc. Railroad Co. v. James*, 161 U. S. 545 (1896); *Doctor v. Harrington*, 196 U. S. 579 (1905); *Southern Realty Investment Co. v. Walker*, 211 U. S. 603 (1909). For an excellent treatment of these cases see GERARD HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, pages 39-60, etc.

³⁹ *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, 108 U. S. 317 (1883).

⁴⁰ 247 U. S. 330 (1918).

a credit to the plaintiff corporation on its books. The dividend was out of income accumulated prior to the year 1913. The court, although holding the view that dividends from earnings accumulated prior to the effective date of the Sixteenth Amendment were taxable, held that the dividend in question was not subject to tax for the reason that the income out of which it was declared had, under the circumstances, accrued to the plaintiff corporation in every substantial sense before the declaration of the dividend. In *Gulf Oil Corporation v. Lewellyn* the court extended the doctrine of this case to one in which the holding corporation which received the dividend was not the lessee of the second corporation and did not conduct its business or hold its funds.⁴¹ In *Bank of California v. Richardson* the court held that a state in exercising its permissive right to tax shares of a national bank to the shareholder, might not take into account as an element of value shares of another national bank held by the bank whose shares were being valued, since this would result in twice taxing the shares of the second bank.⁴² In passing on state taxing acts, however, the court fully recognizes that where under the statute it is the intention of the state to tax a domestic corporation on shares of another domestic corporation, themselves fully taxed, there is no constitutional reason why the statute should not be given effect.⁴³

Even though Congress is not to be held strictly to the entity theory in dealing with the taxation of corporate income, it by no means follows that Congress may disregard this theory at will. The exercise of the taxing power, like the exercise of all other powers of Congress, is presumably subject to the limitations of the Fifth Amendment. Any taxation measures to be valid must be such as not to produce practical results which are arbitrary and without reasonable justification.⁴⁴ Those cases in which the corporation is treated as an association of stockholders and not as a separate

⁴¹ 248 U. S. 71 (1918); see also *Alpha Portland Cement Co. v. United States*, 261 Fed. 339 (1919); *United States v. Oregon-Washington R. & Nav. Co.*, 251 Fed. 211 (1918).

⁴² 248 U. S. 476 (1919).

⁴³ *Ft. Smith Lumber Co. v. Arkansas*, 251 U. S. 532 (1920); *Cook v. Burlington*, 59 Iowa, 251, 13 N. W. 113 (1882).

⁴⁴ For a discussion of the application of the Fifth Amendment to the taxing power, and a collection of cases bearing upon the limits of the taxing power, see "Some Constitutional Aspects of the Excess Profits Tax," 29 YALE L. J. 625 (April, 1920).

entity must belong to a class as to which such treatment is reasonable. Each instance of disregard of the entity theory must be tested for the vice of wanton discrimination.

IV

We have in the stock dividend opinion clear indication that the court does not regard it within the bounds of reason, in the case of an ordinary business corporation, to tax the income of the corporation to the stockholders as it accumulates, even though that income is not taxed at all to the corporation. The court took it to be a "practical fact" that in the case of a corporation like the Standard Oil Company of California the corporation is sufficiently real so that its stockholders cannot be considered to derive any income from its operations except as out of it actual distributions are made to them by the corporation. Even though the expressions in the opinion on this point may be distinguished from the expressions upon which the *Collector v. Hubbard* decision was based, the attitude shown in the opinion indicates the method sustained by the court in the Hubbard case would not be sustained to-day, at least in the case of large and active business corporations employing large capital.

This result, however, in the case of such corporations, is not inconsistent with the position that in certain classes of cases Congress may properly impose tax legislation which treats the corporation not as an entity but as an association of individuals. The Hubbard case was decided in contemplation of a very different background of facts. Corporations to-day are far more numerous than in the Civil War times; their capital is larger and their operations more extensive; and the separation of the stockholder from direct control of the corporation is, in the ordinary case, far more marked. To say to an individual stockholder of the Standard Oil Company of California that he derived income because the corporation had earned a certain amount which might, if the directors so voted, be applied in dividends on his share, would be arbitrary and unreasonable, and the tax imposed upon any such putative income should be held bad.

In contrast, however, to the protection which on any theory the courts are likely to extend to the stockholder against being

taxed upon a portion of the corporation's earnings, not effectively divided off to him, is the willingness of the courts to sustain in the normal case the taxation of income first to the corporation, and also the taxation of that income to the stockholder when distributed in the form of dividends.⁴⁵ This process involves discrimination as compared with the subjecting to individual income tax only of business income realized through a partnership or sole proprietorship, but the discrimination cannot be said to be wanton or without reasonable basis. Any additional burden so resulting is occasioned by the use of the corporate form in a state compelled to raise revenue in ways roughly practicable. This penalty is only to be removed in the future by some legislative expedient hoped for but not yet worked out in a form shown to be consistent with the need for revenue.

The situation of stockholders in a "personal service corporation" is, however, very different from the situation of stockholders in a corporation of the kind considered by the court in the stock dividend opinion. In the personal service case the income is "ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation." Such activities might well be carried on without the corporate instrumentality; incorporation in its practical aspects does little more than to bind together individual workers into a group. Furthermore, "capital is not a material income producing factor"; therefore there is not the same need which frequently exists in the case of other corporations to leave in earnings as additional capital. In such a case the owners clearly have at least as much power as ordinary partners to distribute the earnings from the business to themselves individually if they choose to do so. Under such circumstances it appears to be well within the bounds of reason to treat the corporation in its income taxation aspect as merely an association of individuals who are to be taxed individually on the share of each in the earnings as they accumulate.

The treatment in the law of the corporation "formed or availed of for the purpose of preventing the imposition of the surtax upon

⁴⁵ *Lynch v. Hornby*, 247 U. S. 339, 344 (1918): "The stockholder is, *in the ordinary case* [italics mine], a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him *ab extra*, and as constituting a part of his income when they came to hand."

its stockholders or members through the medium of permitting its gains and profits to be accumulated instead of being distributed" has not, however, the same logical basis. In this class of cases it is equally clear by hypothesis that the controlling stockholders must have it within their power to distribute the gains or profits; otherwise it is difficult to conceive that the corporation could be found to be in fact formed or availed of for the purpose of accumulation.

In dealing with these corporations Congress was not satisfied, however, to provide merely that the corporate entity should be set aside and the income taxed as that of stockholders, as in the case of personal service corporations, but provided instead that there should first be levied upon the corporation as such an excess profits tax, and that the earnings remaining after providing for such tax should be those treated as forming part of the income of the stockholders. Here, therefore, Congress has attempted to treat the corporation as an entity distinguished from the stockholders, who, as individuals, are not subject to excess profits tax under the law, and at the same time to treat the corporation as being, for tax purposes, a mere association of individuals. All that could possibly be urged as justifying this effort to hold these inconsistent positions is the idea that in such cases the corporation and the stockholders are to be considered guilty of attempted evasion of tax and are therefore outlaws subject to any penalties which Congress chooses to impose. The difficulty with this justification is that the penalty is not in any way adjusted to the offense. Such a corporation, most clearly used as a means of avoiding surtax, might have such capital and income that there would be no excess profits tax upon it. The excess profits tax as a penalty which would apply in some cases of this method of evasion and would not apply in other equally clear cases, seems too arbitrary to stand. It seems probable, therefore, that Congress has, in shaping this provision, overreached itself and that on any theory it cannot be sustained.

The question as to the constitutional status of the provision for consolidated income and excess profits tax returns by "affiliated corporations" is more difficult. The decisions in *Lowe v. Southern Pacific Company* and *Lewellyn v. Gulf Oil Corporation* appear to indicate that the court would not have difficulty with the requirement of consolidated returns where the activities carried on by

two or more corporations legally separate are, as a practical fact, the activities of a single enterprise, or where, by virtue of decisive control, the domination of the parent corporation is clear. Under the law as it stands a consolidated return is, however, in terms required where there is substantial identity in the ownership of the stock of two corporations even though the activities carried on by each are in fact not in any sense part of the same enterprise.

In such cases, as the stockholders in their relation to the two separate enterprises have not treated themselves as a single group, there is a fair question as to whether they may be so treated for purposes of taxation. The consolidated return provision in its application to those cases in which there is directly or indirectly substantial identity of stock ownership, and also such relation between the activities of each of the corporations that they can reasonably be regarded as part of the same enterprise, should, on the grounds advocated in this article, be sustained. As in the case of public utility rate legislation, however, the court may refuse to permit the application of this broad provision in certain instances appearing to fall within its terms, where the practical consequence of so applying it is to bring about grossly unreasonable taxation.

The reorganization provision is an exemption from tax of the results of certain transactions which might, but for the exemption, be treated as yielding income subject to tax. It is difficult to see how this provision, in its main aspect, will be subject to a constitutional test. The courts of at least one state have sustained taxation of income deemed to result from the exchange of stock in a corporation formed under the laws of one state, for a similar amount of stock in a second corporation formed under the laws of another state, which took over exactly the same assets and business as those of the first corporation.⁴⁶ Possibly the comparatively small rate of taxes there involved may have assisted the court in coming to its conclusion. It is clear that this exemption rests upon sound legal theory. If a stockholder does not receive income through a stock dividend, as the Supreme Court, unlike the court of the state in question, has held, it is equally clear that the stockholder does not in any real sense receive income merely by exchanging his stock for other stock representing substantially the same thing.

⁴⁶ Nathaniel H. Stone *et al.* Trs. v. Tax Commissioner, 235 Mass. 93, 126 N. E. 373 (1920); Hannah T. Osgood v. Tax Commissioner, 235 Mass. 88, 126 N. E. 371 (1920).

On the principles above indicated the court should refuse to sustain certain departmental rulings upon cases involving the corporate entity. One of these is the ruling above referred to, to the effect that where an individual or individuals owning property transfer that property to a corporation formed to take it over and receive stock in exchange, a realization of income may be deemed to occur. In such a case the corporation and its stockholders are so identified that the transaction should not be regarded as one producing income. An individual does not realize income through what is in practical effect trading with himself.

In the case of a corporation selling out all of its assets for purposes of liquidation, it ought also to be held, as recently contended in a case argued before the Supreme Court,⁴⁷ that there is through this disposition no realization of income both to the stockholders and to the corporation, but that only the corporation or only the stockholders should be taxed on the profit through the disposition. Where a corporation has properly determined to liquidate, it should be regarded as ceasing to function as an entity apart from the stockholders, but as acting instead as an agency of the stockholders for the purpose of realizing upon their interests in the corporate assets. The rulings of the Department are so strongly contrary to this view that where a corporation effected a formal liquidation by turning over all its property to trustees for the stockholders, and the trustees later disposed of the property, it was held that the profit on this disposition was to be taxed to the corporation, and that the stockholders were also subject to tax on their shares of the profits distributed.⁴⁸

V

The application of drastic income taxation of corporations and individuals presents problems not thought of or considered by the courts as the theory of the separate entity of the corporation became established. Even in dealing with other questions arising from the conduct of business under the corporate form the courts have found the complexities such that while adhering to the entity theory in the main they have been obliged to depart from it, or at

⁴⁷ *Eldorado Coal and Mining Co. v. Mager*, October Term, 1920, No. 609.

⁴⁸ CUMULATIVE BULLETIN, June, 1920, Bureau of Internal Revenue, § 1385, page 203.

least to do what they have regarded as departing from it, in order to work justice. Taxation is perhaps the most fundamental of the powers of the Government, and courts have never hesitated to emphasize the extent to which the exercise of this power may be carried upon its positive side. They should be equally anxious to set no fixed limit to the right of the taxing power to adjust taxation so that it will fall upon those who in fact bear the burden with the greatest practicable justice. Each question as to how under the plan of income taxation a corporate entity should be treated should be decided according to the court's view as to whether the effect of the treatment is grossly unreasonable and not upon any "dryly logical" application of a formula as to the nature of a corporation.

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SEISIN AND DISSEISIN

THE exaltation of possession in the common law which began with Mr. Justice Holmes¹ reached its culmination in the Disseisin of Chattels² of the late Dean Ames. He would have made possession an essential of ownership, so that to lose possession was to lose ownership,³ with nothing left in a dispossessed owner but a chose in action.⁴ That this glorification of possession has not yet entirely spent its force is evident from the increased prominence given to possession in late case-books on personal property. It may therefore be well to consider whether seisin and disseisin did mean to the common law what they meant to Ames, and if this be so or not whether for most purposes they have not long been obsolete.

I

SEISIN

Seisin and disseisin suggested quite different things to our mediæval lawyers. The one suggested peace and quiet,⁵ the other robbery, burglary, piracy, and the like.⁶ One could be seised of a chattel.⁷ It was never common usage to speak of the disseisin of anything but a freehold.⁸ Seisin was fundamental. "It was so important that we may almost say that the whole system of our land law was law about seisin and its consequences."⁹ Disseisin owed its importance to the assize of novel disseisin, which was statutory in origin¹⁰ and based on a foreign model.¹¹ So favored, however, was the assize by courts and legislature alike that dis-

¹ COMMON LAW, 164-246.

² 3 HARV. L. REV. 23, 313, 337; 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 541.

³ 3 SELECT ESSAYS, 562.

⁴ *Id.*, 562, 587.

⁵ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 30.

⁶ CO. LIT. 18b, 3b.

⁷ Maitland, 1 L. QUART. REV. 324.

⁸ Ames, 3 SELECT ESSAYS, 541.

⁹ 2 POLLOCK AND MAITLAND, 29.

¹⁰ 1 *Id.*, 45.

¹¹ 2 *Id.*, 47.

seisin became an integral part of the land law, an important sub-head of the all-embracing seisin.

Seisin meant possession.¹² Livery of seisin, therefore, meant delivery of possession. It was the operative fact of the feoffment¹³ and the feoffment dominated the transfer of land.¹⁴ Long before the Norman Conquest we are told that on the Continent they had gotten beyond the stage where an actual delivery of land was necessary to its transfer and that the delivery of a written charter or a surrender in court was enough,¹⁵ but in England constructive livery of seisin never went very far. Livery within the view followed by entrance on the part of the feoffee during the life of the feoffor seems to have been the farthest it ever went.¹⁶ As the livery was the operative fact of the feoffment and not the charter, which was merely evidentiary,¹⁷ the feoffment was effective instantly or not at all. Livery was a present, physical fact, and unlike agreement or intention could not reach into the future. As a consequence we have the common-law doctrine of estates. Such only as could be conceived of in terms of the present were possible.¹⁸

But if seisin meant possession, it meant much more than what we ordinarily think of as possession, the power to control a physical thing. It was closely connected with the idea of enjoyment, and might be predicated of things that one could enjoy but could not touch or grasp, such as services and advowsons and freedom from toll.¹⁹ The number and importance of these intangible things to which seisin was attributed in the Middle Ages was great.²⁰ Already in Bracton's time one might also be seised of a reversion, though not yet of a remainder, for the reversioner was a kind of lord who was entitled to services, whereas the remainderman was not.²¹ Logically these incorporeal and future interests of which

¹² 2 POLLOCK AND MAITLAND, 29.

¹³ 2 *Id.*, 84.

¹⁴ The grant was in place or stead of a feoffment. See Co. Lit. 49a and Butler's note (1) to Co. Lit. 271b. The fine was sometimes said to be a feoffment of record. Co. Lit. 50a; 2 BL. COM. 348.

¹⁵ 2 POLLOCK AND MAITLAND, 86.

¹⁶ *Id.*, 83. Entry in law was sufficient where there was fear of death or bodily harm. A claim would serve to vest a new estate in the feoffee as in the common case to revert an estate in a disseisee. Co. Lit. 48b.

¹⁷ 2 POLLOCK AND MAITLAND, 83, 84; LEAKE, PROPERTY IN LAND, 2 ed., 32.

¹⁸ LEAKE, PROPERTY IN LAND, 33; CHALLIS, REAL PROPERTY, 3 ed., 107.

¹⁹ 2 POLLOCK AND MAITLAND, 34.

²⁰ 2 *Id.*, 124 *et seq.*

²¹ 2 *Id.*, 39.

one might have seisin would have been transferable by livery of seisin and there is some evidence to show that this was the case,²² but, as we have seen, constructive livery did not get far in the English law and it became settled that these interests lay in grant and *not* in livery.²³ The grant alone, however, was not sufficient to effect a change of seisin and thus to complete the transfer. Just as in the case of livery within the view²⁴ or of exchange²⁵ entry by the transferee was necessary during the life of the transferor, so in the case of the grant, it was necessary to complete the transfer that the tenant attorn to the grantee during the life of the grantor.²⁶

Seisin played as important a part in the acquisition of property on the death of the former owner as in conveyances *inter vivos*. Except in special cases such as that of the remainder,²⁷ descent was traced from the person last seised.²⁸ *Seisina facit stipitem* was the rule.²⁹ In proceedings by writ of escheat it was alleged that the tenant died seised,³⁰ and the same thing was probably true in the case of the other feudal casualties.³¹ Except by special custom, wills of land were not allowed,³² but where they were, dying seised seems to have been essential.³³ Dower³⁴ and curtesy³⁵ depended upon seisin during coverture.

Every title had its origin in a seisin. In a proprietary action every demandant had to allege that he or some ancestor of his had been seised, "and not merely seised but seised with an exploited seisin, seised with a taking of esplees."³⁶ He could not count on a seisin prior to a certain date, but this date became fixed³⁷ and as it receded into the past became of less and less consequence. Statutes of limitations played little part in the acquisition of title in

²² As to the feoffment and livery of rents, commons, and advowsons, see Pike, 5 L. QUART. REV. 29-43.

²³ CO. LIT. 9a, 49a, 172a.

²⁴ *Supra*, n. 16.

²⁵ CO. LIT. 50b, 51b.

²⁶ LIT., § 551.

²⁷ CHALLIS, REAL PROPERTY, 238.

²⁸ CO. LIT. 11b.

²⁹ 2 BL. COM. 209; FLETA, lib. 6, cap. 2, § 2.

³⁰ Maitland states that the writ of escheat distinctly says that the tenant died seised (3 SELECT ESSAYS, 599), but this does not appear in the printed Register (REG. BREV., 164), to which he refers. See, however, FITZHERBERT, NOV. BREV., f. 144.

³¹ Maitland, 3 SELECT ESSAYS, 599.

³² 2 POLLOCK AND MAITLAND, 328.

³³ Maitland, 3 SELECT ESSAYS, 596.

³⁴ LIT., § 36.

³⁵ LIT., § 35.

³⁶ 2 POLLOCK AND MAITLAND, 80.

³⁷ *Id.*, 81.

the Middle Ages.³⁸ The fine was a speedy, if expensive, method of cutting off adverse claims,³⁹ but this was done away with by the Statute of Non-Claim of Edward III⁴⁰ and not restored until the reign of Richard III.⁴¹

It was in the law of actions that seisin lost its application to anything other than the freehold and became a special kind of possession. As early as the 1100's the courts denied the ejected tenant for years the assize of novel disseisin on the ground that he was not seised of a freehold,⁴² and though for a time it was not incorrect to speak of him as seised of the term,⁴³ it became so in the latter half of the 1400's when, apparently, the growing importance of his remedy, the action of ejectment, resulted in the bestowal on him of a word of his own.⁴⁴ Henceforth he was possessed and not seised. Seisin and seisin of freeholders thus became identical and 'seisin of chattels' an anachronism.

Like the assize, the writs of entry and the writs of right were actions to recover the freehold. Upon judgment for the demandant a writ of *Habere facias seisinam* issued commanding the sheriff that he cause the demandant to have seisin of the tenements recovered.⁴⁵ Every demandant had to recover on the strength of his own seisin or that of an ancestor. There were a multitude of writs, each adapted to its particular case, and the title of the demandant and the wrong complained of had to be set forth on the record with great precision.⁴⁶ Thus the whole system of seisin outlined above became stereotyped in the forms of action.

Usurpation of the freehold might take the form of an unlawful entry or of an unlawful detainer. The latter constituted a forfeiture, although in certain special cases, more properly a discontinuance.⁴⁷ Where the entry was unlawful, the usurpation of the

³⁸ As to the "novel disseisin" and the "mort d'ancestor," see 2 POLLOCK AND MAITLAND, 51.

³⁹ 2 POLLOCK AND MAITLAND, 101.

⁴⁰ 34 ED. III, c. 16.

⁴¹ 1 RIC. III, c. 7.

⁴² 1 POLLOCK AND MAITLAND, 357; 2 *Id.*, 36, 110.

⁴³ 2 *Id.* 36, 110, n. 2.

⁴⁴ Maitland, 1 L. QUART. REV. 324, 337, 339.

⁴⁵ STEARNS, REAL ACTIONS, 245.

⁴⁶ Sedgwick and Wait, 3 SELECT ESSAYS, 611, 612, 616.

⁴⁷ CO. LIT. 331b. In its widest sense forfeiture included an abatement, an intrusion, a disseisin or a discontinuance, as any other species of wrong, whereby he who had a right to the freehold was kept out of possession. Butler's note (1) to CO. LIT. 331b.

freehold might be a disseisin, an abatement, or an intrusion. The typical disseisin was the entry on the freehold of another and the expulsion of the freeholder.⁴⁸ Abatement was the entry of a stranger before the heir or devisee,⁴⁹ and intrusion, such entry before the remainderman or reversioner.⁵⁰

The primitive seisin was not feudal. If it had been it could have had no application to chattels.⁵¹ Nor was seisin of freehold feudal in the sense of being a distinctly feudal notion,⁵² for the denial of a freehold to the tenant for years was probably due not to feudalism but to the Roman law.⁵³ On the other hand, in so far as feudalism was mere property law as distinct from public law, England was of all countries "the most perfectly feudalized."⁵⁴ Every acre of land except the royal demesne was held directly or indirectly of the king.⁵⁵ And in this feudalized land law, as we have seen, seisin played a most conspicuous part. The complicated structure of the land law was possible only because the ascending series of rights of the feudal hierarchy could be realized in a seisin.⁵⁶ Without seisin there would have been no law of estates or it would have been very different.⁵⁷ The feudal incidents,⁵⁸ the actions for their enforcement,⁵⁹ the power to distrain, all depended on seisin.⁶⁰

But this very importance which seisin had attained in the feudalized land law was its weakness. The feudal incidents, like the inhibition against the devise, were difficult of direct attack. It took the French Revolution to get rid of them on the Continent. Destroy seisin, however, and the feudal incidents also would fall, for they were dependent on it.

II

THE ROUT OF SEISIN

Already when Littleton wrote, seisin had seen its best days. For some time it had been a common practice to make feoffments to the use of one's will or to the use of another. So common was

⁴⁸ LIT., § 279.

⁴⁹ CO. LIT. 277a; STEARNS, REAL ACTIONS, 49.

⁵⁰ CO. LIT. 277a; CHALLIS, REAL PROPERTY, 3 ed., 235.

⁵¹ Maitland, 1 L. QUART. REV. 324.

⁵² *Id.*; Hogg, 25 L. QUART. REV. 178.

⁵³ 2 POLLOCK AND MAITLAND, 113. But see Ames, 3 SELECT ESSAYS, 541, 561.

⁵⁴ 1 POLLOCK AND MAITLAND, 235.

⁵⁵ 1 *Id.*, 232.

⁵⁶ 2 *Id.*, 182.

⁵⁷ 2 *Id.*, 78.

⁵⁸ *Supra*, nn. 30, 31.

⁵⁹ *Supra*, p. 594.

⁶⁰ 2 POLLOCK AND MAITLAND, 578.

the practice that when no use was stated and there was no consideration, the feoffment was presumed to be to the use of the feoffor.⁶¹ Littleton made a feoffment to the uses of his will,⁶² and Blackstone states that during the War of the Roses uses had grown to be almost universal.⁶³ The use was enforced in Chancery and must have been looked on commonly as the beneficial as distinct from the legal ownership.⁶⁴ In matters of descent equity followed the law,⁶⁵ but in general it did not apply the principles of seisin to the use,⁶⁶ for as regards their transfer and limitation, seisin and the use were fundamentally opposed. Technically, the use was a personal right against the feoffee to uses or his successors.⁶⁷ More fundamentally it was something that charged his conscience.⁶⁸ The mental element was all important. The Chancellor thought he could read the mind of man,⁶⁹ the common-law courts thought that this was impossible to the devil himself.⁷⁰ The medieval land law, therefore, was a rough and ready system based on obvious facts. The use was oversubtle perhaps, but it allowed the intention of the parties to operate in the transfer and limitation of rights irrespective of a change of possession. No livery of seisin was necessary to transfer the use. It could be devised. It was not subject to the feudal incidents.⁷¹ It could be limited in many ways not possible with estates.⁷²

The Statute of Uses [1536]⁷³ was a desperate attempt to restore the feudal revenues of the king.⁷⁴ It was hoped to accomplish this by restoring seisin to something like its former importance through

⁶¹ MAITLAND, EQUITY, 33.

⁶² Wambaugh's Introduction to LITTLETON'S TENURES, xlv.

⁶³ 2 BL. COM. 329.

⁶⁴ Holdsworth, 26 HARV. L. REV. 108, 115. See items 32 and 35 of the list of grievances suffered by the realm from uses, which was before Parliament in 1535-36. *Id.*, 125.

⁶⁵ SANDERS, USES AND TRUSTS, 62; LEAKE, PROPERTY IN LAND, 80.

⁶⁶ SANDERS, 65, 67; LEAKE, 80. After the Statute of Uses there was much more in common between the statutory seisin and the trust than there had been between the old common-law seisin and the use. See *Burgess v. Wheate*, 1 W. Bl. 123 (1759); S. C. 1 Eden, 177 (1758).

⁶⁷ MAITLAND, EQUITY, 29.

⁶⁸ CO. LIT. 272b.

⁶⁹ Y. B. 37 HEN. VI, 14B-3, cited by 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 506, n. 1.

⁷⁰ Y. B. 17 ED. IV, 2A-2.

⁷¹ LEAKE, PROPERTY IN LAND, 80.

⁷² *Id.*, 88.

⁷³ 27 HEN. VIII, c. 10.

⁷⁴ Holdsworth, 26 HARV. L. REV. 108.

the transfer of the seisin to the use.⁷⁵ New courts were created to ensure the realization of the feudal profits.⁷⁶ The devise of land by means of the use became impossible because of its transformation into the legal estate.⁷⁷

Thus the universality of concurrent legal and equitable interests in land was destroyed. But it was the use that had conquered seisin, not seisin the use.⁷⁸ The methods of creating and transferring the use, with the exception of the will, were now recognized as legal conveyances,⁷⁹ and four years after the Statute of Uses the all-powerful Henry VIII was compelled to extend this recognition to the will also.⁸⁰ The new statutory seisin into which the use was instantly converted was "after such quality, manner, form and condition" as the executed use.⁸¹ It would be going too far to say that the Statute of Uses had robbed seisin even of its own name and conferred it on the use, for many of the peculiarities of the old legal estates were now applied to the converted use. Thus where a converted use met the requirements of the common-law remainder, it was treated as such and as subject to its casualties.⁸² It was even treated as such when it met those requirements only in part and as a remainder was void.⁸³ But the fantastic efforts to find a remnant of the old seisin (*scintilla juris*) to feed the use⁸⁴ were desperate attempts to avoid recognition of the fact that what the statute had done in large part was to put the stamp of seisin on the old use.

Bargain, sale, covenant, contract, agreement, and the like, were mentioned in the Statute of Uses as means of raising uses.⁸⁵ By operation of the statute they became legal conveyances.⁸⁶ The

⁷⁵ Holdsworth, 26 HARV. L. REV. 117.

⁷⁶ The principal of these courts was the Court of Wards and Liveries set up by 32 HEN. VIII, c. 46, and 33 HEN. VIII, c. 22. For the others see 4 REEVES' HISTORY OF ENGLISH LAW (ed. Finlason), 384-391. See also JENKS, SHORT HISTORY OF ENGLISH LAW, 237.

⁷⁷ That this result was intended, see 27 HEN. VIII, c. 10, § XI.

⁷⁸ See CHALLIS, REAL PROPERTY, 386, and POLLOCK AND WRIGHT, POSSESSION, 55.

⁷⁹ LEAKE, PROPERTY IN LAND, 82.

⁸⁰ 32 HEN. VIII, c. 1.

⁸¹ 27 HEN. VIII, c. 10, § I.

⁸² LEAKE, PROPERTY IN LAND, 87.

⁸³ *Id.* But see GRAY'S RULE AGAINST PERPETUITIES, 3 ed., §§ 58-60.

⁸⁴ Chudleigh's Case, 1 Coke, 120a; LEAKE, PROPERTY IN LAND, 90.

⁸⁵ 27 HEN. VIII, c. 10, § I.

⁸⁶ Sugden's Note to GILB. USES, 139; KIRCHWEY'S READINGS, 161.

most conspicuous of these new legal conveyances was the bargain and sale, and if it were of a freehold, the Statute of Enrollment [1536] required that it should be enrolled.⁸⁷ This requirement may have saved the feoffment for a time⁸⁸ and undoubtedly stimulated the use of the covenant to stand seised which did not have to be enrolled.⁸⁹ In the time of James I the validity of a transfer of land by lease and release without entry and without enrollment was recognized by the courts,⁹⁰ and from that time for over two hundred years "the lease and release may be considered as having, for all purposes of general practice, superseded every other assurance, and as having been applied, with equal reason, and with equal security, in conveying lands held for an estate in possession, and lands held for an estate in reversion or remainder."⁹¹ While the feoffment was capable of a tortious operation, the new conveyances were not,⁹² and so the feoffment continued to be resorted to for its peculiar effects after it had ceased to be in common use.⁹³ The grant and attornment had no such efficacy,⁹⁴ and even before the lease and release had for most purposes supplanted the other assurances, attornment had greatly declined.⁹⁵

The Statute of Uses and the measures taken to supplement it succeeded for a time in their immediate object, the revival of the king's feudal revenue.⁹⁶ But the feudal incidents were as unpopular as ever, and after an unsuccessful attempt on the accession of James I, those which constituted a real burden were gotten rid of by an Ordinance of the Long Parliament in 1646.⁹⁷

One of the complaints in the list of grievances on which the Pre-

⁸⁷ 27 HEN. VIII, c. 16.

⁸⁸ Another reason why the bargain and sale did not itself supplant the feoffment was that it was unsuitable for family settlements. See CHALLIS, *REAL PROPERTY*, 421.

⁸⁹ That the reason why the covenant to stand seised was not referred to in the statute was that it had not yet come to operate as a conveyance, see Holdsworth, 26 HARV. L. REV. 120, n. 67.

⁹⁰ *Lutwich v. Mitton*, Cro. Jac. 604 (1620); *Barker v. Keete*, Freem. 249 (1678), s. c., 2 Mod. 249.

⁹¹ 2 PRESTON, *CONVEYANCING*, 3 ed., 232. See also POLLOCK AND WRIGHT, *POSSESSION*, 55.

⁹² See Butler's note (1) VII to CO. LIT. 330a and Sugden's note to GILB. USES, 232, KIRCHWEY, 507.

⁹³ Stewart's note to 2 BL. COM. 316.

⁹⁴ LEAKE, *PROPERTY IN LAND*, 41.

⁹⁵ CO. LIT. 309b. See also Butler's note (1) to CO. LIT. 309a.

⁹⁶ See JENKS, *SHORT HISTORY OF ENGLISH LAW*, 238.

⁹⁷ *Id.* Military tenures were formally abolished by 12 CAR. II (1660), c. 24.

amble of the Statute of Uses was based was that it was hard for one who was entitled to a real action to tell against whom to bring it.⁹⁸ The confusion in titles wrought by the practice of uses would probably go far to clear up the mystery⁹⁹ of the disappearance of the real actions and assizes. They were the detailed embodiment of the old system and were unsuited to the new. First, apparently, the statutory action for forcible entry and detainer threatened to supplant them.¹⁰⁰ Then they were in fact supplanted by the action of ejectment. In the time of Elizabeth ejectment had become the common method of trying title to land.¹⁰¹ Reeves hazards that this revolution "at once consigned to oblivion at least one-third of the ancient learning of the law."¹⁰²

It was perhaps poetic justice that ejectment, the action of the humble termor, should take the place not only of the assize of novel disseisin which he had been denied,¹⁰³ but of the rest of the 'hierarchy' of real actions as well, and that his 'possession' should be the means of freeing the law of actions from many of the 'sophistications' which had come to be inseparable from seisin.¹⁰⁴ The supersession of seisin by possession, in the law of actions, was even more thoroughgoing than the supersession of seisin by the use, in the law of property. The former had the advantage of a change in terminology, while the latter was obscured by the use of 'seisin' to indicate the old seisin and the new statutory seisin as well.¹⁰⁵

Instead of the multitude of forms and pleadings in real actions which varied according to the source and quality of the demandant's title or the nature of the alleged disseisin, deforcement or other injury, "in ejectment the form of the action was always the same, without regard to the source or nature of the lessor's title, or the character of the disseisin, deforcement, or ouster."¹⁰⁶ In ejectment, as in the old actions, it was necessary for the plaintiff

⁹⁸ 26 HARV. L. REV. 124, § 5, 125, § 35. See also the Preamble to the Statute of Uses, § 7.

⁹⁹ Maitland, 4 L. QUART. REV. 286, 295; ADAMS, EJECTMENT, 4 Am. ed. by Waterman, 9; Sedgwick and Wait, 3 SELECT ESSAYS, 611, 615.

¹⁰⁰ See Finlason's notes to 4 REEVES, 235, 238, 242. See also Sedgwick and Wait, 3 SELECT ESSAYS, 611, 613.

¹⁰¹ Sedgwick and Wait, 3 SELECT ESSAYS, 611, 623; MAITLAND, EQUITY, 353.

¹⁰² 4 REEVES, 241.

¹⁰³ See *supra*, p. 595.

¹⁰⁴ See editorial note by Sir Frederick Pollock, 12 L. QUART. REV. 239.

¹⁰⁵ See POLLOCK AND WRIGHT, POSSESSION, 55.

¹⁰⁶ Sedgwick and Wait, 3 SELECT ESSAYS, 611, 616.

to prove his title, but in ejectment, unlike the old actions, this title appeared in neither the record nor the judgment.¹⁰⁷

"Disseisin or ouster ceased to be a principal fact. Possession remained and remains material as evidence of right to possess; and in order to show that one man possessed at a given time it might and may be necessary to show that another man ceased to possess, and to fix the point of time at which his possession ceased. But this belongs, so to speak, to the accidents of fact and evidence that vary from case to case. The chief importance of such proof nowadays, if not the only importance, is in cases where long-continued possession is relied on as conferring a title under the Statute of Limitation."¹⁰⁸

Entry likewise ceased to be a principal fact. Only in one case where the plaintiff had a right of entry was an actual entry necessary to maintain ejectment. That was where he wished to avoid a fine levied with proclamations.¹⁰⁹ The action of trespass for a disseisin which was based on a re-entry and the revesting of the freehold by relation back¹¹⁰ gave place to the action for mesne profits which was supplementary to ejectment and required no such re-entry.¹¹¹

The revolution that had been brought about in the land law is well summed up by Rawle:

"The introduction into general use of the 'covenants for title' towards the close of the seventeenth century, in place of the feudal warranty, was one of the natural incidents of the change from the ancient to the modern system of law, which, having its rise about the end of the reign of Henry the Seventh, had, towards the latter part of that of Charles the Second, assumed something of a regular form. It is familiar that the principal features of this change, effected partly by statute and partly by gradual alteration of the common law, were the restoration of the right of devise, the abolition of military tenures, the disuse of real actions, the introduction of conveyances to uses, of the mode of trying title to land by ejectment, of the statute of frauds and perjuries, and the establishment of a regular system of equitable jurisdiction. With the disuse of real actions fell the law of warranty, which, from peculiar causes, had grown to be one of the most difficult subjects in the ancient system."¹¹²

¹⁰⁷ Sedgwick and Wait, 3 SELECT ESSAYS, 629.

¹⁰⁸ POLLOCK AND WRIGHT, POSSESSION, 85.

¹⁰⁹ 1 WMS. SAUNDERS, 319 n., and STEARNS, REAL ACTIONS, 72.

¹¹⁰ AMES, LECTURES ON LEGAL HISTORY, 229.

¹¹¹ MAITLAND, EQUITY, 371.

¹¹² COVENANTS FOR TITLE, 5 ed., 1. Rawle's statement is adapted from Butler's Preface to the Thirteenth Edition of CO. LIT. xxii.

III

SOME SURVIVALS

Every rout, however complete, has some survivors. The rout of seisin was no exception. Mention has already been made of the *scintilla juris*,¹¹³ of the requirement of a freehold to support a contingent remainder,¹¹⁴ of the continued importance of seisin in proving title.¹¹⁵ Seisin was still a stock of descent,¹¹⁶ rights of entry could not be devised¹¹⁷ nor alienated among the living,¹¹⁸ seisin was still necessary to dower¹¹⁹ and curtesy.¹²⁰ In rare cases the real actions were still used.¹²¹ And in the clearing up of titles seisin even remained conspicuous. A fine with proclamations levied under 4 Henry VII, c. 24, and 32 Henry VIII, c. 36, was the great method for cutting off adverse claims and to accomplish this the fine had to have a freehold to support it.¹²² The common recovery was the approved method of docking an entail.¹²³ Its efficacy depended on there being a good tenant to the *praecipe*.¹²⁴ The feoffment was still potent in establishing the seisin necessary to the validity of both the fine and the recovery.¹²⁵

Judicial action could do something to eliminate these survivals and it is a tribute to the English Judges that they did so much.¹²⁶ Legislative action was necessary, however, to make the elimination thoroughgoing. The Reform Parliaments of the 1800's proved equal to the task. Already statutes of 4 & 5 Anne had dispensed with the attornment as necessary to complete a grant¹²⁷ and had made an entry or claim of no effect in avoiding a fine or stopping the running of the statute of limitations unless an action was commenced within a year and prosecuted with effect.¹²⁸ The Real Property Limitation Act [1833] provided that nominal entries

¹¹³ *Supra*, p. 598.

¹¹⁵ *Supra*, p. 600.

¹¹⁷ *Id.*, 595.

¹¹⁹ *Id.*, 597.

¹²¹ MAITLAND, EQUITY, 354.

¹²² CHALLIS, REAL PROPERTY, 393; 2 PRESTON, ABSTRACTS OF TITLE, 333.

¹²³ 1 PRESTON, CONVEYANCING, 13.

¹²⁴ LEAKE, PROPERTY IN LAND, 27.

¹²⁵ CHALLIS, REAL PROPERTY, 310, 394.

¹²⁶ See Sweet, 12 L. QUART. REV. 239, 243. How the extension of the tenancy at sufferance and disseisin at election contributed to this end, see the following section.

¹²⁷ c. 16, § 9.

¹¹⁴ *Supra*, p. 598.

¹¹⁶ Maitland, 3 SELECT ESSAYS, 591, 596.

¹¹⁸ *Id.*, 594.

¹²⁰ *Id.*, 598.

¹²⁸ *Id.*, § 16.

should be of no avail in extending the period of limitation,¹²⁹ that no rights should be preserved by continual or other claim,¹³⁰ and that with three exceptions the old real and mixed actions should be abolished.¹³¹ The Fines and Recoveries Act [1833] abolished fines and recoveries.¹³² The Dower Act [1833] allowed the widow dower irrespective of her husband's seisin.¹³³ The Inheritance Act [1833] substituted the purchaser for the person last seised as the one from whom the descent should be traced.¹³⁴ The Wills Act [1837] allowed the devise of a right of entry¹³⁵ and the Real Property Act [1845] its disposal by deed.¹³⁶ The latter act also provided that contingent remainders should be capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold.¹³⁷ The attempt to make contingent remainders take effect as executory devises in 1844¹³⁸ proved abortive¹³⁹ but was successful in 1877.¹⁴⁰ The phantom of a *scintilla juris* was laid to rest in 1860.¹⁴¹

These statutes, says the late Charles Sweet, "deprived seisin of its theoretical as well as its practical importance in all cases except two, viz. (1) where land is conveyed by a feoffment which cannot operate as any other mode of assurance; and (2) where a man claims an estate by the curtesy. . . . If the legislature had been consistent, and had abolished feoffments and made the law of curtesy similar to that of dower, seisin would be completely obsolete."¹⁴²

Seisin, as a special kind of possession, thus ceased to be of any

¹²⁹ 3 & 4 WM. IV, c. 27, § 10.

¹³¹ § 36.

¹³³ 3 & 4 WM. IV, c. 105, § 3.

¹³⁵ 7 WM. IV & 1 VICT., c. 26, § 3.

¹³⁷ *Id.*, § 8.

¹³⁹ 8 & 9 VICT., c. 106, § 1.

¹⁴¹ 23 & 24 VICT., c. 38, § 7.

¹⁴² 12 L. QUART. REV. 239, 244, 251. This statement has gone unanswered, as far as the writer knows, for twenty-seven years. Challis wrote to his future editor that he had thoughts of "coming out with bell, book and candle against the heretic" but he never did (CHALLIS, REAL PROPERTY, 3 ed., 436). Sweet's article had been inspired by the remark concerning seisin of Sir Frederick Pollock that "it is possible even for learned persons to treat it as obsolete. Nevertheless it is there still." But the latter explains that what he meant by seisin was "possession recognized by law" (12 L. QUART. REV. 239, n. 2). He agrees with Sweet that the tendency is away from the sophistications of seisin. The trouble with the retention of the term seisin is that it seems inseparably bound up with these sophistications. It meant possession once, but there is little of possession in it at the present time.

¹³⁰ *Id.*, § 11.

¹³² 3 & 4 WM. IV, c. 74, § 2.

¹³⁴ 3 & 4 WM. IV, c. 106, § 2.

¹³⁶ 8 & 9 VICT., c. 106, § 6.

¹³⁸ 7 & 8 VICT., c. 76, § 8.

¹⁴⁰ 40 & 41 VICT., c. 33.

but historical significance save in a few exceptional cases. The Statute of Uses had reversed the priority of seisin and right. In transfers, at any rate, henceforth seisin followed right and not right seisin. Seisin became in large part an incident of title provided that the one entitled had something more than a right of entry. It indicated henceforth the having of an estate or interest rather than possession¹⁴³ and was applied extensively to equitable as well as to legal interests.¹⁴⁴ In representations as to title it came to be used indifferently with 'lawful seisin' to indicate not possession nor defeasible title but indefeasible title, or in other words ownership.¹⁴⁵ It was this identification of it with ownership that made the doctrine of tortious feoffment so obnoxious.¹⁴⁶ And with the feudalization of the law by Spelman and Wright and Blackstone¹⁴⁷ seisin in demesne as of fee became a kind of feudal ownership¹⁴⁸ and had to share the opprobrium of feudalism. There is little wonder that seisin became anathema and with it the doctrine of an estate turned to a right.

IV

DISSEISIN

It is a curious thing that the owner of land held adversely by another came in England to be considered as having a right of entry. The law of the time of Bracton knew nothing of a technical right of entry¹⁴⁹ but it did know a right of property and a right of possession, and when the complete right of possession, that is, seisin in demesne as of fee as evidenced by the taking of esplees, was

¹⁴³ See the third edition of GOODEVE, *REAL PROPERTY* BY ELPHINSTONE AND CLARK, 365, cited by Sweet, 12 L. QUART. REV. 247, n. 4.

¹⁴⁴ *Casborne v. Scarfe*, 1 Atk. 603 (1737), by Lord Hardwicke; *Burgess v. Wheate*, 1 Wm. Black. 123, 161 (1759), by Lord Mansfield; *Shrapnel v. Vernon*, 2 Bro. C. C. 268 (1787), by Lord Thurlow; LIGHTWOOD, *POSSESSION*, 27, 55, 172, 174; Sweet, 12 L. QUART. REV. 247.

¹⁴⁵ Sweet, 12 L. QUART. REV. 239, 247; RAWLE, 55.

¹⁴⁶ *Infra*, IV, Disseisin.

¹⁴⁷ MAITLAND, *CONSTITUTIONAL HISTORY OF ENGLAND*, 142; Hogg, 25 L. QUART. REV. 178.

¹⁴⁸ Seisin was said to be feudal possession (see Sweet, 12 L. QUART. REV. 239), and to be seised in demesne as of fee, according to Blackstone, was to have the strongest and highest estate any subject could have, "the mere allodial *property* of the soil always remaining in the lord." 2 BL. COM. 105.

¹⁴⁹ LIGHTWOOD, *POSSESSION*, 43, 44. *Infra*, p. 606.

united to the right of property, there was that double right or *droit droit* which was the foundation of the writ of right.¹⁵⁰ Seisin and right of property were the two primary elements that went to make up the perfect title, and the conjunction of these two¹⁵¹ in their various degrees¹⁵² is constantly emphasized in the authorities.¹⁵³ These might be separated in many ways, as by death,¹⁵⁴ disseisin,¹⁵⁵ a tortious feoffment,¹⁵⁶ and until they were reunited the legal powers of the one who had the right of property but not the seisin were very limited.¹⁵⁷ Yet the right of property was something more than a right to recover the property by entry or action, for it did not cease with the recovery. It might and normally would coexist with the seisin.

When the right of property and seisin were separated the phrase ran, in later years at any rate, that the estate was turned to a right. Coke's illustration of this was the familiar one taken from the writs and pleadings that it was the right that descended and not the land.¹⁵⁸ Happily we have Bracton's commentary on this, for he makes it clear that the right into which an estate was turned at common law was right of property, and that in the beginning this was not confined to the case where the severance of the right from the seisin was tortious. Bracton says:

"There are diverse rights, one, to wit, of possession and another of property; of possession as regards the free tenement and as regards the fee. . . . There is likewise a right of property which is termed mere right. And sometimes there is conjoined in one person the right of possession and the right of property, according to what is said, 'This person puts him-

¹⁵⁰ BRACTON, fol. 372b, 206b; CO. LIT. 266a.

¹⁵¹ Blackstone resolves a complete title into three primary elements, — right of property, right of possession, and possession, — and identifies the first two with the *droit droit* of the older law (2 COM., c. 13, p. 199); but whatever basis there may be for this three-fold division in the subsequent history of the law, it only tends to confuse to read it into the law of the time of Bracton. Coke is in accord with Bracton and his contemporaries. See CO. LIT. 266a.

¹⁵² Bracton recognized that there might be rights of property relatively good or bad, according to the priority of the seisins whence they sprung (fol. 434b, quoted *infra*, p. 606), as that there might be various degrees of possession or right of possession (ff. 39, 159, 206).

¹⁵³ BRACTON, fol. 39b; *supra*, n. 150; 1 BRITTON (Nichols), 225, 260, 311; FLETA, lib. 3, c. 15, § 5.

¹⁵⁴ BRACTON, fol. 434b, quoted *infra*, p. 606; 1 BRITTON (Nichols), 310.

¹⁵⁵ BRACTON, fol. 164.

¹⁵⁶ BRACTON, ff. 11, 30b, 31, 31b.

¹⁵⁷ Maitland, 3 SELECT ESSAYS, 591, 594.

¹⁵⁸ CO. LIT. 345a.

self upon an assise of Right right': and to whomsoever appertains the right of property, possession ought to follow him, because possession always follows property, but not the converse. And sometimes the right of property is divided from possession, because the property forthwith after the death of an ancestor descends to the next heir. . . . But nevertheless possession is not forthwith acquired by such persons, because another person, before an entrance into the inheritance, a relative or a stranger, may in the meantime put himself into seysine."

And then he goes on to state the characteristically English doctrine of relative proprietary right:

"And from the seysine of such a person a right of possession may descend to the lower heirs of such persons through the negligence of the proprietor; as if when the right of property descends to an earlier-born next of kin, a younger-born brother puts himself into seysine; and if after a long interval, so that he could not be ejected without a writ, he dies seysed of it, he transmits to his heirs with the right of possession, which he himself had as it were in fee, a certain right of property with the right of that possession, which ought to follow the first property, and so from heir to heir to infinity; and so there will be two rights of property by a different descent and different persons and degrees. . . . So that there may be several rights of property, and several persons may have more right than others, according as they have been prior or posterior."¹⁵⁹

Probably the most striking case in which an estate was turned to a right was that of the tortious feoffment. Such a transfer could not have failed to separate the possession from the right, but there must have been serious question at first¹⁶⁰ as to whether to treat it as a disseisin with an immediate entry in the one next entitled or as what was known in the later law as a discontinuance when the only resort would have been to an action. Immediate entry meant forfeiture of the feoffor's original interest, whereas if an action was brought the feoffee could avail himself of his feoffor's warranty and in Bracton's time at least hold the feoffor's original estate.¹⁶¹ The fact that entry deprived the feoffee of his warranty was probably the reason that entry was extended so slowly against

¹⁵⁹ BRACTON, ff. 434b, 435 (trans. Twiss). See also 1 BRITTON (Nichols), 31a. The heir's seisin in law was yet for the future. See 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, 2 ed., 60.

¹⁶⁰ See 2 POLLOCK AND MAITLAND, 54, and Maitland, 4 L. QUART. REV. 297.

¹⁶¹ BRACTON, fol. 31; 1 BRITTON (Nichols), 226. See also Maitland, 4 L. QUART. REV. 286, 297.

the feoffee.¹⁶² In Littleton's time entry and consequently forfeiture had become the general rule.¹⁶³ Finally in Archer's Case it was held that the tortious feoffment of the life tenant destroyed the life tenancy in fact and in law and extinguished any contingent remainders dependent upon it.¹⁶⁴ The same effect was given to a fine and recovery when they were used in place of a feoffment.¹⁶⁵

On the other hand, if the conveyance did not operate by transmutation of possession but were of the right alone,¹⁶⁶ as in case of grants and releases, there was nothing about it to effect a severance of possession from right or, in other words, the notion of an estate turned to a right had no application.¹⁶⁷ In fact there could be no real possession of interests that lay in grant, such as rents and reversions and remainders, and therefore there was no real possession to be separated from the right. But as we have seen a certain kind of seisin was ascribed to them,¹⁶⁸ and this seisin could be divested or discontinued and the estate of the reversioner or remainderman turned to a right by any act that divested or discontinued the actual freehold,¹⁶⁹ for in many respects the life tenant and the remainderman were as one tenant in law.¹⁷⁰ Interests that lay in grant were incorporeal or future, and therefore unsusceptible of entry,¹⁷¹ and no law of forfeiture developed because of attempts of grantors to transfer more right in them than they had.¹⁷² As the bargain and sale and the covenant to stand seised also operated as conveyances of right and not by transmutation of possession,¹⁷³

¹⁶² See Maitland, 4 L. QUART. REV. 286, 288, citing BRO. ABR. *Entre Congeable*, 48.

¹⁶³ *Infra*.

¹⁶⁴ 1 Co. Rep. 66b. The same view had been taken by four of the judges in Chudleigh's Case, 1 Co. Rep. 120a, 135b.

¹⁶⁵ LEAKE, PROPERTY IN LAND, 41, 238. See also Butler's note (1) VII to Co. Lit. 330a.

¹⁶⁶ See Butler's note (1), I, 3, to Co. Lit. 272a.

¹⁶⁷ That a feoffment might have a tortious operation, while a grant could not, was noticed as early as 1310. See Maitland's note (1) to Sel. Soc. Y. B. 3 Ed. II, 7. See also Lit., § 618, and Co. Lit. 332a.

¹⁶⁸ *Supra*, p. 593.

¹⁶⁹ See Lit., § 470, and Co. Lit. 275b.

¹⁷⁰ Lit., § 471.

¹⁷¹ There is some evidence that livery of seisin, the tortious feoffment, entry and forfeiture were at one time applicable to incorporeal hereditaments (Pike, 5 L. QUART. REV. 29, 31), but this materialism was foreign to Bracton and disappeared.

¹⁷² Co. Lit. 251b; Butler's note (1) to Co. Lit. 233b.

¹⁷³ See Butler's note (1) V, VI, 1, to Co. Lit. 272a and note (1) VII to Co. Lit. 330a.

they were likewise incapable of turning an estate into a right or causing a forfeiture.¹⁷⁴

In the subsequent history of the law right of property in the broad sense in which Bracton had used it became split into the *right of property*, or 'mere right' of the writ of right, and the *right of possession*, which was the foundation of the writ of entry. At least such was Blackstone's classification,¹⁷⁵ and this was not without justification, for the writs of entry, which with Bracton were proprietary, had in time come to be deemed possessory instead.¹⁷⁶ The nomenclature is immaterial. Blackstone's right of possession, like his right of property, might exist apart from the actual seisin or be united with it,¹⁷⁷ and Blackstone himself recognized that when the older authorities spoke of the conjunction of right and seisin they were using 'right' to include both his right of property and right of possession.¹⁷⁸ And when they were speaking of the separation of right from seisin or that an estate was put or turned to a right they were likewise using right in this broad sense,¹⁷⁹ although here Blackstone slipped and identified it with the mere right of the writ of right.¹⁸⁰

Using right in the broad sense of proprietary right, and not in the narrower sense of the 'mere right' of the writ of right, the history of the law from Bracton's time to the present has been the history of the gradual triumph of right over seisin until seisin gave way to possession, as we have seen, and the idea of an estate turned to a right became obsolete. Instead of an estate turned to a right we have land in the adverse possession of another.¹⁸¹ The story of that triumph is the story of how the right of property, though not invested with but separated from the seisin, gradually gained

¹⁷⁴ Sugden's note to GILB. USES, 232.

¹⁷⁵ 2 COM., c. 13.

¹⁷⁶ See 2 POLLOCK AND MAITLAND, 72.

¹⁷⁷ 2 COM. 196.

¹⁷⁸ *Id.*, 199. See *supra*, n. 151.

¹⁷⁹ This is clear from the fact that disseisin was the most common occasion of an estate being turned to a right and that in such a case the one entitled was by no means put to his writ of right. See Butler's note (1) to CO. LIT. 332b.

¹⁸⁰ 2 COM. 197. Blackstone clearly misreads Coke (CO. LIT. 345a), who refers to an estate turned to a right by a disseisin and even by a descent. Butler, with Blackstone in mind, recognizes that 'right' in its strict technical sense had come to mean the right of the writ of right but interprets the expression 'an estate turned to a right' in the broad sense of Coke (note (1) to CO. LIT. 332b).

¹⁸¹ *Infra*.

substance and life, of how it gradually drew to itself the right to enter until it was the exceptional case where the one who had the right of property had to resort to his action,¹⁸² of how right of entry and right of action became the technical terms to describe the right of property when it was separated from the seisin except where both entry and action were gone and the naked right was all that remained,¹⁸³ of how right of entry finally displaced right of action¹⁸⁴ but was itself pushed aside first by tenancy at sufferance,¹⁸⁵ then by disseisin at election,¹⁸⁶ until finally it was displaced by adverse possession and right of property became a true ownership.¹⁸⁷

As long, however, as right of entry remained a technical term of the land law, what gave it vitality was that it was something more than its name implied. Just as recovery in ejectment meant little unless the recoveror had some right or interest in the land which entitled him to hold the land after the recovery,¹⁸⁸ so the right of entry meant little in itself. What gave it vitality was the title or interest, the right of property, back of the right to enter and which would be realized in possession by the entry.¹⁸⁹ Right of entry was therefore not properly a mere right to recover the land. It was a right to enter and to enjoy such right of property as the holder had. It was right of entry plus right of property. Logically the order should have been reversed.

The gradual extension of the right of entry has been depicted by Maitland.¹⁹⁰ Bracton and the judges of his time had a comprehensive and rigorous system of possession.¹⁹¹ In the ordinary case four or five days was all that was allowed the disseisee to re-enter.¹⁹² Until then, according to Bracton, the disseisee was still seised in mind though not in body.¹⁹³ The disseisor had the natural possession but not the civil.¹⁹⁴ Acquiescence for that period gave the disseisor both kinds of possession. He was thenceforth entitled to an assize against the disseisee who attempted to enter and thus had

¹⁸² *Infra.*¹⁸³ *Infra.*¹⁸⁴ *Infra.*¹⁸⁵ *Infra.*¹⁸⁶ *Infra.*¹⁸⁷ *Infra.*¹⁸⁸ Sedgwick and Wait, 3 SELECT ESSAYS, 611, 629.¹⁸⁹ ADAMS, EJECTMENT, 4 Am. ed. by Waterman, 391; SEDGWICK AND WAIT, TRIAL OF TITLE TO LAND, § 510.¹⁹⁰ The Beatitude of Seisin, 4 L. QUART. REV. 24, 286.¹⁹¹ Maitland, 4 L. QUART. REV. 26, 34.¹⁹² *Id.*, 29; 2 POLLOCK AND MAITLAND, 50.¹⁹³ *Id.*; BRACTON, fol. 38.¹⁹⁴ BRACTON, ff. 163b, 209b.

a certain right of possession or right of property which would descend to his heir.¹⁹⁵ Britton gave a new turn to this by requiring 'title' to the freehold of the plaintiff in the assize, although the sufferance and negligence of the true owner might suffice for this 'title.'¹⁹⁶ 'Titled' possession was now alone protected against the self-help of the disseisee and acquiescence soon lost its hold as a kind of 'title.' Entry on the disseisor became lawful no matter what the length of his holding.¹⁹⁷ It became a maxim of the law that to be free from entry the tenant must be 'in by title' and not 'in by tort,'¹⁹⁸ and a note to Britton supposed to be by John of Longueville, a justice of Edward the Second's time, tells us that there were but two kinds of title, inheritance and purchase.¹⁹⁹ For a hundred years or more the right of entry seems to have stopped at this point²⁰⁰ but the test was a hard one to apply.²⁰¹ The feoffee in fee of a tenant for years was in by title but after the statute of Westminster II he was a party to the disseisin.²⁰² He was in by title but it could not be said that he was not in by tort. Even a feoffment subsequent to a disseisin might be in bad faith, but questions of good and bad faith were beyond the ken of the law courts and the feoffment proved a poor stopping point.²⁰³ In the time of Henry IV the alienee still seems to be protected,²⁰⁴ but in 32 Henry VI [1454]²⁰⁵ we find Littleton stating the law much as it appears in his Tenures. Henceforth it was only a descent cast that would toll an entry.²⁰⁶

Even the cutting off of the entry by a descent cast might be avoided by a mere entry and claim within a year before the disseisor's death.²⁰⁷ And if there was danger of personal violence from such entry it was sufficient to make the claim as near the land as possible.²⁰⁸ To be sure that claim should be made within a year of the disseisor's death it was desirable that it should be made each

¹⁹⁵ BRACTON, ff. 163b, 209b. See also fol. 434b, quoted *supra*, p. 606.

¹⁹⁶ 1 BRITTON (Nichols), 309-310; Maitland, 4 L. QUART. REV. 24, 39. Bracton, however, also referred to time as a kind of 'title.' See ff. 165b, 39.

¹⁹⁷ Maitland, 4 L. QUART. REV. 286, 296.

¹⁹⁸ *Id.*, 287, 296.

²⁰⁰ Maitland, 4 L. QUART. REV. 286, 296, 298.

²⁰¹ *Id.*, 296.

²⁰³ Maitland, 4 L. QUART. REV. 286, 298.

²⁰⁵ Y. B. 32 HEN. VI, 27-16.

²⁰⁶ Maitland, 4 L. QUART. REV. 298, 286.

²⁰⁸ *Id.*, § 421.

¹⁹⁹ 1 BRITTON (Nichols), 309.

²⁰² STAT. WEST. II, c. 25.

²⁰⁴ Y. B. 7 HEN. IV, 17-10.

²⁰⁷ LIT., §§ 421, 422, 424.

year and so it came to be known as continual claim.²⁰⁹ A statute of Henry VIII²¹⁰ provided that no claim need be made to prevent the tolling of an entry until the disseisor had been in possession for five years, and although this was confined by the courts to cases where the land descended from the disseisor himself and not from his feoffee or donee, or from an abator or intruder,²¹¹ the statute cut down the tolling of entries to comparatively rare cases.²¹²

The loss of the right of entry and the relegation of the one entitled to his right of action was sometimes termed a discontinuance, but more properly discontinuance applied to cases where there was no entry but merely a right of action from the first.²¹³ The three instances of discontinuance adduced by Littleton were feoffments in fee simple by a husband seised in right of his wife,²¹⁴ by a tenant in tail,²¹⁵ and by an abbot seised in right of his monastery.²¹⁶ The transferee had a lawful interest during the life of the husband, tenant in tail, or abbot, and no entry was given the wife, issue or successor, but on the death of the tortious transferor they were put immediately to their action.²¹⁷ These cases of discontinuance were also reduced to a minimum by legislation of Henry VIII.²¹⁸ The wife was given an entry after her husband's death²¹⁹ and the monasteries were dissolved. Already by means of a common recovery it had become possible to do much more than discontinue an estate tail, it had become possible to destroy it.²²⁰ Discontinuance even in its broad sense had become an anomaly, even a rare anomaly.²²¹ It was not until almost three hundred years later, however, that the discontinuance was eliminated and the one entitled ensured in all cases of his right to enter. By the Real Property Limitation Act of 1833 it was enacted that no descent cast, discontinuance, or warranty should toll or defeat any right of entry or action for the recovery of land.²²²

The same year that the husband was prevented from discontinuing his wife's land was passed the so-called Pretended Title Act.²²³ It was not couched in the technical language of seisin or

²⁰⁹ LIT., § 423.

²¹¹ See CO. LIT. 238a, 256a.

²¹³ Butler's note (1) to CO. LIT. 325a.

²¹⁶ § 593.

²¹⁸ Maitland, 4 L. QUART. REV. 290.

²²⁰ Maitland, 4 L. QUART. REV. 290.

²²² 3 & 4 WM. IV, c. 27, § 39.

²¹⁰ 32 HEN. VIII, c. 33.

²¹² Maitland, 4 L. QUART. REV. 299, 290.

²¹⁴ § 594. ²¹⁵ § 595.

²¹⁷ Butler's note (1) to CO. LIT. 325a.

²¹⁹ Stat. 32 HEN. VIII, c. 28, § 6.

²²¹ *Id.*, 299

²²³ 32 HEN. VIII, c. 9, § 2.

entry but indirectly it did much to develop right of entry as a technical term of the law and to place the non-transferability of non-possessory rights on the plausible ground of the avoidance of maintenance.

The Statute of Uses [1536] had provided in the bargain and sale, and the like, a medium adapted for the transfer of mere rights.²²⁴ It did not go further and make such rights transferable, for it was applicable only where the transferor was seised. On the other hand, it did not prohibit such transfers, and there were apparently those who when out of possession availed themselves of the new forms of conveyance.²²⁵ At any rate, four years later we get the statute "against maintenance and embracery, byeing of titles &c,"²²⁶ one section of which was aimed directly at the new conveyances. These were not to be made use of unless the transferor or those under whom he claimed had been in possession of the land one year next preceding the transfer, on pain of forfeiture of the value of the land by the seller and, in case of guilty knowledge, by the buyer also.²²⁷ There was to be an end to the trafficking in disputed titles.

The drastic requirement of a year's possession was too much for Montague, C. J., and in *Partridge v. Strange*²²⁸ he expressed the opinion that the statute should be read in the light of reason. By repunctuation of the statute he took it to refer only to transfers by persons out of possession and arrived at the desired result that "in this point the statute has not altered the law, for the common law before this statute, was, that he who was out of possession, might not bargain, grant, or let his right or title, and if he had done it, it should have been void. Then this statute was made in affirmance of the common law, and not in alteration of it, and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before."

Henceforth maintenance became the accepted ground for the non-transferability of non-possessory rights²²⁹ and their attempted transfer was even sometimes referred to as a common-law crime.²³⁰ There was little foundation for either of these views in Montague's

²²⁴ See *supra*.

²²⁵ See the preamble to 32 HENRY VIII, c. 9.

²²⁶ 32 HEN. VIII, c. 9.

²²⁷ *Id.*, § 2.

²²⁸ 1 Plow. 77, 88.

²²⁹ CO. LIT. 213b; *Lampet's Case*, 10 Co. Rep. 46b, 48a.

²³⁰ HAWK. PL. CR., Bk. I, c. 86, § 1.

opinion or in the earlier authorities.²³¹ Almost certainly it was seisin and not maintenance that he had in mind.

Montague's offhand statement of the old law of seisin raises the question as to how far the right of entry was, prior to the Pretended Title Act, a non-transferable, non-transmissible right. The confiscatory legislation of Henry VIII raised many questions as to the transfer of non-possessory rights and the judges thought they saw a difference in the old books between the transferability of an action or of a condition on the one hand and of an entry for a disseisin or the like on the other.²³² These older authorities involved the right of the lord to escheat or wardship where the tenant had been disseised and there had been no feoffment or descent cast at the time of his death.²³³ They were not therefore exceptional cases based on the sovereignty of the king, as were the cases involving forfeiture of chattels.²³⁴ Both Maitland²³⁵ and Ames²³⁶ associate these instances of the transmissibility of rights of entry with Coke, but for once Maitland is misleading. The authorities he cites²³⁷ show that the rule allowing escheat in these cases was well settled in the time of Richard II²³⁸ and Henry IV,²³⁹ although there was somewhat of a reaction later.²⁴⁰ Brian, C. J., saw their inconsistency with his thesis that a trespass changed property in a chattel into a non-transmissible right and so denied them,²⁴¹ but in so doing contra-

²³¹ See Winfield, 35 L. QUART. REV. 50, 72.

²³² Winchester's Case, 3 Co. Rep. 1a, 2 (1583).

²³³ The main authorities as to escheat and forfeiture of rights of entry and action are given by Maitland, 3 SELECT ESSAYS, 591, 599, n. 2. As to wardship in like cases see the authorities cited in Butler and Baker's Case, 3 Co. Rep. 25a, 35a, and Co. Lit. 76b.

²³⁴ See Ames, 3 SELECT ESSAYS, 541, 558.

²³⁵ 3 SELECT ESSAYS, 591, 598.

²³⁶ *Id.*, 541, 545, n. 2.

²³⁷ *Id.*, 591, 599, n. 2.

²³⁸ FITZ. ABR. *Entre Congeable*, pl. 38. (Hil. 3 RIC. II.)

²³⁹ Y. B. 7 HEN. IV, 17-10. See also Y. B. 2 HEN. IV, 8-37.

²⁴⁰ There was no denial of the right of the lord to enter in the later cases except by Brian, but whereas Hankford had held that the allegation that the tenant died seised was non-traversable (Y. B. 2 HEN. IV, 8-37), and Fortescue would have allowed the lord both the writ of escheat and the writ of right of escheat, though the tenant did not die seised (Y. B. 37 HEN. VI, 1-1), Pole *contra*, Littleton would have allowed the entry but not the writ (Y. B. 32 HEN. VI, 27-16), and Brian made the same distinction (Y. B. 15 ED. IV. 14-17). Fitzherbert would have allowed both the writ of escheat and the writ of right of ward in such a case (FITZ. NOV. BREV. 144), and his opinion probably settled the matter.

²⁴¹ Y. B. 6 HEN. VII, 9-4; Y. B. 10 HEN. VII, 27-13.

dicted his earlier statement that the lord had an entry in such a case.²⁴²

The transmissibility of the entry in these cases seems to have stopped where the entry itself stopped for so long: at the point where the adverse holder was in by title and not by tort.²⁴³ This transmissibility was not necessarily inconsistent with the inability of the older law to conceive of the transfer of a right which could not be realized in a seisin, for the older law seems to have been deeply influenced by Bracton's view that the disseisee might retain civil possession after the loss of the natural possession.²⁴⁴ Butler's statement, that when the right of entry was lost and the party could only recover by action there was a discontinuance of the *possession*,²⁴⁵ is strictly in accord with Bracton's view.²⁴⁶ And the well-settled rule of the common law that a right of entry would and a right of action would not support a contingent remainder was based on the idea that as long as the right to enter continued, the estate, and therefore the seisin, continued in contemplation of law.²⁴⁷ Fearn's explanation was that "whilst a right of entry remains there can be no doubt but the same estate continues; since the right of entry can exist only in consequence of the subsistence of the estate."²⁴⁸ The same idea was back of the familiar notion that a right of entry in contrast with a right of action was a right of possession.²⁴⁹ It seems probable that the reaction against the escheat of entries which we find in Littleton's and Brian's time was a result of the great extension of the entry which had then taken place and the establishment of the general incompatibility of right of entry and seisin in law.²⁵⁰

²⁴² See *supra*, n. 240.

²⁴³ See *supra*, p. 610.

²⁴⁴ See *supra*, p. 609.

²⁴⁵ Note (1) to Co. Lit. 325a.

²⁴⁶ Fol. 164.

²⁴⁷ Archer's Case, 1 Co. Rep. 63b, 66b; LEAKE, PROPERTY IN LAND, 42; WILLIAMS, REAL PROPERTY, 22 ed., 375; CHALLIS, REAL PROPERTY, 121.

²⁴⁸ CONTINGENT REMAINDERS, 6 ed., 285.

²⁴⁹ See CHALLIS, REAL PROPERTY, 89; LIGHTWOOD, POSSESSION, 77; WILLIAMS, REAL PROPERTY, 22 ed., 375.

²⁵⁰ LIGHTWOOD, POSSESSION, p. 46, says: "The extension of the right of entry was not accompanied by any corresponding prolongation of the seisin in favour of the disseisee, and the disseisin might be complete, although the disseisor's right of entry still existed." This would seem to be true in general of the law of Littleton's time, but to be doubtful as to the time when the rule that entry depended on whether the tenant was in by title or in by tort was still in force. As to the incompatibility of right of entry and seisin in law in the classic land law see CHALLIS, REAL PROPERTY, 234, and Maitland, 3 SELECT ESSAYS, 591, 597.

Until right of entry and seisin in law did become generally incompatible there would seem to have been nothing more difficult about the transfer, as well as transmission, of the right of entry than about the transfer of any other interest of which there was seisin in law.²⁵¹ Livery in deed would not have been available because it meant actual seisin, but there was livery in law, and in a case in the reign of Edward III it was stated that where one dared not approach certain lands for fear of death, a charter of feoffment of the same might yet be made effectual through parole claim and livery within the view.²⁵² The case in mind seems to have been a livery within the view by a disseisee, but it does not appear clearly whether the claim was to be by the feoffor prior to the livery²⁵³ or by the feoffee afterwards so as to constitute an entry in law.²⁵⁴ Any claim sufficient to prevent the tolling of an entry by a descent cast would seem to have been sufficient in cases of this kind also.²⁵⁵

Furthermore, that there was no well-settled rule in the Middle Ages that rights of entry because of a disseisin were not transferable²⁵⁶ is evident from the failure of Brian, C. J., to refer to such a rule when he ransacked the law of real property to support his thesis that his 'right of property' in chattels was not transferable.²⁵⁷ The nearest he could come to it was that when a man had been disseised of rent, he could not grant it over.²⁵⁸ When the Statute of Uses, therefore, provided a medium adapted to the transfer of such rights, it may well have been that but for the Pretended Title Act their transfer would have become general. Certainly thereafter their non-transferability was placed not on any inherent defect in their transferability but on the ground of the avoidance of maintenance.

²⁵¹ The possibility of using livery in law in such a case was first brought out by Costigan, 19 HARV. L. REV. 267, 272.

²⁵² 38 ASS. PL. 23; 13 VIN. ABR. 184; COKE'S LAW TRACTS, 265, 266; CO. LIT. 48b; Costigan, 19 HARV. L. REV. 273, n. 3.

²⁵³ See 13 VIN. ABR. 184 and COKE'S LAW TRACTS, 265, 266.

²⁵⁴ See CO. LIT. 48b and BRO. ABR. ASSISE, pl. 349, *Feoffment*, pl. 32.

²⁵⁵ CO. LIT. 48b.

²⁵⁶ In § 347 of his TENURES, Littleton is referring to entries for condition broken and not to entries in general. Coke's commentary is much broader. See CO. LIT. 214a.

²⁵⁷ Y. B. 6 HEN. VII, 9-4; Y. B. 10 HEN. VII, 27-13.

²⁵⁸ Y. B. 10 HEN. VII, 27-13. In his statement that the grant of rent of which one had been disseised would be void, Brian is contradicting Littleton (§§ 589, 590, 591). Littleton's opinion was that such a disseisin was a disseisin at election.

The cases arising under the Pretended Title Act were never numerous in England.²⁵⁹ They were mostly suits for penalties under the act. Not until 1845 does it seem to have been decided that a transfer in violation of the act was void.²⁶⁰ No attempt seems to have been made on the part of a grantee to sue in the grantor's name, although this was allowed in the case of a chose in action as early as the time of Henry VII.²⁶¹ A considerable number of the early cases involved leases to try title²⁶² and the decision that their execution without entry came within the penalties of the act²⁶³ had important consequences. In the early stages of ejectment to try title it made entry and right of entry a prerequisite for ejectment,²⁶⁴ and while the necessity of an entry was afterwards avoided by fictions²⁶⁵ the necessity of a right of entry remained.²⁶⁶ This did much towards giving right of entry the prominence it had in the 1700's and 1800's and prevented ejectment from being the universal action for the recovery of land for two hundred years.²⁶⁷

That the general adoption of the terms 'right of entry' and 'right of action' to indicate the respective rights of the disseisee

²⁵⁹ The cases in chronological order are: *Partridge v. Strange*, 1 Plow. 77, 1 Dyer, 74b; *Waly v. Burnell*, Dal. 56, pl. 1; *Gerrarde v. Worsley* (lease to try title), 3 Dyer, 374a, 1 Anderson, 75; *Stamp's Case*, 3 Leon. 78; *Slywright v. Page* (l. t. t. t.), Moore, 266, Gould. 101, 1 Leon. 166, 1 Anderson, 201; *Finch v. Cokaine* (l. t. t. t.), Sav. 95; *Taylor v. Brounsal*, 2 Leon. 48; *Mowse v. Weaver*, Moore, 655; *Leigh v. Helyar* (l. t. t. t.), Moore, 751; *Robinson's Case* (l. t. t. t.), 2 Brown. & G. 271; *Flower's Case*, Hobart, 115; *King v. Hill*, Cro. Car. 232, Godb. 450; *Goodwin v. Butcher*, 2 Mod. 67; *Kennedy v. Lyell*, 15 Q. B. D. 491 (1885).

²⁶⁰ See *Doe d. Williams v. Evans*, 1 C. B. 717 (1845), and *Jenkin v. Jones*, 9 Q. B. D. 128 (1882).

²⁶¹ See Sweet, 10 L. QUART. REV. 303, 310.

²⁶² See *supra*, n. 259.

²⁶³ It was argued by Anderson, J., Gould. 101, that even though the one who had title, entered and executed the lease while temporarily in possession, it was within the statute, but in *Finch v. Cokaine*, *supra*, and *Robinson's Case*, *supra*, it was held that this would not be so if the lease to try title were made to a son, servant, or other inferior. And in such a case Coke would have made the validity of the lease to try title the general rule. CO. LIT. 369a. But if the lease were made or sealed by one out of possession, there would seem to have been no question but that it was within the statute. See also *RUNNINGTON, EJECTMENT*, 1 Am. ed. 145, and 3 BL. COM. 201.

²⁶⁴ 3 BL. COM. 201; *ADAMS, EJECTMENT*, 4 Am. ed. by Waterman, 12.

²⁶⁵ 3 BL. COM. 202.

²⁶⁶ 3 BL. COM. 206; *ADAMS, EJECTMENT*, 4 Am. ed. by Waterman, 12.

²⁶⁷ 1 PRESTON, CONVEYANCING, 247, suggests that if the confession of lease entry and ouster had been carried to its utmost extent, it would in strictness have been an admission of the lessor's seisin. This would have enabled one to bring ejectment notwithstanding a discontinuance.

and discontinuee was contemporaneous with the use of ejectment to try title will be evident to any one who searches for those terms in the pages of Littleton and Coke. 'Entry,'²⁶⁸ 'right and title to enter,'²⁶⁹ 'cause to enter,'²⁷⁰ 'title to enter,'²⁷¹ 'title of entry,'²⁷² appear frequently in Littleton, but 'right of entry' seems to be used only twice;²⁷³ and while Coke in his Commentaries corrects Littleton for using 'title of entry' when 'right of entry' would be more accurate,²⁷⁴ he seldom uses 'right of entry' himself.²⁷⁵ The difference in this respect between Coke's Commentaries and Butler's Notes is very marked. And Blackstone in his famous chapter on titles does not mention right of entry, but has much to say of possession, right of possession, and right of property.²⁷⁶ Is it not likely that the necessity for distinguishing between the entry which was confessed in the action of ejectment and the right to that entry which was not confessed and marked the limit between ejectment and the old real actions was the cause of the sudden ubiquity of 'right of entry' in the books. Even with Fearné 'right of entry' had no distinct personality but was merely incidental to the "subsistence of the estate"²⁷⁷ of the disseisee, as with Bracton it was incidental to his civil possession.²⁷⁸ In truth right of entry and right of action were helpful terms of art in the law of real property as long as the distinction between divestment and discontinuance prevailed and when that vanished their reason for existence ceased.

It has already been noticed that the most notable survivals of the old seisin in the modern system of land law were the fine and the recovery and the tortious feoffment.²⁷⁹ In order that a recovery should bar an estate tail there had to be a good tenant to the *praecipe*²⁸⁰ and strangers to a fine might avoid the barring of their right under the statutes 4 Henry VII, c. 24, and 32 Henry VIII, c. 36, notwithstanding a non-claim of five years, by a plea of *partes finis nihil habuerunt*.²⁸¹ In either case a freehold estate was necessary.

²⁶⁸ Bk. III, c. 6.

²⁶⁹ §§ 394, 403, 414.

²⁷⁰ §§ 402, 405, 417.

²⁷¹ §§ 419, 421, 429.

²⁷² §§ 426, 427, 428.

²⁷³ §§ 430, 633.

²⁷⁴ Co. Lit. 252b.

²⁷⁵ Instances of the use of 'right of entry' by Coke are Co. Lit. 245b, 252b, 258a, 266a.

²⁷⁶ 2 Com., c. 13.

²⁷⁷ *Supra*, p. 614.

²⁷⁸ *Supra*.

²⁷⁹ *Supra*, p. 602.

²⁸⁰ CHALLIS, REAL PROPERTY, 310; WILLIAMS, REAL PROPERTY, 98.

²⁸¹ CHALLIS, REAL PROPERTY, 393, 306.

In the case of the entail it was essential to the proper working of family settlements that the remainderman or reversioner in tail should not bar the estate without the concurrence of the life tenant,²⁸² and in the case of the fine with proclamations the rule that the fine might be avoided if the parties to the fine had nothing in the land was thought worthy of an express saving clause in the statute.²⁸³ But if the bare possessor could by a tortious feoffment create a good tenant to the *praecipe* or confer a tortious freehold sufficient to support a fine, these rules meant little, for the feoffor to his own use would straightway be invested with the seisin by the statute of uses²⁸⁴ and no apparent change of possession take place. Accordingly we find the judges in Coke's time looking with suspicion on feoffments entered into with such a purpose by those having particular interests and apparently inclined to regard them as fraudulent *per se*.²⁸⁵ Later judges took much the same view,²⁸⁶ and especially Lord Mansfield. In the much maligned case of *Taylor d. Atkyns v. Horde*,²⁸⁷ he not only pronounced them fraudulent²⁸⁸ but went much further. His reasoning would have deprived the feoffment of any tortious operation²⁸⁹ and would have confined the old notion of an estate turned to a right or, as it had long become, the doctrine of the tortious freehold, to cases where one held under a valid fine with proclamations²⁹⁰ or there had been a discontinuance.²⁹¹ For disseisin he would have substituted dis-

²⁸² Probably the greater part of the land of England was, and possibly still is, held in strict settlement, that is, under limitation to the settlor for life with successive remainders in tail to the sons. When the settlor's eldest son becomes of age, a resettlement is made. The successful working of the scheme depends on the concurrence of the life tenant and the tenant in tail in remainder in the resettlement. See Underhill, 3 SELECT ESSAYS, 673, 674. See also 1 Burr. 116.

²⁸³ 4 HEN. VII, c. 24, § 10.

²⁸⁴ This is noticed by Butler at the end of his note (1) to Co. Lit. 330b.

²⁸⁵ See Fermor's Case, 3 Co. Rep. 77a, 79a. Coke lays stress on the fact that the feoffor remained in possession and continued to pay rent and in such a case it became established law that the fine based on the feoffment was a nullity (see Thomas' note (R) to 3 Co. Rep. 79a and 2 SANDERS, USES, 16), but the disfavor of the judges was not confined to cases of this kind and apparently extended to all cases where there was an attempt to circumvent the Statute of Fines by means of a tortious feoffment.

²⁸⁶ See particularly the opinion of Hale, C. J., in *Whaley v. Tankard*, 2 Lev. 52. In *Parkhurst v. Smith*, Willes, 327 (1741), Willes, C. J., assumed that a feoffment would be effective in such a case, but held that a fine by a tenant for years was not equivalent to a feoffment for this purpose.

²⁸⁷ 1 Burr. 60 (1757).

²⁸⁸ *Id.*, 114.

²⁸⁹ *Id.*, 111-112.

²⁸⁸ *Id.*, 114-119.

²⁹¹ *Id.*, 107.

seisin at election.²⁹² This necessitates our retracing our steps for a minute.

If right of entry had its advantages over right of action, it was much better still for the owner if his estate were not turned into a right at all. We see this at work very early in the law. Thus, as we have seen, Bracton denied the loss of seisin till entry was gone.²⁹³ And whereas with Bracton the heir before entry had merely a right,²⁹⁴ by the time of Littleton he had seisin in law.²⁹⁵ So in Littleton²⁹⁶ we find that where the younger son anticipated the heir it was presumed that he entered claiming as heir, and his death did not cut off the entry of his elder brother.²⁹⁷ Again, no estate was divested where a man of his own head occupied lands and claimed nothing but at will.²⁹⁸

For a time it looked as if the bare possessor who was neither a lawful tenant nor a tortious freeholder would receive the general appellation of 'tenant at sufferance.' Prior to the Statute of Uses this term had been commonly applied to the *cestui que use* in possession.²⁹⁹ Such possession as he had was clearly compatible with the seisin of another. In like case was the tenant at will who held over after the death of the lessor and therefore after the determination of the will,³⁰⁰ or more broadly any one who occupied land of his own head without claiming anything but at the will of an-

²⁹² 1 Burr. 111-112.

²⁹³ *Supra*, p. 609.

²⁹⁴ *Supra*, p. 606.

²⁹⁵ § 448.

²⁹⁶ § 396. See also LIGHTWOOD, POSSESSION, 161.

²⁹⁷ Coke, however, thought that the younger son had the fee and inferred that this was Littleton's view from the fact that Littleton called the entry of the younger son an abatement. Co. Lit. 242a.

²⁹⁸ § 461. Coke would have it that Littleton was referring only to the hold-over tenant and that the one who entered of his own head and occupied at will was a disseisor on the ground that a wrongdoer could not qualify his wrong (Co. Lit. 271a); but while Littleton probably had in mind the hold-over tenant, the case first suggested by his language is that of the squatter. See *infra*, n. 301. That Coke's commentary states the law as changed in the time of Henry VIII, see *infra*, n. 306.

²⁹⁹ 1 SANDERS, USES AND TRUSTS, 65; Y. B. 4 ED. IV, 8-9; Y. B. 15 HEN. VII, 2-4; Basset v. Manxel, 2 Plow. (App.) 3; KEELW. 41b, pl. 2; *Id.*, 42b, pl. 7; *Id.*, 46b, pl. 2. But even according to Littleton a *cestui que use* in possession was like a tenant at will in that a release might be made to him (§ 464), and accordingly in later years both *cestuis que trust* and mortgagors in possession were treated as tenants at will (2 LEWIN, TRUSTS, 677, LIGHTWOOD, POSSESSION, 165), although the mortgagor was such only *quodam modo* (Moss v. Gallimore, 1 Doug. 279), and it was urged that he was more properly a tenant at sufferance. (Note to Keech v. Hall, 1 Smith L. C. 5 Am. ed., 659.)

³⁰⁰ BRO. ABR. *Tenant per copie*, pl. 4, citing 21 HEN. VI, 37; Y. B. 21 HEN. VII, 38-47, *per* Brooke, of counsel.

other.³⁰¹ The term 'tenant at sufferance' was applied to these also, but more especially to the hold-over tenant.³⁰² In order further to avoid the consequences of disseisin it was also applied to the tenant who held over after a term for years³⁰³ or after an estate for the life of another,³⁰⁴ although in both these cases the hold-over tenant had been considered to have the fee in the time of Edward IV.³⁰⁵ But with this extension of tenancies at sufferance in the time of Henry VIII came also a limitation of their scope. According to Brooke³⁰⁶ it became law that one who entered without authority, even though he claimed nothing but at the will of the owner, was not a tenant at sufferance but a disseisor. Only one who had entered by title could be a tenant at sufferance, and in Coke³⁰⁷ this came to be still further restricted to the hold-over tenant who had come in by lease and not by an estate created by act in law, as guardian in chivalry or tenant in dower or by curtesy. Coke's definition of tenant at sufferance stereotyped it and its broader career was cut short.

The tendency to limit the divesting of the freehold, however, would not down and it took the form of an extension of the doctrine of disseisin at election. Disseisin at election appears in very modest form in Littleton,³⁰⁸ where the example given of it is that of a rent service in gross collected by force by one having no right

³⁰¹ See *supra*, n. 298. That Littleton's language in § 461 was intended to include one who entered wrongfully as well as one who held over is borne out by 31 Lib. Ass. pl. 6, Y. B. 11 & 12 Ed. III, 46, BRO. ABR. *Tenant per copie*, pl. 7, 1 ROLLE ABR. 659.

³⁰² See BRO. ABR. *Tenant per copie de court rol, tenant a volunte & tenant per suffrance*, pl. 4, 7, 8, 20, but see pl. 15. See also the opinion of Bridgman, C. J., in *Geary v. Bearcroft*, O. Bridgman, 484, 488 (1666).

³⁰³ Owen, 35; Sir Moil Finch's Case, 2 Leon. 134, 143; BRO. ABR. *Tenant per copie*, pl. 15.

³⁰⁴ Lord Zouche's Case, 1 Dyer, 57b; Rouse's Case, Owen, 27, 2 Leon. 45, TUDOR, LEADING CASES REAL PROPERTY, 1; Allen v. Hill, Cro. Eliz. 238, 3 Leon. 152.

³⁰⁵ Y. B. 18 Ed. IV, 25-16; Y. B. 22 Ed. IV, 38-23. 1 TIFFANY, LANDLORD AND TENANT, 149, attributes to 2 SMITH L. C. 533, note to Nepean v. Doe, TUDOR, LEADING CASES REAL PROPERTY, 2 ed., 9, and LIGHTWOOD, POSSESSION OF LAND, 161, the suggestion that these tenancies were created to avoid the running of the statute of limitations and then proceeds to show that this was a chronological impossibility, but Smith's statement is that "it was for the very purpose of preventing the true owner's entry from being taken away, that the law originally raised such tenancies," and it is submitted that such was the case. It was to avoid the effects of the old disseisin, not to avoid the running of the statute.

³⁰⁶ *Tenant per copie*, pl. 15.

³⁰⁷ CO. LIT. 57b.

³⁰⁸ §§ 588, 589. See also POLLOCK AND WRIGHT, POSSESSION, 88.

to it. This could be treated as a disseisin of the rent and an assize brought against the pignor, or treated as no disseisin and the rent distrained for or granted over. Rents lay in grant, and of them there could be no discontinuance or divestment.³⁰⁹ Coke barely touches on disseisin at election,³¹⁰ but in the time of Charles I³¹¹ three judges in the King's Bench to one declared that a lease for years by a tenant at will was no disseisin but a disseisin at election, "and so much the rather for the great mischief which would ensue, if one who hath a tenant at will, who makes a lease for a small time, and the first lessor, not knowing thereof, levies a fine for a jointure for his wife, or to perform his will, or to other uses, etc., if he should be adjudged disseised, . . . many should lose their inheritances." This was directly contrary to the decision in *Rouse's Case*³¹² in the time of Elizabeth and was contrary to Coke.³¹³

But Coke had stood between the old system of land law and the new,³¹⁴ while Lord Mansfield was the embodiment of the new. The latter seized on disseisin at election as laid down in *Blunden v. Baugh*, and would have given it an extension that would have left little of the tortious feoffment or of disseisin in general.³¹⁵ He said that the changes in the land law had left "little but the names of *feoffment, seisin, tenure and freehold*; without any precise knowledge of the *thing originally signified*, by these sounds."³¹⁶ He saw that ejectment had made the necessity of entry an anomaly,³¹⁷ that the theory of ejectment differed *in toto* from that of disseisin, in that the latter involved the divesting of the freehold, while the former was based on the dispossession of one who was not a freeholder.³¹⁸ He held, therefore, that the right to bring ejectment without a previous entry was a right to treat any wrongful holding as a dispossession instead of as a disseisin, and that accordingly every such holding was a disseisin merely at the election of the one entitled.³¹⁹ This was of course revolutionary. It profoundly dissatisfied the

³⁰⁹ Co. Lit. 306b, 323b.

³¹⁰ The principal passages in the commentaries are those cited in the preceding note.

³¹¹ *Blunden v. Baugh*, Cro. Car. 302, 305 (1632).

³¹² Owen, 27, 2 Leon. 45, TUDOR, LEADING CASES REAL PROPERTY, I.

³¹³ See Hargrave's note (3) to Co. Lit. 57a.

³¹⁴ Butler's Preface to Co. Lit. xxiii.

³¹⁵ Taylor d. Atkins v. Horde, 1 Burr. 60, 107 (1757).

³¹⁶ *Id.*, 108.

³¹⁷ *Id.*, 111-112.

³¹⁸ *Id.*, 111, 113.

³¹⁹ *Id.*, 112.

conveyancers,³²⁰ but it seemed 'good sense' to Lord Mansfield's successors³²¹ and it dealt a blow to the old disseisin from which it never recovered.³²² The elimination of disseisin, however, was left for the reform legislation of the next century.³²³

It is from Lord Mansfield's time that the notion of an estate turned to a right or the doctrine of the 'tortious freehold' has been generally termed disseisin. Already disseisin had been used to indicate *the acquisition of a tortious freehold* whether by a disseisin properly so-called or by an abatement or intrusion,³²⁴ and it was natural that this should have been extended to indicate *any* acquisition of a tortious freehold even by a deforcement or discontinuance in contrast with the bare possession of the now prominent disseisor at election. Preston used disseisin in this broad sense³²⁵ and it is in this sense that it is used by Ames.

Disseisin at election, however, was at best but a negation of disseisin. It meant that the old estate was not divested, that it was not changed to a right, but it preserved the ancient terminology and was not a positive expression of the new order. Dispossession

³²⁰ See Butler's note (1) to CO. LIT. 330b; 2 PRESTON, ABSTRACTS OF TITLE, 280; CHALLIS, REAL PROPERTY, 3 ed., 405, and Maitland, 3 SELECT ESSAYS, 600, n. 3.

³²¹ Abbott, C. J., in *Doe v. Lynes*, 3 B. & C. 388, 402 (1824); Graham, B., in *Jerritt v. Weare*, 3 Price, 575, 598 (1817). The same controversy involved in *Taylor v. Horde* again came before the King's Bench twenty years later (*Doe v. Horde*, 2 Cowp. 689 (1777)) and Lord Mansfield refrained from sitting on it, but the judges placed themselves on record as approving his views.

³²² In *Goodright v. Forester*, 1 Taunt. 578 (1809), *Jerritt v. Weare*, *supra*, and in *Doe v. Lynes*, *supra*, Preston made determined effort to get the courts to disavow the doctrine laid down by Lord Mansfield in *Taylor v. Horde*, but with what success may be judged from the following comment of Chancellor Kent on *Jerritt v. Weare*. "In that case, Baron Graham, in delivering the opinion of the court, observed, that the principle of the decision in *Taylor v. Horde* rested on a foundation not to be shaken; and he spoke with even reprehensible harshness of the effort to revive the old doctrine of disseisin in its unmitigated force. Mr. Preston was not dismayed nor diverted from his opinions by that decision; and he says, in the preface to his third volume on ABSTRACTS OF TITLE, that he has stated his propositions on disseisin, though that decision was before him, with the fullest conviction of their accuracy. It is presumed, further, that Mr. Preston is the same person, who, as counsel, once more brought up and enforced his tenacious opinions on the efficacy of feoffment working a disseisin and creating a wrongful fee; and the K. B., in *Doe v. Lynes* (3 B. & C. 388), very peremptorily rejected them. His views on this subject, as laid down in his treatises on property, may therefore be considered as essentially expelled from Westminster Hall." 4 Com. 488, n. (b).

³²³ *Supra*, p. 602.

³²⁴ See note to *Taylor d. Atkins v. Horde*, 2 Smith's Leading Cases, 495, 519.

³²⁵ 2 ABSTRACTS OF TITLE, 285.

was the alternative to disseisin and so might have been expected to take its place had not something better presented itself. This was 'adverse possession.' It seems to have been first used by Lord Mansfield in the very case of *Taylor d. Atkyns v. Horde*.³²⁶ It immediately found favor. It was used to indicate the kind of possession that would set the statute of limitations running. Eighty years later it was said to have been engrafted by the courts upon the statute.³²⁷ It was therefore associated with a definite period of limitation from the first and this supplied the positive element that made it not a mere negation of disseisin but a substitution of something better. As long as there was no operative statute of limitations some doctrine of a defeasible title which it would gradually become more and more difficult to defeat but which would never become perfectly good, would seem to have been almost inevitable. As soon as there was an operative statute of limitations, however, the essentially provisional nature of the possessory right until the running of the statute must have been manifest and any doctrine of defeasible title an anomaly. The significance of the blow which Lord Mansfield struck disseisin with his disseisin at election was that it left free play for the statute of limitations. There were those who would have fitted the statute of limitations into the old system and merely added it to the other casualties, such as descent cast, which the right of entry had to meet,³²⁸ but their view was not accepted.³²⁹ This failure to distinguish the new adverse possession from the old disseisin is a story in itself and will be taken up in another place.

That the doctrine of the tortious freehold should have fallen into such odium was largely due to the changed meaning which seisin had come to have. Blackstone and Butler stated the old doctrine that if A was disseised by B, while the possession continued in B, B had a *mere naked possession*.³³⁰ Here there was no identification of seisin with ownership or any modification of ownership,³³¹ and if the tortious feoffment had been thought of in these terms it would

³²⁶ 1 Burr. 60, 119.

³²⁷ *Nepean v. Doe*, 2 M. & W. 894, 900 (1837), per Sir W. W. Follett, of counsel.

³²⁸ Smith's note to *Nepean v. Doe* — *Taylor v. Horde*, 2 Smith's, L. C., 495, 530.

³²⁹ *Doe d. Parker v. Gregory*, 2 A. & E. 14 (1834), 3 GRAY, CASES ON PROPERTY, 2 ed., 39. See also LIGHTWOOD, POSSESSION OF LAND, 162-164.

³³⁰ 2 BL. COM. 198; Butler's note (1) to CO. LIT. 239a.

³³¹ See Maitland, 3 SELECT ESSAYS, 591, 600.

have met with more favor; but such was not the meaning of seisin that had generally come to prevail,³³² nor was it the meaning of seisin advanced by the most conspicuous advocate of the tortious feoffment and the old disseisin in general, namely, Preston. In the case of *Goodright v. Forester*³³³ before the Exchequer Chamber Preston stated that "while the estate is vested, the owner retains the seisin of the estate: when the estate is divested, he no longer retains any ownership or seisin; for seisin and ownership are convertible terms."³³⁴ Again, "the ownership is in the person who has the seisin, though the right of defeating that ownership is in the person who has the right or title of entry."³³⁵ This was not common law but Preston,³³⁶ and there is little wonder that the courts treated him with scant ceremony and that the Reform Parliaments were ready to wipe out disseisin root and branch. Ames took Preston's doctrine and elevated it into a "working principle for the determination of controversies for all time."³³⁷ If this be historical jurisprudence there is little to wonder at the disrepute into which it has fallen.

(To be Concluded.)

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³³² See *supra*.

³³³ 1 Taunt. 578 (1809).

³³⁴ *Id.*, 588. See also 2 PRESTON, ABSTRACTS OF TITLE, 285, where it is said that "as soon as a disseisin is committed, the title consists of two divisions; first, the title under the estate or seisin; and secondly, the title under the former ownership."

³³⁵ 1 Taunt. 578, 602 (1809). See also 2 ABSTRACTS OF TITLE, 396, where it is said: "A disseisor is in all other respects to be considered in the same situation as a rightful owner; with the difference, that his title is defeasible by the entry, or, according to circumstances, by the action of the rightful proprietor."

³³⁶ Preston's treatment of disseisin calls to mind the following reference to Preston by Gray in his debate with Challis on determinable fees: "On the other hand in reading Mr. Preston, to whom Mr. Challis pays as much deference as so independent a writer can, I feel in fairyland, a very tedious fairyland." RULE AGAINST PERPETUITIES, 3 ed., § 778.

³³⁷ 3 SELECT ESSAYS, 541, 590.

PSYCHIC PHENOMENA AND THE LAW

*Credere nil sapiens amat, omnia credere simplex;
Scilicet hic aliis credulus, ille sibi.*

AT the outset the writer disclaims any desire to take a position one way or another upon the occurrence or the real nature of what are called psychic phenomena. He knows nothing more about them than may properly be expected of one who is moderately acquainted with the literature of the subject and has always been fond of ghosts.¹ The position which the law takes is entirely independent of the true nature of the phenomena themselves, or of their actual occurrence, but depends only upon a belief in the minds of the living in regard to supposed actions of or communications from the dead. No one can examine the literature of the subject, which has become very large, not only in English but in French, German, and Italian, without learning that in the presence of a kind of person described as a medium² there purport to occur communications from persons deceased, sometimes by rapping noises, sometimes by a voice speaking, but usually by what is called automatic writing, in which the hand of the medium writes, in a continuous script, apparently without conscious control, the supposed communications, the medium being either wide awake or in some cases in a state of trance. Automatic writing seems to be a fairly common phenomenon and has the advantage of leaving a permanent record.³ Modern spiritualism is based mainly on these supposed communications, beginning about seventy years ago. The alleged phenomena are very often simulated, either consciously by charlatans, some of them of the worst kind, or perhaps unconsciously by hysterics. Just what really occurs is not very clear. The curious things are the continual personation of the dead and

¹ The safest place to search for ghosts (always excepting the Bible) is in the *ENCYCLOPEDIA BRITANNICA*, where one should read Mrs. Sedgwick's "Spiritualism" and Andrew Lang's "Psychical Research," "Apparitions," "Hauntings," "Crystal Gazing," "Second Sight," and especially "Poltergeist."

² Compare *Leviticus* xix. 31; *1 Samuel* xxviii. 3-25; *ENCYCLOPEDIA BRITANNICA*, article "Medium."

³ See *ENC. BRIT.*, articles "Automatic Writing" and "Divination."

the selection of information by the supposed communicators. The important fact for legal purposes is that some people believe that they receive communications from the dead, and that under the influence of this belief they do various legal acts in which such a belief has legal importance.

One must not approach the subject assuming that all of the alleged communications are fraudulent. The reported cases, especially where old people have been overreached, would make one ready to believe that all mediums are rogues. But only the cases of fraud get into the courts. Some of the mediums themselves believe in spiritualism. It would be a large order to condemn all professional mediums without investigation, and the professionals are insignificant in number compared with the amateur mediums who are to be found in every walk of life. Goethe, Victor Hugo, and Sardou are said to have written automatically.⁴ Many amateur mediums are undoubtedly sincere.

It would be also an error to assume in advance that all the alleged communications are unintelligent. It would not be unreasonable to expect intelligent communications from an intelligent medium, and in fact the communications are sometimes quite intelligent. It is like conversation. The communications sometimes assume the shape of requests or commands. They may be insistent enough to control the will, intelligent enough to convince the intellect, appealing enough to sway the affections, assuming that the recipient of the communications believes them to be what they purport to be.⁵ There is a real legal problem here.

It would also be an error to assume that all people who entertain spiritualistic beliefs are unintelligent.⁶ Not to mention a few prominent names of the hour in the scientific and literary world which have been identified with such ideas, most of us have known people who accepted such communications, and were, to say the least, intelligent enough to perform any kind of legal act.

⁴ Spence, *ENCYCLOPAEDIA OF OCCULTISM* (1920), article "Automatic Writing." The articles on "Mediums" and "Spiritualism" are worth consulting.

⁵ For a vivid illustration of this from current literature, see MAGNUSSEN'S *GOD'S SMILE* (from the Danish).

⁶ *Carnahan v. Hamilton*, 265 Ill. 508, 107 N. E. 210, 215 (1914); *Crumbaugh v. Owen*, 238 Ill. 497, 87 N. E. 312 (1909); *Raison v. Raison*, 148 Ky. 116, 146 S. W. 400 (1912); *In re Sieb's Estate*, 70 Wash. 374, 126 Pac. 912 (1912); *Steinkuehler v. Wempner*, 169 Ind. 154, 164, 81 N. E. 482 (1907).

In the interest of brevity I shall not use the word "alleged" before communications and other psychic phenomena, assuming that the reader will always consider it as there when they are spoken of. Since the writings of Swedenborg, almost everybody agrees that the communications come not from angels or demons, as was previously believed, but from human beings, spiritualists claiming that the communications, or some of them, are from human beings out of the body, or at least out of their own bodies,⁷ while the skeptics claim the communications come from the minds of living persons. In determining what legal effect is to be given to spiritualistic communications believed to be genuine by the recipient, the communications should be treated for legal purposes as if the supposed communicators had still survived, and made the communications.⁸ Justice and common sense require that the judge or jury should put themselves, as well as they can, for this purpose in the place of the believer. If, for example, a person believed that his dead mother told him to make a certain devise, the communication should be dealt with, so far as the believer is concerned, as if it had in fact been made by his mother. The more importance is given to these communications the easier it will be to break wills or contracts made under their control. In case of a gift or a will the same questions of fraud and undue influence arise as in case of communications from persons in the flesh. There is of course an additional factor which arises where the medium acts fraudulently or in bad faith. If the recipient of the communications believes them to be genuine, a confidential situation arises similar to that of a guardian, attorney, physician, or spiritual adviser, and gifts or legacies directly or indirectly in favor of the medium should be treated in the same manner as in case of other confidential relations which may have been similarly abused. One of the most celebrated cases of this character⁹ is that of the gift to D. D. Home,

⁷ See ENC. BRIT., article "Possession." A few authors still hold out for the theory of demons; works cited in article "Spiritism," CATHOLIC ENCYCLOPEDIA. See also KIESEWETTER, GEHEIMWISSENSCHAFTEN, 749 (Leipzig, 1895).

⁸ *Robinson v. Adams*, 62 Me. 369, 409 (1874). Although it is fully recognized by the decisions that belief in spiritualism is not an insane delusion, being based upon some evidence and believed by many people, upon the justice of the rule there is an analogy in the law of criminal responsibility where an insane person is given the benefit of his delusion as if it were true. 16 CORPUS JURIS, 101 (1918).

⁹ *Lyon v. Home*, L. R. 6 Eq. 655 (1868).

possibly the most famous medium on record, by an aged English woman who adopted him as a son, and gave him great sums under the advice, as she supposed, of spirits. She was allowed to recover the property on account of the confidential relation between the parties. The report of the case is quite interesting. Vice Chancellor Giffard pays his respects to spiritualism as follows:¹⁰ "The system, as presented by the evidence, is mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious; and, on the other, to assist the projects of the needy and of the adventurer."¹¹ It is interesting to note from the evidence reported that the supposed communications to Mrs. Lyon were made by the process of Home's saying over the alphabet and waiting for raps. The ordinary principles of fraud and undue influence are sufficient to deal with the situation. Payment for services as a medium is of itself a great temptation to fraud. The customer must have something for his money. Mediumistic powers are said to be fleeting and wavering, so that phenomena cannot be produced at will and frequently cease entirely, for no apparent cause.

The problem of spiritualism in the making of wills is largely one of undue influence.¹² Where the mind of the testator is controlled by the communications in which he believes, the testament may cease to be the expression of his own will; the will of another may be expressed in the testament instead of his own. The pressure exerted on the testator's mind has been real and overmastering, no matter where it came from.

If, however, the communications have not overcome the will of the testator, we are in the familiar realm of statements, suggestions, requests, and demands addressed to the testator. Reinforced by the belief of the testator in their genuineness, they may have great weight, perhaps even more than if the person from whom they are believed to come had made them before death, because of the natural reverence felt for the dead and the very common idea that somehow the dead know more than the living or have been improved by dying. But these notions do not create a difference in

¹⁰ *Lyon v. Home*, L. R. 6 Eq. 655, 682 (1868).

¹¹ See *In re Willitt's Estate*, 175 Cal. 173, 165 Pac. 537 (1917).

¹² See *In re Randall*, 99 Me. 396, 59 Atl. 552 (1904); *Irwin v. Lattin*, 29 S. D. 1, 135 N. W. 759, 763 (1912); *Dalloz* 1910, Part 5, p. 3, Trib. Civ. de la Seine, 30 Nov., 1909. For the last citation I am indebted to Mr. Edward B. Adams.

kind. The mere fact that the will follows suggestions in spiritualistic communications should no more avoid it than if the suggestions came from living persons whose influence upon the testator would have been as great. While a belief in spiritualism is not insanity, an actual monomania about spiritualism will avoid a will, just like any other insanity which affects its provisions.¹³

Cases on witchcraft have been purposely omitted, as carrying us too far afield, although they may contain a little material which would be relevant here. Witchcraft cannot be explained completely unless we assume the presence sometimes of psychic phenomena.¹⁴

In *Addington v. Wilson*¹⁵ the court held, in an interesting opinion, that a belief in witchcraft was not evidence of such insanity as disabled a person to make a will.¹⁶ A criminal case holding that a belief in witchcraft is not of itself an insane delusion is *Holema v. United States*.¹⁷

In *Burchill v. Hermameyer*¹⁸ the plaintiff sued to recover back ten thousand dollars paid for stock in an oil company upon the

¹³ *O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736 (1907); *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197 (1898). See generally notes in 37 L. R. A. 270 (1897) and 15 L. R. A. (N. S.) 674 (1908).

¹⁴ Especially is this true of the life of Saint Joan of Arc, who suffered as a witch. See Spence, ENC. OCC., article "Jeanne D'Arc," citing her Life by Andrew Lang. For the skeptical view he cites her Life by Anatole France. Upon the whole subject see Spence, article "Witchcraft." The latest theory is that witchcraft was the survival of an aboriginal cult. 1 WELLS, OUTLINE UNIVERSAL HISTORY, Am. ed., 373-374. For a list of articles about witchcraft in legal periodicals, see the writer's article entitled "The Conjuror" in 7 VA. L. REV. 370, at page 373 (Feb., 1921).

¹⁵ 5 Ind. 137, 139 (1854).

¹⁶ Note in 37 L. R. A. 272.

¹⁷ 186 U. S. 413, 421 (1902). The Twelve Tables punished bewitching another's hanging fruit or spiriting away a crop from his fields, with death. MUIRHEAD, ROMAN LAW, 2 ed., 140; 1 STRACHAN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW, 107. See also *Ib.*, Vol. II., 173, 199; SCOTT'S VISIGOTHIC CODE, 204-205; MOMMSEN, RÖMISCHES STRAFRECHT, 639, 861; MENDELSON, THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS, 48, 56; CODE OF HAMURABI, § 2; VON BAR, HISTORY OF CONTINENTAL CRIMINAL LAW, 45, 183, 226, 243; 2 REICHEL, COMPLETE MANUAL OF CANON LAW, 62. That there never was any considerable evidence of the supernormal in witchcraft, see Note on Witchcraft by EDMUND GURNEY, PHANTASMS OF THE LIVING, 172 (1886). Also at page 119 he says: "A few cases are recorded, on respectable authority, of a remarkable susceptibility, shown by persons whom we might now recognize as hypnotic 'subjects,' to the conscious or unconscious influence of some absent person supposed to be a witch; and perhaps also of abnormal powers of discernment on the part of the supposed witches themselves."

¹⁸ 212 S. W. (Tex. Civ. App.) 767 (1919). For this case and a number of others herein cited the writer is indebted to the courtesy of the West Publishing Company.

ground of fraud, a part of the fraud being that plaintiff believed what the defendant was telling him about spiritualistic predictions that oil underlay the defendant's land. The court says:¹⁹

"There was considerable other evidence relating to Spiritualistic communications as to the existence of oil underneath the lands in question, and we should perhaps notice the subject a little more particularly. We do not care to say that spirits from the great beyond may not visit and communicate with the living, nor that it is impossible for man's spiritual powers to be so developed and purified as to constitute a medium for communication with disembodied beings, for the phantasm of today is so often a reality of tomorrow. But these subjects belong to realms and powers that as yet must generally be classed as purely speculative, and not so established by evidences cognizable by the law which we are required to administer as to be classed as facts — as among proven things. Indeed, we think it may be said that a belief that the living, through the agency of a medium, can receive authentic information from the spirits of the dead, is, in the general acceptance of mankind, a species of delusion, and that such communications, in general acceptance, are of too unsubstantial a character to be received as representations of fact. We think, therefore, that the representations of the defendants, if any, to the effect that spirits had revealed, through a medium, the existence of oil in valuable quantities beneath the lands in question, must, under the circumstances of the case, be regarded as insufficient to form a basis for relief to plaintiff."

People not only consult mediums about making wills but about all sorts of business.²⁰ We suggest that a much simpler way to deal with the problem is to treat the person who consulted the medium the same way as if he had consulted a living person and received the same advice. The one who consults the medium cannot object to having the transaction taken at its face value, the advice of a human being, and a just result would be reached without indulging in any speculations about spiritualism.

In *Steinkuehler v. Wempner*²¹ the following extracts are made from the opinion:

"It is entirely legitimate and proper for the wife to seek the advice of her living husband, and after death to pay some regard to his known

¹⁹ 212 S. W. (Tex. Civ. App.) 771 (1919).

²⁰ In an appendix to MAXWELL'S METAPSYCHICAL PHENOMENA is an account of a French speculator who was ruined by spiritualistic tips.

²¹ 169 Ind. 154, 164-165, 81 N. E. 482 (1907).

wishes in the preparation of her will; but, when such pretended counsel comes through the dubious channel of a 'medium,' as an oracle from one possessing knowledge of the great hereafter, under the solemn surroundings of the seance, its influence upon a credulous mind can hardly be measured. The indulgence of such belief and practices may be so long continued and of such a character as to affect the mental status. The conduct of the decedent with relation to this subject, shown by the evidence, was a proper matter for the consideration of the jury in connection with other evidence upon the subject of testamentary capacity. A mere belief in spiritualism may be harmless and of no concern to any one other than its possessor, but occult 'revelations' cannot be permitted to control the practical affairs of this world, and the belief upon this subject and consequent conduct of the testatrix with reference to the making of her will was particularly relevant upon the question of undue influence. It appears that the instrument in question was prompted, to some extent at least, by these spiritual communications, and it was the province of the jury, under proper instructions, to determine whether such 'revelations' constituted such undue influence as invalidated the will."

In *Irwin v. Lattin*,²² a case involving the competency of a spiritualist to make a will, the court quoted with approval the following extract from the opinion in *McClary v. Stull*:²³

"Law, it is said, is 'of the earth, earthy,' and that spirit-wills are too celestial for cognizance by earthly tribunals, — a proposition readily conceded; and yet the courts have not assumed to deny to spirits of the departed the privilege of holding communion with those of their friends who are still in the flesh so long as they do not interfere with vested rights or by the means of undue influence seek to prejudice the interests of persons still within our jurisdiction."

In the case cited of *McClary v. Stull* the will was sustained, although there was in the record evidence which tended to prove that the testatrix was a believer in the doctrine of spiritualism and seems to have been under the impression that she could directly and through the instrumentality of the planchette communicate with the spirits of the dead, including her deceased husband.²⁴ According to the evidence quoted, she consulted planchette about her affairs.

²² 29 S. D. 1, 135 N. W. 759 (1912).

²³ 44 Neb. 175, 62 N. W. 501 (1895).

²⁴ 44 Neb. 175, 185-186, 62 N. W. 501 (1895).

*In Nurse v. State*²⁵

"Appellant was convicted of swindling. The false representations and deceitful pretenses are that he represented to one Alexander that he, appellant, was a spiritualist, and worked with spirits, and that the spirits had told him that there was a large sum of money buried on the property of said Alexander, and that if he, Alexander, would give to him, appellant, \$20, he would find a large sum of money and give it to Alexander, and that by this means he obtained the sum of \$20 in exchange for the services rendered and to be rendered in discovering the place where the large sum of money was buried. . . . Alexander testified that about a year before the trial his house settled and he procured the services of Will Mabry to dig down on one side and put in a new foundation. "After that one of our doors kept rapping — rapping every day and night — and made such a peculiar noise that we became suspicious. My wife and I would see lights²⁶ around the place where they had dug to fix the foundation. I have always heard that where you would see lights at night there was money buried."

Some digging was done in the attempt to find the money. Alexander's wife kept seeing lights and hearing the door rattle. He was talking to Jim Nurse, and Nurse told Alexander that there was money buried in the yard, and that Nurse would find it for Alexander for \$20. Nurse, according to the evidence, dug up \$42 and afterwards more out of the hole, but under Nurse's advice the money was buried again, for Nurse said that there was some more money in the hole, and if the money was handled that the spirits would "vanish it all." It was charged that after Nurse had caused the money to be buried again he came back that night and stole it. The court said:²⁷

"If appellant made the representations that he was a spiritualist and could talk with spirits, this matter raised the question about which this court does not feel called upon to discuss or decide. . . . There is no evidence in regard to the matter, one way or the other, that is, as to whether or not appellant conversed with the spirits, or called them up and tested their veracity, but the fact is uncontroverted, whether he talked with the spirits or not, that he found the money as he promised."²⁸

²⁵ 59 Tex. Cr. 354, 355, 356, 128 S. W. 906 (1910). Compare the case of *Mirabel* in *ANDREW LANG, COCK LANE AND COMMON SENSE*, 251.

²⁶ Acts xii. 7.

²⁷ 59 Tex. Cr. 355, 357, 128 S. W. 906 (1910).

²⁸ 1 Samuel ix. 3-10; x. 2.

The conviction was reversed. This case has some bearing on the next question.

Would proof of the truth of the medium's statements be a good defense to a charge of fraud? In *Dean v. Ross*²⁹ the plaintiff sued for the conversion of fifteen bonds which the defendant had induced the plaintiff to give her by what purported to be directions from the spirit of the plaintiff's deceased husband, speaking through the defendant as a medium. Judge Bond instructed the jury, "If there was a message received from the husband, and the defendant simply delivered the message, believing it to be true, to this plaintiff, why then that would not be any false statement with reference to the transaction; that would be a true statement, and I meant you to understand that then the plaintiff could not recover, if that was a fact and that was a real communication."³⁰ This ruling was not passed upon, on appeal. The plaintiff recovered. Nothing is said (perhaps it was overlooked) about the confidential relation of the parties raising a presumption of fraud. Apart from that and assuming there was evidence by which the question was presented, in case for example the bonds had been given by direction of the purported message to a stranger, was not this a proper charge to the jury? A contrary rule is open to the accusation of injustice, not to say bigotry, and simply plays into the hands of the charlatan, who will then be able to claim that he was forcibly prevented from showing the truth. Instead of the medium not being allowed to prove the truth of his statement, he should be invited to prove it. This particular proof the world has been waiting for a long time.

The following is taken from "The Night Side of Nature"³¹ by Catherine Crowe:

"The account is extracted verbatim from a work published by the Bannatyne Club, and is entitled, 'Authentic Account of the Appearance of a Ghost in Queen Ann's County, Maryland, United States of North America, proved in the following remarkable trial, from attested notes taken in court at the time by one of the counsel.'

"It appears that Thomas Harris had made some alteration in the disposal of his property, immediately previous to his death; and that the

²⁹ 178 Mass. 397, 60 N. E. 119 (1901).

³⁰ *Ibid.*, 399.

³¹ (New York, 1853), p. 257. A more condensed and critical account is in COCK LANE AND COMMON SENSE, 269, where it is suggested that there was a conspiracy of counsel to make Briggs tell his story under oath.

family disputed the will and raised up difficulties likely to be injurious to his children."

In the text follow three pages containing William Briggs' testimony as to repeated appearances after death by Thomas Harris, and of Briggs' conversations with him and Briggs' receiving from Harris a message to Harris' brother in regard to a conversation in life between the two brothers alone about how the estate of Thomas Harris should be managed for the best interests of his children.³² The surviving brother recalled the conversation and undertook to carry out the wishes of the deceased. The witness testified as to the misbehavior of his horse³³ on the appearance of the apparition, and that on one of the occasions when the ghost appeared to and conversed with the witness another person was present but saw nothing. The doings of the apparition as narrated resemble the ghostly incidents in William De Morgan's novel "The Old Mad House" and have parallels in spiritualistic literature. The witness testified that he had a further conversation with Thomas Harris' apparition but not on the subject in litigation. The book goes on as follows:³⁴

"The counsel was extremely anxious to hear from Mr. Briggs the whole of the conversation of the ghost, and on his cross-examination took every means, without effect, to obtain it. They represented to him, as a religious man, he was bound to disclose the whole truth. He appeared agitated when applied to, declaring nothing short of life should make him reveal the whole conversation, and, claiming the protection of the court, that he had declared all he knew relative to the case.

"The court overruled the question of the counsel. Hon. James Tilgman, judge.

"His excellency Robert Wright, late governor of Maryland, and the Hon. Joseph H. Nicholson, afterward judge of one of the courts in Maryland, were the counsel for the plaintiff.

"John Scott and Richard T. Earl, Esqs., were counsel for the defendant."

It is very difficult at this day to sustain such a ruling upon the question of privilege.³⁵ The interesting thing legally is the thoroughly matter-of-fact way these phenomena were dealt with, ac-

³² Gen. xix. 1-3.

³³ Numbers xxii. 23-35.

³⁴ CROWE, *THE NIGHT SIDE OF NATURE*, 260, 261.

³⁵ See 40 CYC. 2390, 2392, 2394; WIGMORE, *EVIDENCE*, §§ 2285, 2286; *Lindsey v. People*, 66 Colo. 343, 181 Pac. 531 (1919).

cording to the account given. The suit of *Webster v. Molesworth* in 1835 before the Sheriff of Edinburgh was for injuries done a house by boring holes trying to find out the cause of mysterious poltergeist noises.³⁶ According to Andrew Lang³⁷ the papers in the case are still in existence, and he examined a number of documents relating to it in the office of a firm of solicitors employed in the case. Andrew Lang has found for us the affidavit of Mr. John Mompesson of Tedworth, in the celebrated haunting case of the *Drummer of Tedworth*³⁸ (April, 1663), which gives the appearance of haunting by a spirit of a person still living, and has also given us an abstract of the evidence in 1851 in judicial proceedings for defamation arising out of a haunting at Cideville, France, by a musically accomplished poltergeist. The court found that the cause of the phenomena was unknown.³⁹ An account of much more serious poltergeist occurrences at Lipzy in Russia,—where the phenomena finally resulted in the burning of a house,⁴⁰ July 25, 1853, but the court was unable to find any one responsible,—which is contained in a long series of official documents, including the depositions of numerous witnesses and a report to the Czar, will be found in German translation in Aksakoff's "Vorläufer des Spiritismus," 33.⁴¹ At page xi, note, Aksakoff, who was a high official in the Russian service, refers to several other Russian cases in judicial proceedings.⁴² In 1767 there were shocking criminal proceedings on account of rappings at Dibbersdorf, Germany.⁴³ In 1852 one Abby Warner, a medium, was charged with disturbing religious services at Massillon, Ohio, by loud raps, and the defense was made that

³⁶ See ROBERT DALE OWEN, FOOTFALLS ON THE BOUNDARY OF ANOTHER WORLD, 10 ed., 181 (London, 1860), citing MRS. CROWE, NIGHT SIDE OF NATURE, 445-447 (Routledge & Co's. Ed.), 400 Redfield's Ed. (New York, 1850). Mrs. Crowe interviewed one of the counsel, and gives a very lively account of the happenings. She says beds were also heaved up as if some one were under them, but no one was there. With these two books our ancestors used to scare themselves delightfully.

³⁷ ENC. BRIT., article "Poltergeist."

³⁸ 17 PROC. SOC. FOR PSYCHICAL RESEARCH, 308; there were also court proceedings in this case. A convenient reference is "Spiritualism in the days of Charles II," the case of the Drummer of Tedworth, 117 CONTEMPORARY REV. 87, 91 (Jan., 1920).

³⁹ 18 PROC. SOC. PSYCH. RESEARCH, 454-463; Mr. Lang had a copy of the entire record. For a lively account of the case, see his chapter, "A Modern Trial for Witchcraft," in COCK LANE AND COMMON SENSE, 274.

⁴⁰ 1 Kings xviii. 38.

⁴¹ (Leipzig, 1898.)

⁴² This is the author of ANIMISM AND SPIRITISM, which fills a large place in spiritualistic literature.

⁴³ KIESEWETTER, GEHEIMWISSENSCHAFTEN, 396-399 (Leipzig, 1895).

the defendant did not rap and had no control over the raps. The defendant was acquitted.⁴⁴ Those who are curious about revelations of murders by apparitions, haunted houses where tenants have refused to pay rent, important information in dreams, and the like, are referred to the articles on "Law and Apparitions" by Mr. William White Ackerley,⁴⁵ and "Wills and Ghosts" by Mr. E. Vine Hall.⁴⁶ Much of the material is traditional and cannot now be verified.

In *Craven v. Craven*⁴⁷ the plaintiff was suing for the recovery of real estate under a will made by his uncle, Jasper Barker. The following quotations are made from the opinion of the court:

"This suit was commenced by appellee August 18, 1910, for the recovery of certain real estate in Hendricks County, with rents and profits; to quiet title thereto, and asking for partition. The appellee's claim is based on a devise contained in a will, alleged to have been made September 20, 1864, the maker of which died, December 13, 1864, the will never having been probated or offered for probate until April 14, 1909, forty-four years after its execution. . . .

"As appellee claims, his uncle Jasper Barker, although having been dead for more than forty-four years, appeared to him in a vision or dream, and told him of the existence of a will and that it was in possession of Enoch Scotten, who still lived in the neighborhood, and who upon request of appellee produced and gave him the will. It was presented for probate on April 14, 1909, on the testimony of Enoch Scotten, whose name with F. M. York appeared as witnesses to its execution forty-four years, six months, and twenty-four days after its execution."

The statute of limitations was held a good defense, the court intimating that the dream had been too long deferred.

In *Ex parte Jack*⁴⁸ there was a habeas corpus proceeding in which bail was refused. Jack was charged with the murder of C. T. Stewart, who it is conceded died of strychnia poisoning. The following extract is from the statement of facts:

⁴⁴ A suit for defamation also grew out of the circumstances. 1 *PODMORE'S MODERN SPIRITUALISM*, 304. *THE ARREST, TRIAL AND ACQUITTAL OF ABBY WARNER, etc.*, by Mrs. S. A. Underhill (Cleveland Plain Dealer Press), copy in Congressional Library.

⁴⁵ 21 *CASE AND COMMENT*, 453, also at page 506, and see especially the chapter on "Ghosts before the Law" in *LANG'S COCK LANE AND COMMON SENSE*. Similar accounts appear from time to time in the newspapers. Two recent murder cases of this kind will be found in the *New York Times* of Jan. 25 and March 10, 1921.

⁴⁶ 21 *CASE AND COMMENT*, 464.

⁴⁷ 181 Ind. 553-556, 103 N. E. 333 (1913). Compare, for example, *Matt. ii. 12*, 13, 22.

⁴⁸ 22 So. (Miss.) 188 (1897), not in the official reports.

"Mrs. C. T. Stewart testified that her husband took a capsule about the time he went to bed, and in about 15 or 20 minutes thereafter he threw up his arms, looking very wild out of his eyes, and seemed to be cramped and in great pain; that he had a convulsion, and, after she had given him some whisky and coffee, he had another convulsion, and when he revived he made the following statement: 'I am going to die. I have been dead, and the Lord sent me back to tell you that Dr. Lipscomb poisoned me with the capsule that he gave me to-night. Guy Jack had my life insured, and he hired Dr. Lipscomb to kill me;' that he soon had another convulsion and died."

Upon the entire evidence the court held that bail should have been allowed.

In *Lipscomb v. State*⁴⁹ the same statement was offered in evidence as a dying declaration. It appears that only Mrs. Stewart and a negro man were present, that the statement was voluntarily made by the deceased and without suggestion of any kind. The majority of the court held that the statement that "Dr. Lipscomb has killed me, has poisoned me with a capsule he gave me to-night," was admissible as a dying declaration. To this opinion the court adhered in a second appeal of the case.⁵⁰ Dr. Lipscomb was twice convicted, but died in jail before transfer to the Penitentiary. At the second trial the defendant himself offered in evidence, and was permitted to prove, the entire declaration.⁵¹ This includes the statement of the declarant that he had been dead and that the Lord had sent him back to tell the story of his death.

As we might have learned from witchcraft cases, there is no peculiar rule of evidence for supernormal phenomena. A man may prove them, if he can, just like any facts.

A statement that a house is haunted is actionable. Several unreported cases, in one of which the poet, Stephen Phillips, was tenant of the house, are mentioned in an article on "Ghosts in Litigation."⁵² Upon its criminal side the attitude of the law towards professional spiritualists is very unfavorable. In England they are punishable as rogues and vagabonds.⁵³ A gift for chari-

⁴⁹ 75 Miss. 559, 574, 23 So. 210 (1897).

⁵⁰ 76 Miss. 223, 25 So. 158 (1898).

⁵¹ 76 Miss. 254, 25 So. 158 (1898).

⁵² 27 CANADIAN LAW TIMES, 243 (1907). For an early French case, with references to mediæval law on the subject, see COCK LANE AND COMMON SENSE, 269.

⁵³ 22 HALSBURY'S LAWS OF ENGLAND, 612; 5 GEO. IV, chap. 83, § 4. For American cases see "Legal Status of Seers and Necromancers," by L. Arthur Wilder,

table purposes, otherwise valid, will be sustained although it promotes belief in spiritualism.⁵⁴ A gift to found a spiritualistic church is valid.⁵⁵

If this article should find readers, some will undoubtedly think that there are no psychic phenomena, and this is really the only comfortable view.⁵⁶ There may be some obscure human faculty, or more than one, at work here, just as there was in "Mesmerism," now (after having twice survived being discredited by a host of charlatans) everywhere accepted under the name of Hypnotism.⁵⁷ The main difficulty about psychic phenomena is not with the law, but with the facts, and what is worse, the explanation of them. The law we have already.

Blewett Lee.

NEW YORK CITY.

21 CASE AND COMMENT, 445, 451 (Nov., 1914). See especially note upon "Prohibition of fortune telling and kindred superstitions," 43 L. R. A. (N. S.) 203 (1913), which includes cases on giving spiritualistic seances for a reward. Also see *City of Chicago v. Payne*, 160 Ill. App. 641 (1911), affirmed on appeal, 257 Ill. 76, 100 N. E. 159 (1912). Those who profess to cure disease by means of spiritualism may be punished for practising medicine without a license. Note, L. R. A. 1917C, 828. Where a professional medium has assistants he may be convicted of a conspiracy to defraud. *People v. Gilman*, 121 Mich. 187, 80 N. W. 4 (1899). For the Italian law, see Part 3 of *LA SUGGESTIONE E LE FACOLTA PSICHICHE OCCULTE IN RAPPORTO ALLA PRACTICA LEGALE E MEDICO-FORENSE* (Turin, 1900), by SALVATORE OTTOLENGHI. A hint as to the German law applicable to fraudulent mediums is given at page 148 of *DER FALL ROTHE* by DR. JUR. ERICH BOHN (Breslau, 1901), an exposure of the "flower-medium" Anna Rothe. Frau Rothe was prosecuted later, see Dr. Maxwell's articles in *REVUE PHILOMATHIQUE DE BORDEAUX*, Année 7, pp. 97-117, 158-178 (Bordeaux, 1904). For a French case, see the article by Francis Wharton cited later (spirit-photography by one Bruguet, who was convicted of fraud), also referred to in *LEHMANN'S ABERGLAUBE U ZAUBEREI*, 2 ed., 323.

⁵⁴ *Jones v. Watford*, 62 N. J. Eq. 339; 50 Atl. 180 (1901).

⁵⁵ *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044 (1907); a good case.

⁵⁶ For accounts of spiritualistic phenomena *semper et ubique* see "Savage Spiritualism," by Andrew Lang, 23 LONGMAN'S MAGAZINE, 482 (1894), and especially his book, *THE MAKING OF RELIGION*; "Mesmerism, Planchette and Spiritualism in China," by H. A. Giles, 99 FRASER'S MAGAZINE, 238 (1879); JACOLLIOT, *OCCULT SCIENCE IN INDIA*, Fourth Part. The subject is intimately connected with early magic: "Malay Spiritualism," by Walter Skeat, 13 FOLKLORE, 134, also his book, *MALAY MAGIC*; "Animism, Sorcery and Spiritualism," by C. Mercier, 227 EDINBURGH REVIEW, 49 (1918); LAPPONI, *HYPNOTISM AND SPIRITISM*, pp. 20-54; TYLOR, *PRIMITIVE CULTURE*; ENC. BRIT., article "Demonology." An article by Francis Wharton on "Spiritualism and Jurisprudence," 16 LIPPINCOTT'S, 423 (1875), deals mainly with the history of magic and witchcraft on their legal side. He refers to the legislation against magicians in the civil law collected in COD. IX. 18.

⁵⁷ ENC. BRIT., article "Hypnotism."

THE PROGRESS OF THE LAW, 1919-1920

ESTATES AND FUTURE INTERESTS (*Concluded*)

CLASSES

I. In *In re Paul's Settlement*¹⁵⁰ funds were settled upon trust for A, a daughter of the settlor, for life, and after her death upon trust for her children or remoter issue as she by deed or will appoint and in default of appointment for all her children, with a gift over in default of issue upon trust for the children of the settlor's other children who, being male, should attain the age of twenty-one or, being female, should attain that age or marry. A had also a power under the settlement, which she exercised, to appoint one half of the trust fund to any husband who should survive her during the residue of his life or until his marriage. A died leaving a husband but no issue. During the life of the husband two of the seventeen grandchildren of the settlor reached twenty-one, and each claimed immediate payment of one-seventeenth of the one half of the capital not covered by the life estate of the widower and a similar share in the other half subject to his interpolated life estate. But the court was governed by *In re Faux*,¹⁵¹ and held that the class of grandchildren remained open until the death of the widower. The decision shows the same reluctance as that in *Hill v. Chapman*¹⁵² to deal with a whole fund in moieties, and to determine the class at different times for each moiety. In *Hill v. Chapman* the residue of personalty was left to grandchildren and a portion of it was set aside to pay annuities to servants. The court held that the grandchildren alive at the death of the testator took, to the exclusion of a brother born thereafter in the life of the annuitants, not only the residue not subject to the life interests but that portion which was subject thereto. Here the fund was treated as a whole and the class determined as

¹⁵⁰ [1920] 1 Ch. 99.

¹⁵¹ 84 L. J. Ch. (N. S.) 873 (1915).

¹⁵² 3 Bro. C. C. 391 (1791).

to the whole at the first possible period of distribution; in the principal case the fund was also treated as an entirety, but the class was left open until the later period of distribution. But is there any real objection to determining the class at one time for one moiety and at another time for the other? Rules for defining classes — often called rules of convenience — are to some extent artificial. But cannot they be molded to achieve the intent which the testator would probably have possessed had he given any thought to this contingency? Where a gift of income was concerned the court treated each year as a new period of distribution and allowed the class from time to time to fluctuate, thus permitting to participate as many members of the natural class as were consistent with convenience.¹⁵³

II. In *Fletcher v. Los Angeles Trust & Savings Bank*¹⁵⁴ a trust was created to pay the income to the testator's daughter Annie K. Fletcher for life and upon her death to transfer the principal to the "children of said Annie K. Fletcher to be equally divided among them." Mrs. Fletcher at the age of 55 and her only child brought an action to terminate the trust. On the evidence of a physician that Mrs. Fletcher was past childbearing, the court ordered the fund to be paid to the plaintiffs. It said, "We think that the phrase 'to the children of said Annie K. Fletcher,' should be construed to apply exclusively to the children of her body and not to include adopted persons." The case has been criticized,¹⁵⁵ but must be deemed correct so far as the termination of the trust is concerned. It is a question of custody and management. But that a later adopted child could not take is another question.

III. In *In re Deloitte*¹⁵⁶ £3000 was left without any intervening life estate in trust for all the children of A who should, whether living at the death of the testatrix or born afterwards, attain twenty-one. The trustees were given power at discretion to advance one-third of "the presumptive or vested" share of such child. A had one child who was born before the testatrix died and attained twenty-one thereafter. Though A was still alive the Court of Appeal declared the son entitled to the whole fund. Under

¹⁵³ *In re Wenmoth's Estate*, 37 Ch. D. 266 (1887).

¹⁵⁴ 28 Cal. App. Dec. 548 (1919).

¹⁵⁵ 7 CAL. L. REV. 353.

¹⁵⁶ [1919] 1 Ch. 209.

the terms of the gift the son of A on becoming of age was entitled to his share of the fund. There being no intervening life estate, that was the period of distribution. Under the rule of *Andrews v. Partington*¹⁵⁷ the class then closed, and after-born members were not admitted. The court met the argument that the use of the term "vested," in the advancement clause, by the testator showed that he intended to include all children, by saying the word applied to another gift in the will of £4000 to the children of A after a prior life estate. *Bateman v. Gray*¹⁵⁸ was discredited.

POWERS

I. In *McCormick v. Security Trust Co.*¹⁵⁹ one E had a special power of appointment over certain land exercisable by deed or will among her children. She had a life estate in the land, but besides the power no other interest. She conveyed part of the land to her son T in fee by deed, reserving a life estate in herself but not mentioning the power. By will she devised all her property to her four children, including T, in equal shares, but again said nothing of the power. The Kentucky statute¹⁶⁰ read thus: "A devise or bequest shall extend to any real or personal estate over which the testator has a discretionary power of appointment, and to which it would apply if the estate was his own property; and shall operate as an execution of such power, unless a contrary intention shall appear by the will." The Kentucky court, following established principles,¹⁶¹ held the power exercised by both instruments.

The New York statute,¹⁶² which resembles the Kentucky act, is thus worded: "Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication." The New York Supreme Court has recently said, that if the donee of the power has an individual interest in the subject of the power as well as his power to appoint, a general de-

¹⁵⁷ 3 Bro. C. C. 401 (1791).

¹⁵⁸ L. R. 6 Eq. 215 (1868).

¹⁵⁹ 184 Ky. 25, 211 S. W. 196 (1919).

¹⁶⁰ KENTUCKY STATS. (1915), § 4845.

¹⁶¹ The authorities are collected in 1 TIFFANY, REAL PROPERTY, 2 ed., § 324.

¹⁶² CONSOL. LAWS, Real Property Law, § 176.

vise will not operate an execution of the power.¹⁶³ This seems to have been the law of England prior to the Wills Act of 1837, which contained the forerunner of the Kentucky and New York Acts.¹⁶⁴ Since then the personal ownership of the donee should be only one circumstance, not conclusive, in determining whether the statutory presumption is rebutted.¹⁶⁵

II. A power of appointment over real and personal property in favor of a child "in such manner" as the donee by will appoint is well exercised by an appointment to a trustee in favor of the child.¹⁶⁶

RULE AGAINST PERPETUITIES

I. In *Lewis Oyster Co. v. West*,¹⁶⁷ Lewis conveyed a dock and premises to West, who covenanted for himself, his heirs, executors and administrators, with Lewis, his heirs and assigns, that if "said West" should sell certain oyster grounds, he would, at the option of "said Lewis" expressed six months from the time Lewis received from West written notice that the oyster grounds had been sold, reconvey the dock and premises to Lewis for a substantial price. The Connecticut court on a construction of the whole instrument found that the power of exercising the option was not confined to the lives of Lewis and West, and held Lewis' future interest void as too remote. One has no difficulty either in reason or in authority in supporting the case. The court in *London & S. W. Ry. Co. v. Gomm*,¹⁶⁸ held an equity created by a covenant to reconvey on notice for £100 land to the railway company, whenever necessary for the railway works of the company, to be a future interest in land which was too remote. It is an executory interest which may not vest in possession until after the limit allowed by law. This case has had a following in this country.¹⁶⁹ In Illinois a contract under seal to reconvey whenever the original owner,

¹⁶³ *Duff v. Rodenkirchen*, 110 Misc. 575, 182 N. Y. Supp. 35, 38, 39 (1920).

¹⁶⁴ 1 VICT., c. 26, § 27.

¹⁶⁵ *Moore v. Avery*, 225 S. W. (Ark.) 598 (1920); *Amory v. Meredith*, 7 Allen (Mass.), 397 (1863); *Lockwood v. Mildeberger*, 159 N. Y. 181, 54 N. E. 803 (1899); FARWELL, POWERS, 2 ed., 235; 1 TIFFANY, REAL PROPERTY, 2 ed., § 324.

¹⁶⁶ *Greenough v. Osgood*, 235 Mass. 235, 126 N. E. 461 (1920).

¹⁶⁷ 93 Conn. 518, 107 Atl. 138 (1919).

¹⁶⁸ 20 Ch. D. 562 (1882).

¹⁶⁹ Professor Woodbine in 29 YALE L. J. 88. But see Professor Rood in 14 MICH. L. REV. 231.

his heirs or assigns, should demand in writing and pay the purchase money, was held too unfair for a court of equity to enforce.¹⁷⁰ In dealing with options it has been pointed out that if the holder of the option had paid the purchase money in advance and had under his contract a power to call for a conveyance at any time merely by giving notice, the Rule against Perpetuities would not be violated, for he would in fact be dominus of the property, and the holder of a present not a future interest.¹⁷¹ Thus a general power to appoint by deed given to the unborn child of a living person is not too remote though it may possibly be exercised one hundred years hence, for upon birth the donee has the power to appoint to himself, and is, therefore, from that moment the owner of the property.¹⁷² And this is the point which is most difficult to deal with in questions of remoteness of interests created by options to purchase. The mere fact that the power of calling for a conveyance is subject to a condition precedent is not conclusive against the holder being dominus of the land. The extent of his control over the performance of the condition and the burden it imposes on him are of importance. If he has merely to give notice in writing to acquire title he has a present interest. But the needing the land for business operations, as in the Gomm case, or the paying a substantial price for a reconveyance, as in the Illinois case, are not so fully within the control of the holder of the power as to prevent his interest from being future. These are Mr. Kales' conclusions,¹⁷³ and, it is submitted, they are sound. The principal case presents no such difficulty, for the condition is in the control not of the holder of the option but of the other party. The court treated with appropriate brevity counsel's contention that the future interest was destructible by the covenantor, the person for the time being entitled to the property, and therefore not within the Rule.¹⁷⁴

II. In *Eastman Marble Co. v. Vermont Marble Co.*¹⁷⁵ the court held that a power created by covenant in A, his heirs, executors, administrators and assigns, of acquiring from a corporation title to nine-tenths of a lot for \$2800 with interest and taxes at

¹⁷⁰ *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634 (1904).

¹⁷¹ *KALES, FUTURE INTERESTS*, 2 ed., § 665.

¹⁷² *GRAY, RULE AGAINST PERPETUITIES*, 3 ed., § 477.

¹⁷³ *KALES, FUTURE INTERESTS*, 2 ed., § 665.

¹⁷⁴ 93 Conn. 518, 107 Atl. 138, 143 (1919).

¹⁷⁵ 236 Mass. 138, 128 N. E. 177 (1920).

any time within twenty-five years created an equitable interest in land void for remoteness. And it further said the contract was void for remoteness so far as recovery of damages was concerned. But no case holds that contract rights are within the Rule, and authority is against the latter part of the decision.¹⁷⁶ If we were today able to start with a clean slate, the Rule against Perpetuities which we would develop might differ from the existing law. For instance, we might condemn a vested interest after a long term for years.¹⁷⁷ It is a matter, however, that should be left to the legislature.¹⁷⁸

III. In the Colorado case of *Miller v. Weston*¹⁷⁹ the testator by the second paragraph of his will left his property on the admission of the will to probate to executors and trustees upon trust to convert and distribute in payment of legacies; and by the fourteenth paragraph directed his executors "as soon after my decease as reasonably may be practicable without material sacrifice of the value of my estate" to sell enough of his property to pay legacies and distribute the funds thus realized "as early as may be done consistently with fair money returns from said estate." The court correctly held that the vesting of the title in the executors and trustees under paragraph two violated the Rule, in spite of the Connecticut decision of *Belfield v. Booth*¹⁸⁰ to the contrary. In the latter case the trustee under a will was to make final distribution fourteen years after the executor had settled with the judge of probate; and it was held that the time of the commencement of the trust could not under the laws of Connecticut be delayed more than seven years. The Colorado court supports Mr. Gray's criticism of this assumption.¹⁸¹

This objectionable portion, the court continued, being void, is to

¹⁷⁶ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532. GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 273*a*, 329-330*c*.

¹⁷⁷ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 970-974.

¹⁷⁸ See some interesting suggestions of Professor Freund in 33 HARV. L. REV. 526, 535-541.

¹⁷⁹ 189 Pac. (Col.) 610 (1920).

¹⁸⁰ 63 Conn. 299, 27 Atl. 585 (1893).

¹⁸¹ Mr. Gray, after suggesting probable contingencies that might well delay the settlement of an estate beyond seven years, proceeds, "or if such delay is absolutely impossible in the *Saturnia regna* of Connecticut, the case can hardly be an authority in jurisdictions in which justice is not so speedy." RULE AGAINST PERPETUITIES, 3 ed., § 214*c*. It would be interesting to see to what extent the probate records of Connecticut bear out the statement of its Supreme Court.

be erased from the will, and title to the estate thus passed to the heirs determinable upon conveyance by the executor under the powers given by paragraph fourteen. And this paragraph, it held, did not violate the Rule, for the sale directed thereunder must be made within a reasonable time, which on a fair construction of the language of the will, urging speed, could not last longer than twenty-one years.¹⁸² The court effectuated, therefore, the intent of the testator without sacrifice of sound reason.

IV. A new doctrine of remoteness of charitable trusts is developed in *Herron v. Stanton*.¹⁸³ The residue of an estate was left to the "Art Association of Indianapolis, Ind.," an existing corporation, provided that the art gallery established thereby should include in its designation the name of the testator. If the association did not comply with the condition, the residue was directed to be distributed among such charitable organizations in Indianapolis as the executor might select. The Appellate Court of Indiana held that the gift over to such charities as the executor select was void for remoteness, and that the art association held the absolute interest free from the condition.

Apart from remoteness the gift to such charities as the executor designate is a charitable trust, not void for indefiniteness.¹⁸⁴

It is probably settled — certainly it has never been doubted in the first three — that in the four cases following, the second gift is void for remoteness.¹⁸⁵ (1) To A on a charitable trust, — on a remote contingency to B, for his own use. (2) To A on a charitable trust, — on a remote contingency in trust for B. (3) To A for his own use, — on a remote contingency to B on a charitable trust. (4) To A in trust for B, — on a remote contingency on a charitable trust.

But where the gift is to one charity and then on a remote contingency to another, the judicial opinion that exists is in favor of the validity of the second interest and an exception to the Rule against Perpetuities.¹⁸⁶ The exception has led to this. In the

¹⁸² *Brandenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575 (1885); GRAY, RULE AGAINST PERPETUITIES, 3 ed., 214*a*, 214*c*.

¹⁸³ 128 N. E. (Ind. App.) 363 (1920).

¹⁸⁴ SCOTT, CASES ON TRUSTS, 276.

¹⁸⁵ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 592-596.

¹⁸⁶ *Christ's Hospital v. Grainger*, 16 Sim. 83 (1847); 1 McN. & G. 460 (1848); 1 H. & Tw. 533 (1849); *Storr's Agricultural School v. Whitney*, 54 Conn. 342, 8 Atl. 141

case of *In re Tyler*¹⁸⁷ the testator bequeathed property to trustees for a charity and provided that, if they should at any time neglect to repair the testator's family vault, the fund should pass to the trustees of a different charity. The gift over was held valid. If this be true, it might be argued that a gift can be made to Harvard College on condition that the President and Fellows pay every year a designated sum to the testator's then heirs; but if they fail to do so the fund to go to Yale University; and that thus a man could provide forever for his family. In neither this case nor in *In re Tyler* has the condition anything to do with the administration of either charity. Mr. Gray has suggested that if land is taken wholly out of commerce, as it is when there is a gift from one charity to another, there is no occasion to apply the Rule which is aimed at preventing property being unmarketable. But he also suggests and leaves this to the judgment of the "learned reader" whether another reason for the Rule is not "that when property is in danger of being lost by a future contingency the property is not likely to be used with that energy and interest with which it would be used if it were a man's own." "These considerations apply with full force to charities."¹⁸⁸

On the whole, these latter arguments and the result of *In re Tyler* lead us to prefer no exception in the case of a gift from one charity to another,¹⁸⁹ and to approve the result of the principal case, which as a decision stands alone. Unfortunately the court gave little consideration to the point, and cited as the leading authority for its position *Brattle Square Church v. Grant*.¹⁹⁰ In that case the prior gift to the charity was on the condition that if it was not put to the designated purpose the land should revert to the testatrix's estate, and she then gave it to her nephew and his heirs. Here there was no gift from one charity to another; but either a gift to a charity with a possibility of reverter, or such a gift with an executory devise over to an individual, in either case a situation governed by entirely different considerations.¹⁹¹

(1887); *MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. Eq. 652, 669, 61 Atl. 1027 (1904); GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 597.

¹⁸⁷ [1891] 3 Ch. 252.

¹⁸⁸ GRAY, RULE AGAINST PERPETUITIES, 3 ed., 603*a*, 603*e*-603*h*.

¹⁸⁹ Professor Scott in 65 U. OF PA. L. REV. 632, 640-642.

¹⁹⁰ 3 Gray (Mass.), 142 (1855).

¹⁹¹ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 40, 41, 592.

V. A trust for the perpetual care of a cemetery lot is void in the absence of statute permitting it.¹⁹² Mr. Gray thought the reasons were that it could not be supported as a charitable trust, and that there were no beneficiaries to enforce it.¹⁹³ But these suggestions run counter to the view, supported by a little authority, that if the trust is to last not longer than the limits set by the Rule against Perpetuities, it is valid.¹⁹⁴ It is assumed in the cases, which hold the trust invalid because it may last till a more remote period, that such provisions of a will violate the Rule.¹⁹⁵ Mr. Gray is entirely right in condemning this as the basis of invalidity.¹⁹⁶ The interest vests within the prescribed limits, and the Rule is no more violated than when a fee simple is given presently to A and his heirs.¹⁹⁷ But the real difficulty is that such perpetual provisions create an indestructible trust for private purposes which may be effective years hence. That such provisions are void has been recognized in decisions,¹⁹⁸ and by leading text writers.¹⁹⁹ And it is predicted that by analogy the period fixed by the Rule against Perpetuities will be adopted as the limit of a valid indestructible private trust.²⁰⁰ A recent Rhode Island case²⁰¹ has thrown no further light on the subject. It merely decides briefly that a bequest of stock in trust to apply the dividends to repairing and caring for the family burial lot is void as a private trust in per-

¹⁹² SCOTT, CASES ON TRUSTS, 282.

¹⁹³ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 894-909a.

¹⁹⁴ *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278 (1900); *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7 (1898); *Pirbright v. Salwey*, WEEKLY NOTES (1896), 86.

¹⁹⁵ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 898, 899; KALES, FUTURE INTERESTS, 2 ed., § 660; Professor G. L. Clark, 10 MICH. L. REV. 32-35.

¹⁹⁶ GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 898.

¹⁹⁷ *Ibid.*, § 232.

¹⁹⁸ *Bigelow v. Cady*, 171 Ill. 229; *Pennsylvania Co. v. Price*, 7 Phila. (Pa.) 465; *Williams v. Herrick*, 19 R. I. 197; *Sadler v. Pratt*, 5 Sim. 632. And see *Fry v. Capper*, Kay, 163 (1853); *Re Teague's Settlement*, L. R. 10 Eq. 564 (1870); *Re Ridley*, 11 Ch. D. 645 (1879). But see *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213 (1899).

¹⁹⁹ Mr. G. L. Clark, 10 MICH. L. REV. 36-41; GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 121i, 121ii; KALES, FUTURE INTERESTS, 2 ed., §§ 658, 659; SCOTT, CASES ON TRUSTS, 282, 65 U. OF PA. L. REV. 632, 642.

²⁰⁰ Mr. G. L. Clark, 10 MICH. L. REV. 41; GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 121i; Mr. A. W. Scott, 65 U. OF PA. L. REV. 632, 642; Mr. Gray thought that in calculating the period we should begin from the beginning of the interest, § 121ii. Mr. Kales's view, that we should start from the testator's death, is, however, likely to prevail. *Re Ridley*, 11 Ch. D. 645 (1879); 19 HARV. L. REV. 598, 604 n.; 20 HARV. L. REV. 192, 202.

²⁰¹ *Shippee v. Industrial Trust Co.*, 110 Atl. (R. I.) 410 (1920).

petuity. No suggestion is given whether by perpetuity is meant the Rule against Perpetuities, which of course does not apply, or the more modern rule, above indicated, making void certain indestructible trusts. But this is a common error.²⁰²

VI. A right of entry for condition broken has been held, and held consciously, in Colorado not to be within the Rule against Perpetuities.²⁰³ This is the law in the United States, though in many of the cases the courts were unaware that they were passing on the point.²⁰⁴ The law of England,²⁰⁵ reason, and expediency are the other way.²⁰⁶

Professor Freund in a recent article has made some suggestions in regard to the separability of limitations, and the policy against remoteness and particularly its application to presentation against estates of claims payable at a remote date.²⁰⁷

VII. If personal property is bequeathed in trust to pay the income to such persons as A shall by will appoint and A by will appoints to B, who was not living at the death of the testator, for life and on B's death to his children, is the appointment to B's children good? Mr. Gray²⁰⁸ emphatically answered this question in the negative; Mr. Kales²⁰⁹ and Mr. Thorndike²¹⁰ with equal emphasis in the affirmative. The English law²¹¹ on the whole is in favor of the interest; the American law against it.²¹² Massachusetts has recently fallen in line with Mr. Gray and the American decisions.²¹³ Where a power is general to appoint by deed or will

²⁰² GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 898-899. Compare *Smith v. Heyward*, 104 S. E. (S. C.) 473 (1920).

²⁰³ *Strong v. Shatto*, 187 Pac. (Cal.) 159 (1920).

²⁰⁴ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 304-307.

²⁰⁵ *In re Hollis's Hospital*, [1899] 2 Ch. 540.

²⁰⁶ GRAY, RULE AGAINST PERPETUITIES, § 304. But Mr. Kales for historical reasons believes our law to be correct. KALES, FUTURE INTERESTS, § 662.

²⁰⁷ 33 HARV. L. REV. 526, 531, 535.

²⁰⁸ GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 526-526b; 948-969.

²⁰⁹ 26 HARV. L. REV. 64; KALES, FUTURE INTERESTS, 2 ed., §§ 693-695.

²¹⁰ 27 HARV. L. REV. 705, 709.

²¹¹ *Rous v. Jackson*, L. R. 29 Ch. D. 521 (1885); *In re Flower*, 55 L. J. Ch. 200 (1885); *Stuart v. Babington*, L. R. 27 Ir. 551 (1891). *Contra*, *In re Powell's Trusts*, 39 L. J. Ch. 188 (1869).

²¹² *Reed v. McIlvain*, 113 Md. 140, 77 Atl. 329 (1910); *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91 (1889); *Lawrence's Estate*, 136 Pa. 354, 20 Atl. 521 (1890); *Boyd's Estate*, 199 Pa. 487, 49 Atl. 297 (1901). See MINNESOTA, GEN. STATS. (1913), §§ 6780, 6781; *Hershey v. Meeker County Bank*, 71 Minn. 255, 73 N. W. 967 (1898).

²¹³ *Minot v. Paine*, 230 Mass. 514, 120 N. E. 167 (1918).

the rule is undoubted that for the purposes of the Rule against Perpetuities the validity of the exercise of the power depends not on the distance of vesting of the interest appointed from the creation of the power but from the time of the exercise thereof.²¹⁴ The donee of such a power has an interest so closely approximating ownership that his exercise may be considered as a fresh starting point for the purposes of the Rule. He has the present unconditional right to acquire the absolute interest. And when he exercises the power he is in effect limiting his own interest.

The present problem concerns itself with the inquiry whether this result can be reached in the case of a donee living at the testator's death who by the will has been given a general power exercisable by will only. Against reaching this result it may be said that the donee, far from being able to appoint to himself and become absolute owner, is the only person to whom the appointment can surely not be made. He, therefore, does not come under the exception to the general doctrine that the exercise of powers for the purposes of the Rule must be referred to the time of their creation.²¹⁵ Mr. Kales points out that the power itself is valid to start with, for it must be exercised in lives in being at the time of its creation. He then says that though the donee of the general power by will is not practically owner at the time of the creation of the power, he certainly becomes so at his death, and, if he becomes such an owner within the limits of the Rule, his exercise is entitled to be judged from that juncture.²¹⁶

Mr. Kales has had the last word. In his new edition published since *Minot v. Paine* he suggests that the rule there established tends to set a trap for testators, in making a distinction between general powers exercisable by deed or will and those exercisable by will only. And he answers a difficulty, put to him by Mr. Gray in correspondence and suggested in Mr. Gray's book;²¹⁷ *i. e.* an unfortunate result of the later English cases is that if A have a general power to appoint by will and appoints to B for life and then as B shall by will appoint, this device may be kept up throughout the alphabet. The reply is that the scheme is highly objec-

²¹⁴ GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 524.

²¹⁵ *Ibid.*, § 952.

²¹⁶ KALES, FUTURE INTERESTS, 2 ed., §§ 693, 695.

²¹⁷ GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 514.

tionable, but that A's appointment to B for life and then as B by will appoint is void, apart from the Rule, under the newer doctrine that a substantial restraint on the alienation of the fee simple to last until a remote period is illegal. Such a restraint is here created by splitting up the interests, so that reckoning from the death of A's testator the alienation of the fee has been seriously restricted for longer than lives in being and twenty-one years.²¹⁸

It is said elsewhere by way of analogy in support of the view assimilating powers by will to powers by deed or will that the appointed property often by judicial decision and statute is subject to the inheritance taxes as descended from the donee.²¹⁹ Much reliance, however, cannot be placed on this suggestion, for courts and legislatures often treat similarly special powers. No one contends that for purposes of the Rule special powers should be dealt with in the same fashion as general powers by deed or will. Editorial comment on *Minot v. Paine* is divided.²²⁰ Mr. Tiffany states the problem but expresses no opinion.²²¹

VIII. There is a careful note in the *Columbia Law Review*²²² discussing a case in the Appellate Division of the Supreme Court of New York²²³ which involved the distribution of unlawful accumulations, which pass under Art. III, Section III, of the Real Property Law "to the persons presumptively entitled to the next eventual estate."

IX. Minnesota adopted the provisions of the New York statutes on the subject of remoteness of interests in land,²²⁴ but did not adopt those in regard to remoteness of interests in personal property. The Supreme Court has just decided that a trust to invest funds for the benefit of a class under the act for uses and trusts²²⁵ is not

²¹⁸ KALES, FUTURE INTERESTS, 2 ed., §§ 658, 695.

²¹⁹ 19 COLUMBIA L. REV. 65; GLEASON AND OTIS, INHERITANCE TAXES, 2 ed., 173-180.

²²⁰ Supporting *Minot v. Paine*, 3 MINNESOTA L. REV. 134; opposing it, 19 COLUMBIA L. REV. 62.

²²¹ TIFFANY, REAL PROPERTY, 2 ed., § 334.

²²² 20 COLUMBIA L. REV. 887. See *ibid.*, 767.

²²³ *In re Kohler*, 193 App. Div. 550, 183 N. Y. Supp. 550 (1920).

The Michigan statute is construed in *Cary v. Toles*, 210 Mich. 30, 177 N. W. 279 (1920), and in *Woolfit v. Preston*, 203 Mich. 502, 169 N. W. 838 (1918). See the remarks of Professor E. C. Goddard in 19 MICH. L. REV. 430-431.

²²⁴ MINNESOTA STATS. (1913), §§ 6664, 6665.

²²⁵ STATS. (1913), § 6710, subd. 5.

invalid where personalty is the subject matter of the trust because it may suspend the power of alienation beyond the period fixed by the statute as to land.²²⁶

X. An Elizabethan Bill against Perpetuities, which in 1597 the discussions of Chudleigh's case occasioned, is printed with comments by Mr. W. S. Holdsworth in 35 *Law Quarterly Review*, 258.

RESTRAINTS ON ALIENATION

I. In an estate in fee simple a covenant against alienation, a condition or conditional limitation on alienation, is void everywhere. And the weight of authority and reason is against the validity of such covenant condition, or conditional limitation even when limited in time.²²⁷ The Supreme Court of Illinois has just held a conditional limitation on alienation of a fee before the devisee reached thirty to be bad.²²⁸ In Kentucky²²⁹ it has just been said, following earlier cases in that commonwealth, that a provision in a will attached to a fee that the devisee should have no power to "sell or dispose of any part thereof until fifteen years have elapsed," prevented the owner from selling, but, on the special context, not from devising the land.

II. Two California cases have attracted widespread comment.²³⁰ The Civil Code²³¹ has this provision: "Conditions restraining alienation, when repugnant to the interest created, are void." In *Title Guarantee & Trust Co. v. Garrot*²³² the grantee of a fee simple covenanted for herself, her heirs and assigns, not to sell or lease any portion of the premises to any person of African, Chinese, or Japanese descent, with a condition forfeiting the property on such

²²⁶ *In re Bell's Will*, 179 N. W. (Minn.) 650 (1920); 30 YALE L. J. 429; 1 MINNESOTA L. REV. 226-229. See a recent article by Professor Oliver S. Rundell, "The Suspension of the Absolute Power of Alienation," in 19 MICH. L. REV. 235. The Michigan statute is construed in *Cary v. Toles*, 210 Mich. 30, 177 N. W. 279 (1920), and in *Woolfit v. Preston*, 203 Mich. 502, 169 N. W. 838 (1918). See 19 MICH. L. REV. 430-431.

²²⁷ GRAY, RESTRAINTS ON ALIENATION, 2 ed., §§ 45-54.

²²⁸ *McIntyre v. Dietrich*, 128 N. E. (Ill.) 321 (1920).

²²⁹ *Speckman v. Meyer*, 187 Ky. 687, 220 S. W. 529 (1920). And see *McNamara v. McNamara*, 293 Ill. 54, 127 N. E. 130 (1920).

²³⁰ 8 CALIFORNIA L. REV. 107, 188; 20 COLUMBIA L. REV. 353; 18 MICHIGAN L. REV. 548; 68 U. OF PA. L. REV. 185.

²³¹ CALIFORNIA CIV. CODE, § 711.

²³² 183 Pac. (Cal.) 470 (1919).

sale or lease. The covenant and condition was not to last beyond January 1, 1925. The grantee sold the premises, which came by mesne conveyances to a negro of African descent. The District Court of Appeal held these provisions, whether operating as covenants or conditions, bad. The Supreme Court denied a rehearing. In *Los Angeles Inv. Co. v. Gary*²³³ the fee of a city lot was conveyed with a covenant that the "property shall not be sold leased or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots"; and there was also a condition providing for forfeiture for breaches. In the deed the covenants and conditions were declared to be operative only until Jan. 1, 1930. The property was sold to and occupied by a colored man of African descent. The Supreme Court, approving the earlier case, held the covenants and conditions against sale, though limited as to persons and time, void, but declared a forfeiture for breach of the condition against occupation, which it held valid.

Both courts relied upon the code provision; but the District Court of Appeal said that it was declaratory of the common law. Both fell in line with authority in holding that the time limit placed on the restrictions against alienation did not affect their invalidity. That the restrictions are in the form of a covenant, condition, or conditional limitation, is immaterial.²³⁴ That the restraints on alienation in the principal cases were qualified as to persons presents greater difficulty. The authorities being "in hopeless conflict," Mr. Gray suggested as a possible rule that "the condition is good if it allows of alienation to all the world with the exception of selected individuals or classes; but is bad if it allows of alienation only to selected individuals or classes."²³⁵ But this distinction cannot depend on mere form; and if alienation is allowed to all except a large number of large classes the test has reached a breaking point. This point is approached in the California cases. Moreover, the form of the restriction in the two deeds is not quite the same. To which category does the restriction in the later case, that "the property shall not be sold to any persons other than

²³³ 186 Pac. (Cal.) 596 (1920).

²³⁴ GRAY, RESTRAINTS, 2 ed., §§ 19, 29a; *Prey v. Stanley*, 110 Cal. 423, 427, 42 Pac. 908 (1895).

²³⁵ GRAY, RESTRAINTS, 2 ed., §§ 31-44. But in § 44 Mr. Gray seems to think it wiser to disallow such qualified restrictions altogether.

of Caucasian race," belong? A conveyancer would have great difficulty in passing on these titles under this test.

Another criterion, which has been suggested by some authorities, is that the condition or covenant is bad only when all alienation is substantially fettered.²³⁶ But this allows considerable restriction and is even more difficult of application by the conveyancer than the first. Furthermore, conditions are not in the United States subject to the Rule against Perpetuities.²³⁷ And the repugnant and fettering whims of settlors and testators may with us last for centuries. Happy is the jurisdiction whose court, uncontrolled by prior decisions, or under the protection of a code provision, may declare all such restraints on alienation invalid. But two cases²³⁸ within the decade have upheld them, on facts not very different from those in the decisions under discussion. The California courts were clearly right in saying the provisions did not violate the fourteenth amendment of the Federal Constitution, which applies only to action by the state not to contracts of individuals.²³⁹

But while the alienation cannot be restricted, the use of property may, and unless use by individuals — in the particular case — can be construed to mean a tenancy and therefore an alienation, the Supreme Court in the second case has gone a long way to nullify the effect of the prior decision.²⁴⁰

III. Restraints on alienation of legal life estates have recently been held void in Illinois.²⁴¹ The court overlooked an earlier Illinois case of which Mr. Kales says that it is "probably the only case in any jurisdiction in which a legal life estate has been held subject to an absolute restraint on alienation."²⁴²

IV. The validity of a gift of land or personalty, if the first taker who has been given a fee or absolute interest does not dispose of the property by deed or will, has often been questioned. As to personalty, the future interest may be held invalid because of uncer-

²³⁶ GRAY, RESTRAINTS, 2 ed., §§ 43, 44.

²³⁷ *Ante*, p. 648.

²³⁸ *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Koehler v. Rowland*, 275 Mo. 573, 205 S. W. 217 (1918).

²³⁹ 7 CALIFORNIA L. REV. 191.

²⁴⁰ *Ibid.*, 190.

²⁴¹ *Randolph v. Wilkinson*, 128 N. E. (Ill.) 525 (1920).

²⁴² *Christy v. Pulliam*, 17 Ill. 59 (1855); *Pulliam v. Christy*, 19 Ill. 331 (1857); *Christy v. Ogle*, 33 Ill. 295 (1864); GRAY, RESTRAINTS, 2 ed., §§ 135, 138; KALES, FUTURE INTERESTS, 2 ed., § 730.

tainty and the great difficulty of ascertaining the subject matter of the gift over.²⁴³ But no such explanation can be advanced for holding the devise over of land invalid, and the cases thus deciding have been severely criticized.²⁴⁴ *In re Ashton*²⁴⁵ reaches an absurd result. A bequeathed the residue of all his land and chattels to his sister B absolutely, but if B was at "her decease mentally unfit to manage her own affairs" then to his brother, C. Before A's death, B while sane made a will leaving A the residue of her estate. A died, and on B becoming insane the court held she took the absolute interest in A's property free from the gift to C. That was held bad as substantially a gift over on intestacy. In other words, if a man gives a relative an absolute interest in property and says, "if at your death you are capable of making an intelligent choice as to the disposition of your estate you are free to do so; but if you are not, I wish now to do it for you," such a clause is bad. Public policy, far from being opposed to such a conditional limitation, is in favor of it. Indeed, the provision was not one against intestacy except in a limited sense. If B died insane she would have died testate, for while competent she had made a will.

SPENDTHRIFT TRUSTS

On the subject of spendthrift trusts in Connecticut the *dicta* were conflicting down to 1899.²⁴⁶ In that year a statute enacted that "Whenever property is given to trustees to pay over the income to any person, and there is no provision for accumulation, and the trustees are not expressly authorized to withhold such income, and the income is not expressly given for the support of the beneficiary or his family, such income shall be liable in equity to the claims of all creditors of such beneficiary."²⁴⁷ A woman by will left all her property in trust to pay the income to her husband "for the sole and separate use of my said husband for and during all the term of his natural life, and so that the same shall not be

²⁴³ GRAY, RESTRAINTS, 2 ed., § 58.

²⁴⁴ *Ibid.*, §§ 59-74g; KALES, FUTURE INTERESTS, 2 ed., § 723; Manley O. Hudson, 17 MISSOURI BULLETIN, 8, LAW SERIES, 11, pp. 37-55.

²⁴⁵ [1920] 2 Ch. 481.

²⁴⁶ GRAY, RESTRAINTS, 2 ed., §§ 195-212. See *Huntington v. Jones*, 72 Conn. 45, 50, 43 Atl. 564 (1899); *Mason v. Rhode Island Hospital Trust Co.*, 78 Conn. 81, 85, 61 Atl. 57 (1905); *Holmes v. Bushnell*, 80 Conn. 233, 67 Atl. 479 (1907).

²⁴⁷ CONNECTICUT GEN. STATS. (1918), § 5872.

liable for the contracts, debts or engagements of my said husband." The Supreme Court of Connecticut ²⁴⁸ has just said that the statute was exclusive and included all methods by which spendthrift trusts could be created; and that, as none of the essentials of such a trust mentioned in the statute appeared in the will, the husband's interest was liable for an indebtedness existing at the time of the will and the death of the testatrix. The court assumed that had the will been drawn to meet the statute an effective spendthrift trust could have been created, but declined to pass on the important question for the Connecticut conveyancer "whether the statute intends that all income may be given by such a trust to the support of the beneficiary and his family, or the support intended is limited to reasonable support in view of the station in life of the beneficiary, or limited in some other way." ²⁴⁹

Joseph Warren.

HARVARD LAW SCHOOL.

²⁴⁸ *Carter v. Brownell*, 111 Atl. (Conn.) 182 (1920).

²⁴⁹ *Carter v. Brownell*, 111 Atl. (Conn.) 185 (1920). The case is commented on in 30 YALE L. J. 203.

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KNOWLEDGE OF A DIRECTOR AS KNOWLEDGE OF A CORPORATION.¹—A meeting of the board of directors of a banking corporation has been called. Seven directors are present. The discount of a promissory note of a partnership with which the bank has had many similar transactions is before the board. The note has been signed by one of the partners on behalf of the firm as has been customary. But the fact that the partnership was dissolved prior to the affixing of this signature is known only to two of the directors, who make no mention of it in the meeting. These two directors, with intent to serve their own interests and in disregard of their duty to the corporation, vote in favor of the discount and two of the other directors vote likewise. The other three vote against discounting the note, but the discount is made. The bank now sues the other partners upon the note. Will it be charged with knowledge of the dissolution so as to bar its recovery?

In the above hypothetical case it will be noted that the directors having the knowledge of the dissolution (1) are engaged in corporate business at a board meeting, (2) do not comprise a majority of the directors present, but (3) their votes are essential to produce the corporate action of discounting the note.

There are various situations in which the knowledge of a director becomes a material issue, but which are distinct from the present prob-

¹ For a discussion of this subject, which has received scant attention in legal periodicals, see U. M. Rose, "Notice to Directors — How Far Binding on a Corporation," 6 SOUTH. L. REV. 45; Edwin G. Merriam, "Notice to Corporations," 6 SOUTH. L. REV. 793.

lem. Suppose a director is acting, not as a member of the board, but as an agent of his corporation. What effect has his knowledge upon the corporation? The law is settled that a corporation is responsible to the same extent as a natural principal for the acts of its agents, including improper acts, done in the scope of the agency.² An agent's knowledge of facts concerning any transaction done in the scope of the agency should be treated as his acts are treated, and a principal, corporate or natural, should therefore be bound by it.³ But courts have developed an exception to such a general rule where an interest of the agent "adverse" to his principal is shown and have refused to impute knowledge in such cases.⁴ When the effect of an agent's acts are in controversy as between the principal and third persons the fact that the agent has acted improperly or adversely towards his principal does not protect the principal, provided the act was within the scope of the agency.⁵ Why should a different rule prevail when the effect of an agent's knowledge is in dispute? The misleading nature of the word "adverse" may be the answer. In the majority of cases where the agent is said to be acting "adversely," it will be found that he is acting for himself, and not for his principal, so that the act done cannot be considered as done within the scope of the agency.⁶ Whether an act is within the scope of the agency depends not solely on the nature of the act, but also on the intent with which the act is done.⁷ Thus, in *Allen v. The South Boston R. R. Co.*,⁸ the plaintiff employed a stockbroker to purchase stock of the defendant corporation. The broker was treasurer of the corporation and had been intrusted with blank certificates of stock which he fraudulently and for his sole benefit sold to the plaintiff after all the capital stock had been issued. The defendant sought to have the knowledge of the broker imputed to the plaintiff but the court refused to do so on the ground that the acts of the broker were beyond the limits of his agency with the plaintiff. It is submitted that this is the correct test, whether the principal is a human being or a corporation, and that this is the only significance to be attached to the adverse interest of an agent.⁹

But when a director, who has not been delegated an agent with respect to the matter in question, is present at the meeting of the board when action is taken upon the matter, and does not communicate to the board the pertinent information which he has, will the corporation be charged with his knowledge? It is clear that the mere participation of one such director in the corporate action is cause for imputing his knowledge to

² *The N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30 (1865). See *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 71, 86 (1854).

³ See 2 *MECHEM, AGENCY*, 2 ed., § 1822; *WHARTON, AGENCY*, § 184.

⁴ *American Surety Co. v. Pauly*, 170 U. S. 133 (1898). See 4 *FLETCHER, CYC. CORP.*, § 2243; 2 *MECHEM, AGENCY*, 2 ed., § 1815.

⁵ *North River Bank v. Aymar*, 3 Hill (N. Y.), 262 (1842); *Limpus v. London General Omnibus Co.*, 1 H. & C. 526 (1862); *Howe v. Newmarch*, 12 Allen (Mass.), 49 (1866). See *HUFFCUT, AGENCY*, 2 ed., §§ 153, 157.

⁶ *Platt v. Birmingham Axle Co.*, 41 Conn. 255 (1874); *Frenkel v. Hudson*, 82 Ala. 158, 2 So. 758 (1887); *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 43 N. E. 912 (1896); *American Surety Co. v. Pauly*, *supra*.

⁷ *Illinois Central R. R. Co. v. Latham*, 72 Miss. 32, 16 So. 757 (1894).

⁸ 150 Mass. 200, 22 N. E. 917 (1889).

⁹ See 2 *MECHEM, AGENCY*, 2 ed., § 1822.

the corporation provided such director did not withhold the information to serve a purpose of his own.¹⁰ It is his duty to disclose to the board all facts pertinent to the matter before it,¹¹ and the corporation should have a remedy against him for violation of that duty. It will promote more intelligent corporate action if each director realizes that his failure to impart pertinent information will be a ground for charging the corporation. Such a rule does not make the conduct of corporate business too risky, for a director will rarely¹² fail to impart pertinent information unless he has a purpose of his own to be served.

Some courts have held that the corporation is likewise to be charged with the knowledge of a single director, acting in a board meeting, even when he has withheld his information to serve a purpose of his own.¹³ Although an agent's adverse interest may remove his acts beyond the scope of the agency, it would seem that a director is acting as a director, whatever his motives, when he votes at a board meeting. But, it is submitted, this rule is too severe when the single director was not essential to produce the directorate action.¹⁴ For it charges the corporation with knowledge of a nonessential minority in cases where we may be sure the pertinent information will not be revealed to the rest of the board.

But if the corporation is seeking to assert some right or title which it would not have obtained without the action of its directors, then the corporation ought to be charged with the knowledge of any single director, whose vote was essential to the directorate action, even if the director so voted, with intent to serve his own interests and in disregard of the interests of the corporation.¹⁵ And this should be the law, even if there is no precise analogy from the law of agency; for the relation of a corporation to those human beings in whom are vested the powers of management is a closer relation than that between one human being who is a principal and another human being who is an agent. It would follow that, in the hypothetical case put at the opening of the note, the corporation should be charged with knowledge of the dissolution of the partnership, because the vote of the two directors who acted improperly was essential to bring about the discount. *A fortiori*, the corporation

¹⁰ *Nat. Security Bank v. Cushman*, 121 Mass. 490 (1877). See 4 FLETCHER, CYC. CORP., § 2232. Cf. STORY, AGENCY, 9 ed., § 140, b.

¹¹ *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394 (1843). See Edwin G. Merriam, "Notice to Corporations," 6 SOUTH. L. REV. 793, 811.

¹² The scarcity of cases involving such a situation is not surprising and seems convincing.

¹³ *Bank of United States v. Davis*, 2 Hill (N. Y.), 451 (1842). See 1 MORSE, BANKS AND BANKING, 3 ed., § 134. *Contra*, *La. State Bank v. Senecal*, 13 La. 525 (1839); *Terrell v. The Branch Bank at Mobile*, 12 Ala. 502 (1847); *Custer v. Tompkins County Bank*, 9 Pa. St. 27 (1848). Cf. *Shattuck v. Guardian Trust Co.*, 145 App. Div. 734, 130 N. Y. S. 658 (1911).

¹⁴ Though many courts recognize this and do not impute a director's knowledge to the corporation, the reason given is that he was acting "adversely" and hence that knowledge of the corporation will not be presumed. *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282 (1885); *Home Building & Loan Ass'n v. Barrett*, 160 Mo. App. 164, 141 S. W. 723 (1911). This overlooks the fact that all corporate action must, in the nature of things, be vicarious and that the problem is to determine when it is proper to hold a corporation for the acts, omissions, or knowledge of human beings.

¹⁵ *Mercier v. Canonge*, 8 La. Ann. 37 (1853). See 1 MORSE, BANKS AND BANKING, 3 ed., § 112 (6).

would be charged with knowledge possessed by the majority of the directors, even if they did not disclose it to the minority, and acted with intent to serve their own interests and in disregard of the interests of the corporation.¹⁶ The converse situation is illustrated by the recent case of *Western Securities Co. v. Silver King Consolidated Mining Co.*,¹⁷ where the votes of the two directors who were acting to serve their own fraudulent scheme comprised only a minority and were not essential to produce the directorate action. Their knowledge was properly held not to be imputed to the corporation.

TRIAL OF CIVILIANS BY MILITARY COURTS IN TIME OF PEACE. — A federal court was recently faced with the problem of the jurisdiction of a military court over civilians. The governor of Texas had suspended the local officials, declared a state of martial law, and directed the militia to maintain law and order. The defendant was fined and, upon his refusal to pay, imprisoned by a military court for exceeding the speed limits fixed by ordinance. His petition for a writ of *habeas corpus* was denied by the federal court and the jurisdiction of the military court upheld as a proper exercise of martial law.¹

Martial law in its correct sense is simply the will of the military commander of a territory exercised in accordance with the usages of war.² It corresponds in a way to what in France and other continental countries is called a state of siege.³ Where it exists the functions of the civil tribunals are or may be suspended and for the time vested in the military arm of the state. And just as the régime of the civil law is both preventive and punitive so also is that of martial law.⁴ Our problem is to determine whether there is a place in our constitutional system for martial law in this sense apart from actual war.

Martial law must be sharply distinguished from the common-law power of a sovereign, — sometimes called qualified martial law,⁵ — to employ all force necessary to meet opposition to the law of the land.⁶ By virtue of that power the state may in time of disturbance call upon the militia to help maintain the orderly administration of the law by dispersing mobs, quelling riots, safeguarding life and property, and arresting and detaining persons obnoxious to the safety of the community.⁷ Indeed the proper authorities must, when the occasion arises, so

¹⁶ See *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. (Ky.) 545, 559 (1831).

¹⁷ 192 Pac. 664 (Utah). See RECENT CASES, p. 674; *infra*.

¹ United States *ex rel. McMaster v. Wolters*, 268 Fed. 69 (1920). For a statement of the facts in this case see RECENT CASES, p. 673, *infra*.

² See GLENN, *THE ARMY AND THE LAW*, 157, 158.

³ See DICEY, *LAW OF THE CONSTITUTION*, 8 ed., 287.

⁴ See GLENN, *supra*, 166.

⁵ See *Commonwealth v. Shortall*, 206 Pa. 165, 55 Atl. 952 (1903).

⁶ See DICEY, *supra*, 284; see Holdsworth, "Martial Law Historically Considered," 18 L. Q. REV. 117, 128. See BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW*, 433.

⁷ *Luther v. Borden*, 7 How. (U. S.) 1 (1849); *Druecker v. Salomon*, 21 Wis. 621 (1867); *In re Boyle*, 6 Ida. 609, 57 Pac. 706 (1889); *Commonwealth v. Shortall*, *supra*; *In re Moyer*, 35 Colo. 159, 85 Pac. 190 (1905); *Moyer v. Peabody*, 212 U. S. 78 (1909);

use the militia.⁸ But the militia so employed is merely acting the preventive, defensive rôle of martial law. The present question is whether the sovereign in time of peace can go a step further, proclaim absolute martial law, and thus authorize the militia to adopt the punitive rôle and subject those civilians taken in custody to military trial.

In England an answer in the negative may safely be ventured.⁹ In the United States the authorities are not of one mind.¹⁰ On the one hand it has been held that in time of local insurrection the military summoned by the governor are in control to the exclusion of the civil authorities¹¹ and that the military tribunals have jurisdiction to try and punish civilians.¹² The reasons given are that there is a *de facto* state of war,¹³ the continued session of the civil courts notwithstanding;¹⁴ that motives of fear or favor render the ordinary civil processes ineffective or entirely inoperative; that the necessity of the situation demands summary action and justifies the temporary dethronement of the constitutional guarantees in order to hasten the restoration of the sovereignty of the law; that in time of need executive process is due process.¹⁵

On the other hand it has been held¹⁶ that the declaration of the governor that a state of insurrection exists in a given district does not create a new legal situation,¹⁷ but that it is merely the recognition of an existing state of affairs¹⁸ which calls for the exercise of the state's reserve police force. The militia may be called out simply to restore order, to suppress but not to punish.¹⁹ A riot or insurrection is not

State v. Brown, 71 W. Va. 519, 77 S. E. 243 (1912); *Ex parte Jones*, 71 W. Va. 567, 77 S. E. 1029 (1913); *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947 (1914); *Hatfield v. Graham*, 73 W. Va. 759, 81 S. E. 533 (1914).

⁸ *Rex v. Kennett*, 5 C. & P. 282 (1781); *Rex v. Pinney*, 5 C. & P. 254 (1832).

⁹ See 3 COKE'S INSTITUTES, 52; 1 HALE, P. C., 500; 1 HALE, HISTORY OF THE COMMON LAW, 5 ed., 55; DICEY, *supra*, 281-283, 289, 544; F. Pollock, "What is Martial Law," 18 L. Q. REV. 152-158.

¹⁰ See State v. Brown, *supra*; *Ex parte McDonald*, *supra*. See G. S. Wallace, "The Need, the Propriety, and the Basis of Martial Law," 8 JOUR. OF CRIM. LAW AND CRIMINOLOGY, 167-189; H. J. Hershey, "Power and Authority of Governor and Militia in Domestic Disturbances," 19 LAW NOTES, 28-33; GLENN, *supra*; A. C. VANDIVER, MARTIAL LAW; A. J. Lobb, "Civil Authority *versus* Military," 3 MINN. L. REV. 105, 111; 2 WINTHROP'S MILITARY LAW AND PRECEDENTS, 2 ed., 1274. For suggestions as to legislation on the subject, see H. W. Ballantine, "Qualified Martial Law, a Legislative Proposal," 14 MICH. L. REV. 102, 197.

¹¹ State v. Brown, *supra*; *Ex parte Jones*, *supra*. See Commonwealth v. Shortall, *supra*, 172, 173.

¹² State v. Brown, *supra*. See *Ex parte Jones*, *supra*, 574. See 15 COL. L. REV. 177; 26 HARV. L. REV. 636.

¹³ See *Ex parte Jones*, *supra*, 605; Commonwealth v. Shortall, *supra*, 171, 172, 174.

¹⁴ *Ex parte Marais*, 1902 A. C. 109, is not an authority for this proposition. There a war was in progress. The court merely held that in view of the large-scale operations of modern warfare it was reasonable to treat the territory in question as though actually within the zone of battle. See C. Dodd, "*Ex parte Marais*," 18 L. Q. REV. 147. Cf. *Ex parte Milligan*, 4 Wall. (U. S.) 2, 121 (1866).

¹⁵ State v. Brown, *supra*.

¹⁶ *Ex parte McDonald*, *supra*.

¹⁷ See Holdsworth, *supra*, 129.

¹⁸ See Cushing, 8 OPINIONS OF ATTORNEY GENERALS 374.

¹⁹ See *Ex parte Milligan*, *supra*, 121. See GLENN, *supra*, 157-190; A. C. VANDIVER, *supra*, 13; E. M. Cullen, "The Decline of Personal Liberty in America," 48 AM. L. REV. 345, 346, 352. In *Moyer v. Peabody*, *supra*, holding that custody by the military authorities during the period of disturbances is warranted, there is some broad lan-

war.²⁰ The existence of either does not, therefore, put the citizens of the affected area beyond the pale of the law.²¹ The authority to call troops out for police purposes and to employ any amount of force necessary to abate the disorder is adequate to meet all needs. A reasonable belief on the part of the military authorities that a man should be kept in custody during the period of disorder is a sufficient answer to a petition for a writ of *habeas corpus*.²² If local officials fail in their duty there are legal ways for replacing them with others. If juries will not convict, a change of venue may be had. The Petition of Right²³ was leveled at military trial of civilians in time of peace. Its substance is found in our federal and state constitutions,²⁴ — the latter often providing expressly that the military shall at all times be subordinate to the civil authorities.²⁵ The governor in calling out the militia acts as the chief civil officer of the state²⁶ by virtue of his constitutional power to enforce the law, but in the absence of constitutional authority he has no power to create courts which have no standing in our judicial system or to suspend the law of the land.²⁷ To imply such a power would be to fly in the face of the constitutional history of England and the United States. Finally, while the decision in *Ex parte Milligan*²⁸ rests on a statute²⁹ it contains a strong *dictum* that military courts have no jurisdiction over civilians beyond the zone of actual war.³⁰

The validity and force of most of the arguments on either side depend upon the extent and duration of the disorder. But even if there is a very extensive and protracted insurrection it is doubtful if such serious constitutional objections could be overcome. In view of the frequency of local disturbances where the militia is called out and of the magnitude of the public interests concerned the problem involved in *United States*

guage which offhand would seem *contra*. But this language must be considered as bearing only upon the particular question involved and as limited by the following *dictum* (p. 85): "Such arrests are not necessarily by way of punishment but are by way of precaution to prevent the exercise of hostile power." See *Commonwealth v. Shortall*, *supra*, 170, "It [martial law] was put in force only as to the preservation of public peace and order not for the ascertainment or vindication of private rights or the other ordinary functions of government." See *In re Moyer*, *supra*, 167, where the court is careful to add, "He was not tried by any military court, or denied the right of trial by jury, neither is he punished for violation of the law nor held without due process of law."

²⁰ *Ex parte McDonald*, *supra*.

²¹ See *F. Pollock*, *supra*, 157; *BIRKHIMER*, *supra*, § 437.

²² *Moyer v. Peabody*, *supra*; *In re Moyer*, *supra*; *In re Boyle*, *supra*; *Ex parte Jones*, *supra*.

²³ See 3 CHAS. I, c. 1, especially § 7; 5 STATUTES OF THE REALM, 24.

²⁴ See TEXAS CONSTITUTION, Art. I, §§ 10, 12, 15, 19, 20, 28.

²⁵ See TEXAS CONSTITUTION, Art. I, § 24. The constitution of every state in the union, except New York, provides for subordination of the military to the civil power. See STIMSON, FEDERAL AND STATE CONSTITUTIONS, § 292.

²⁶ *Ex parte McDonald*, *supra*; *Ela v. Smith*, 5 Gray (Mass.), 121 (1855); *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484 (1911); *In re Moyer*, *supra*, 168.

²⁷ See *Ex parte Milligan*, *supra*, 121.

²⁸ See note 14, *supra*.

²⁹ See 12 STAT. AT L. 755.

³⁰ It is true that Amendments V and VI of the Federal Constitution discussed in *Ex parte Milligan* are limitations solely upon the federal government. None the less the interpretation placed upon them certainly carries weight in construing state constitutions containing similar provisions.

v. *Wollers*³¹ is one of great importance. A decision by the United States Supreme Court upon the problem would do much to clear up a doubtful situation.

DAMAGES FOR LOSS OF PROSPECTIVE CROPS. — "Although by performance the benefits of the contract would accrue at a future time, yet upon a breach by which such future advantages will be prevented, the injured party may immediately thereafter recover damages equivalent to the loss."¹ To deny that there is any case, where such an equivalent can be determined, would be, in the words of Sir George Jessel, M. R., "to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is known as the other side of Westminster Hall."² Yet in the recent case of *Turpin v. Jones*³ the court denied recovery of damages because they involved the calculation of the probable value of crops to be raised in the future. In that case the contract was for the cultivation of land upon shares. The owner of the land refused to allow the plaintiff to enter; suit was brought immediately, and before any of the season's crop had been raised, or even planted, in the neighborhood. A demurrer to the petition was sustained on the ground that damages were too conjectural.

The purpose of the law in awarding damages for breach of contract is "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract."⁴ The basic principle is thus compensation.⁵ To determine the proper amount of compensation, the courts have adopted various tests, or measures of damage, based upon the value of various factors involved in the performance contracted for. In these crop cases the most usual test is the value of the plaintiff's share of the crop, less what he might reasonably have earned in other employments during the period of the contract.⁶ Some courts take the measure of damage to be the value of the plaintiff's share, less the value of the labor he was required to perform;⁷ others take the value of the lease or contract, *i. e.*, the profits to be derived therefrom.⁸ The usual evidence upon which the value of the crop is computed is that of the average yield of adjoining lands, and the market price, in the same year.⁹ But this is only one of the several kinds of evidence upon which the probable value

³¹ See note 1, *supra*.

¹ SUTHERLAND, DAMAGES, 4 ed., § 107.

² *Fothergill v. Rowland*, 17 Eq. 132 (1873).

³ 225 S. W. 465 (1920). See RECENT CASES, p. 675, *infra*.

⁴ WILLISTON, CONTRACTS, § 1338.

⁵ See SEDGWICK, DAMAGES, 9 ed., §§ 29, 30; SUTHERLAND, DAMAGES, 4 ed., § 12.

⁶ *Somers v. Musolf*, 86 Ark. 97, 109 S. W. 1173 (1908); *Crews v. Cortez*, 102 Tex. 111, 113 S. W. 523 (1908).

⁷ *Lindley v. Dempsey*, 45 Ind. 246 (1873); *Harrell v. Johnson*, 93 Kan. 119, 143 Pac. 411 (1914).

⁸ *Cull v. San Francisco & F. Land Co.*, 124 Cal. 591, 57 Pac. 456 (1898); *Taylor v. Bradley*, 39 N. Y. 129 (1868); *Cornelius v. Little*, 52 Pa. Super. Ct. 394 (1913). See SEDGWICK, DAMAGES, 9 ed., § 624.

⁹ *U. S. Smelting Co. v. Sisam*, 191 Fed. 293 (1911); *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549 (1913); *Teller v. Bay, etc. Dredging Co.*, 151 Cal. 209, 90 Pac. 942 (1907).

of this factor may be calculated.¹⁰ Its unavailability should not be sufficient ground for refusing recovery; there is usually ample other competent evidence, including the judgment of properly informed experts.¹¹ However, because this one sort of evidence was unavailable, the court in *Turpin v. Jones* denied recovery. The absurdity of considering this as the sole source of evidence is manifest in cases where such evidence will never be available, as where the crop is unique,¹² or will be available only after an extended period of time, as where the crop lease has several years to run.¹³ In such cases the courts allow the jury to form a reasonable estimate of the value of the crop on the basis of all the available evidence.¹⁴ To require evidence of the size and value of surrounding crops in the same year would be, in the former case, to deny recovery altogether, and in the latter to postpone materially the recovery of damages to which the plaintiff has an immediate right.¹⁵

There is undoubtedly, in our law, the principle that damages, to be recoverable, must be reasonably certain. But the certainty required is certainty as to the *fact* of damage, and not as to the *amount*.¹⁶ Here there is reasonable certainty as to the fact of damage; it is at least reasonably certain that one who takes land on such terms will be able to raise a crop and obtain a share of it. "Where it is clear that substantial damage has been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether."¹⁷ Any reasonable test for ascertaining the amount of such damage is justified; and there is no objection to the adoption by the court of the most certain test available.¹⁸ But where one form of evidence is unobtainable,

¹⁰ See note 9, *supra*. The same cases also admit evidence of the kind of land, the kind of crops to be raised, the average yield in previous years, and the opinion of experts as to the probable yield.

¹¹ "Farmers acquainted with the land in question can tell how much it would produce with proper cultivation, and there is no greater danger of mistake here than in any other case where an exercise of judgment is necessary in the estimation of damages." *Zachary v. Swanger*, 1 Ore. 92, 93 (1854).

¹² *Sandusky Cement Co. v. Dixon Ice Co.*, 251 Fed. 506 (1918); *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 6 N. W. 636 (1880). These were actions for the negligent destruction of ice fields; there were no similar fields in the vicinity. The measure of damage was taken to be the probable value of the crop, less the cost of harvesting it.

¹³ *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62 (1897); *Taylor v. Bradley*, 39 N. Y. 129 (1868).

¹⁴ In *Sandusky Cement Co. v. Dixon Ice Co.*, *supra*, the amount was computed upon the basis of the average daily capacity of the plaintiff's ice plant, the average length of the harvesting season for the past five years, and the average market price for the same period.

¹⁵ This is not a case of anticipatory breach or prospective damages. The performance to which the contract entitled the plaintiff was to be allowed to enter and hold the land; it is the value of that performance which is the extent of his damage. See SUTHERLAND, DAMAGES, 4 ed., § 107; WILLISTON, CONTRACTS, § 1339.

¹⁶ It has been suggested that certainty as to the fact of damage and certainty as to the amount are but two aspects of the same thing, and shade into each other. See WILLISTON, CONTRACTS, § 1346. However this may be, there is undoubtedly a marked distinction between the two ends of the scale; and it is definitely possible to point to many cases where the fact of damage is reasonably certain, while the amount of such damage is incapable of exact measurement.

¹⁷ WILLISTON, CONTRACTS, § 1345. See *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62, 64 (1898).

¹⁸ In *Smith v. Phillips*, 16 Ky. L. 615, 29 S. W. 358 (1895), upon which the court in *Turpin v. Jones*, *supra*, relied, the contract was for the lease of a farm at a fixed price.

the defendant, who has by his wrong forced the plaintiff into the strait of proving damages, cannot complain that the latter wishes to use the best methods left him for accomplishing the result.¹⁹

The court, in *Turpin v. Jones*, suggested that the plaintiff wait until after the season's crop was grown, and then renew his action. And on its face the suggestion seems eminently sensible. Far better evidence would then be available, both as to the value of the crop and as to the plaintiff's earnings in other employments. By the original contract, he did not contemplate any compensation until that time. Furthermore, while the measure of damage is usually considered a matter of substantive law,²⁰ the admission of evidence and the computation of the amount of damage are purely matters of procedure.²¹ Courts frequently, in their discretion, suspend a trial or an inquiry for the assessment of damages for a reasonable time, until evidence not then on hand becomes available.²² But one must proceed carefully. If this is entirely a matter of evidence, it must be recognized as such, and may be dealt with through the proper medium of a continuance or a postponed assessment of damages. It may do very well to postpone the trial in this way, but the plaintiff should not be required to bring an entirely new suit.²³ To deny a remedy for established rights, as did the Kentucky court, is to exercise a jurisdiction closely analogous to that usurped by the English Chancellor in the course of the seventeenth century, at a time when there was a real need for a softening liberality in applying the rules of the strict law. With the growth of equity and modern legal procedure, that time has passed. We are here in a court of law, where certain legal results are supposed to follow upon the establishment of a certain set of facts. To extend the discretion of the judge from evidence into substance would be a far-reaching and inherently dangerous change.

EFFECT OF AN ORAL DIRECTION TO A DEBTOR TO PAY THE DEBT TO A DONEE AT THE CREDITOR'S DEATH. — It is probably a common transaction, particularly where the parties are all members of the same family, for a creditor orally and gratuitously to direct his debtor to pay the money to a third person at the creditor's death. The legal effect of such a direction, given without any thought of possible litigation and in reliance on the honor of the parties, and yet intended to create a binding

The court refused to allow conjectural profits as the measure of damages, but took the more certain measure of the difference between the contract price and the normal rental value, in money. The court in the later case was evidently misled by a failure to notice the great difference in the circumstances of the two cases.

¹⁹ See *Shoemaker v. Acker*, *supra*.

²⁰ See *SEDGWICK, DAMAGES*, 9 ed., § 1373.

²¹ See *id.*, § 1383. The line between the two is not clear, and it is often hard to determine with which the courts are dealing. Thus, for the destruction of growing crops, some courts take the measure of damage to be the value of the crops when destroyed, to be estimated by taking the market value at maturity less the cost of producing; while others take the latter statement to be the actual measure of damage. Cf. also *Cornelius v. Little*, *supra*, with *Harrell v. Johnson*, *supra*.

²² See *WIGMORE, EVIDENCE*, § 2575.

²³ There may be some question whether the decision in *Turpin v. Jones* does not make the matter *res judicata*. This certainly should not be the result.

obligation, is not wholly clear. If the words of the creditor can be fairly construed as declaring himself trustee of the debt for the intended donee, a valid trust will arise,¹ but his instructions can rarely be given this technical meaning. The tendency for equity to torture every legally incompleted gift into such a trust for the donee² has been definitely arrested.³ The more natural meaning of the creditor's words, that the debtor is to be the trustee, cannot be given effect, for a debtor cannot be trustee of his own debt.⁴ So the creditor's intention cannot usually be carried out by means of a trust.

But under the law of contracts the transaction may contain all the necessary elements of a binding obligation. In consideration of the creditor's discharge of the debt the debtor may promise the creditor to pay the donee, substituting a sole-beneficiary contract⁵ for the original obligation, or the debtor may make his promise directly to the donee, thus bringing about a novation of creditors.⁶ In both cases the donee acquires a direct right against the debtor. Apparently either of these principles is applicable to a recent Nebraska case⁷ upholding this kind of a transaction. But the court rested its decision on the ground that there was a completed gift *inter vivos*.⁸

The general principle is that either a deed or a delivery of the property is essential for a legal gift.⁹ A chose in action can be given by deed¹⁰

¹ *Ex parte Pye*, 18 Ves. 140 (1811). See SCOTT, CASES, TRUSTS, 146 n; AMES, CASES, TRUSTS, 125 n; LEWIN, TRUSTS, 12 ed., 71; PERRY, TRUSTS, 6 ed., § 96.

² *M'Fadden v. Jenkyns*, 1 Phillips, 153 (1842); *Eaton v. Cook*, 25 N. J. Eq. 55 (1874); *Morgan v. Malleeson*, L. R. 10 Eq. 475 (1870); *Caylor v. Caylor's Estate*, 22 Ind. App. 666, 52 N. E. 465 (1899).

³ *Milroy v. Lord*, 4 DeG. F. & J. 264 (1862); *Richards v. Delbridge*, L. R. 18 Eq. 11 (1874); *In re Ashman's Estate*, 223 Pa. 543, 72 Atl. 899 (1909); *Cardoza v. Leveroni*, 233 Mass. 310, 123 N. E. 672 (1919). See SCOTT, CASES, TRUSTS, 151 n; AMES, CASES, TRUSTS, 130 n, 133 n.

⁴ See Austin W. Scott, "The Progress of the Law: Trusts," 33 HARV. L. REV. 688.

⁵ See 1 WILLISTON, CONTRACTS, §§ 360, 368.

⁶ See AMES, LECTURES ON LEGAL HISTORY, 298, 6 HARV. L. REV. 184; 3 WILLISTON, CONTRACTS, §§ 1865, 1866.

⁷ *Dinslage v. Stratman*, 180 N. W. 81 (1920). For a statement of the facts, see RECENT CASES, p. 672, *infra*.

⁸ If there was a completed gift, the court properly held that the postponement of the enjoyment until the donor's death did not render the transfer void as testamentary. *Tucker v. Tucker*, 138 Ia. 344, 116 N. W. 119 (1908); *Roepke v. Nutzmann*, 95 Neb. 589, 146 N. W. 939 (1914); *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604 (1915); *Howard v. Hobbs*, 125 Md. 636, 94 Atl. 318 (1915); *Goodan v. Goodan*, 184 Ky. 79, 211 S. W. 423 (1919). Nor would an otherwise valid gift be defeated by the fact that the enjoyment was contingent, as in *Dinslage v. Stratman*, *supra*, on the donor's death before the donee reached the age of eighteen. *Neale v. Neales*, 9 Wall. (U. S.) 1 (1869); *Simer v. Flatt*, 177 Pac. 545 (Okla.) (1918); *Green v. Redmond*, 132 Md. 166, 103 Atl. 431 (1918); *Edgar v. Yant*, 66 Colo. 599, 185 Pac. 252 (1919). And the fact that the gift in *Dinslage v. Stratman*, *supra*, was of only part of the debt is not fatal. *Carpenter v. Soule*, 88 N. Y. 251 (1882); *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890); *Holmes v. Holmes*, 129 Mich. 412, 89 N. W. 47 (1902).

⁹ *Irons v. Smallpiece*, 2 B. & Ald. 551 (1819); *Cochrane v. Moore*, 25 Q. B. D. 57 (1890); *Gammon Theological Seminary v. Robbins*, 128 Ind. 85, 27 N. E. 341 (1891). For the development of this principle, see Roscoe Pound, "Juristic Science and Law," 31 HARV. L. REV. 1053.

¹⁰ *Airey v. Hall*, 3 Sm. & G. 315 (1856); *Walker v. Bradford Old Bank*, 12 Q. B. D. 511 (1884); *In re Patrick*, [1891] 1 Ch. 82; *De Caumont v. Bogert*, 36 Hun (N. Y.), 382 (1885); *Matson v. Abbey*, 141 N. Y. 179, 36 N. E. 11 (1894); *Taylor v. Purdy*, 151 Ky.

but can never be actually delivered. But where the chose in action is represented by a specialty, whether a negotiable¹¹ or a non-negotiable¹² instrument, a gift can be made by delivery of the specialty. A gift to the obligor can be effected with less formality. This can be accomplished by delivery of the instrument¹³ or of a receipt for payment,¹⁴ or, without delivery, by destruction of the instrument¹⁵ or indorsement of payment upon it.¹⁶ Some cases, however, seem to allow a gift to a third person by delivery of practically any written evidence of the chose in action.¹⁷ And two recent New York cases¹⁸ held that delivery of an informal written declaration of gift effected a valid gift. The Nebraska case goes a step further and holds that where there is no written evidence of the debt a gift is completed by an oral direction to the debtor in the presence of the donee.¹⁹

The real essential of a gift is the intent of the donor.²⁰ The donor must intend gratuitously to divest himself irrevocably of his rights in the property and to create a present interest in the donee.²¹ And he

82, 151 S. W. 45 (1912); *Garrison v. Spencer*, 58 Okla. 442, 160 Pac. 493 (1916); *Curriden v. Chandler*, 108 Atl. 296 (N. H.) (1919).

¹¹ *Grover v. Grover*, 24 Pick. (Mass.) 261 (1837); *Clark v. Gurley*, 48 Tex. Civ. App. 274, 106 S. W. 394 (1907). See THORNTON, GIFTS, § 271.

¹² *Commonwealth v. Crompton*, 137 Pa. 138, 20 Atl. 417 (1890); *Martin v. McCullough*, 136 Ind. 331, 34 N. E. 819 (1893); *Shepard v. Shepard*, 164 Mich. 183, 129 N. W. 201 (1910); *Hall v. O'Brien*, 218 N. Y. 50, 112 N. E. 569 (1916); *Dirks v. Union Savings Ass'n*, 40 S. D. 529, 168 N. W. 578 (1918). See SCOTT, CASES, TRUSTS, 155 n, 162, 163; AMES, CASES, TRUSTS, 155 n.

¹³ *Lanham v. Meadows*, 72 W. Va. 610, 78 S. E. 750 (1913); *Pyle v. East*, 173 Ia. 165, 155 N. W. 283 (1915).

¹⁴ *Gray v. Barton*, 55 N. Y. 68 (1873); *Carpenter v. Soule*, *supra*; *McKenzie v. Harrison*, *supra*.

¹⁵ *Gardner v. Gardner*, 22 Wend. (N. Y.) 525 (1839); *Denunzio's Receiver v. Scholtz*, 117 Ky. 182, 77 S. W. 715 (1903).

¹⁶ *Ferry v. Stephens*, 66 N. Y. 321 (1876). As to gifts by creation of a joint tenancy, see *East*, etc. *Ass'n v. McKenzie*, 87 N. J. Eq. 375, 100 Atl. 931 (1917); *Marston v. Industrial Trust Co.*, 107 Atl. 88 (R. I.) (1919); *Rice v. Bennington Bank*, 108 Atl. 708 (Vt.) (1920).

¹⁷ *Jones v. Moore*, 102 Ky. 591, 44 S. W. 126 (1898); *In re Huggin's Estate*, 204 Pa. 167, 53 Atl. 746 (1902); *Claytor v. Pierson*, 55 W. Va. 167, 46 S. E. 935 (1904); *Davie v. Davie*, 47 Wash. 231, 91 Pac. 950 (1907); *Lipson v. Evans*, 133 Md. 370, 105 Atl. 312 (1918); *McGavic v. Cossum*, 72 App. Div. 35, 76 N. Y. Supp. 305 (1902). But see *Cook v. Lum*, 55 N. J. L. 373, 26 Atl. 803 (1893).

¹⁸ *In re Cohn*, 187 App. Div. 392, 176 N. Y. Supp. 225 (1919); *Hawkins v. Union Trust Co.*, 187 App. Div. 472, 175 N. Y. Supp. 694 (1919).

¹⁹ The court's language indicates that the presence of the donee's representative at the giving of the direction to the debtor was not necessary for a gift. The opinion emphasizes the clear intent to give and the donor's belief that the gift was complete. It amounts to a holding that no delivery is necessary.

²⁰ For a long time it was doubtful whether intent alone was not sufficient. See the principles laid down by Pollock, B., in *Danby v. Tucker*, 31 W. R. 578 (1883); and by Cave, J., in *In re Ridgway*, 15 Q. B. D. 447 (1885); overruled by *Cochrane v. Moore*, *supra*. See *Leitch v. Diamond National Bank*, 234 Pa. 557, 83 Atl. 416 (1912); *Sullivan v. Hess*, 241 Pa. 407, 88 Atl. 544 (1913). It is often said that the assent of both parties is necessary, but the assent of the donee is presumed. *Martin v. McCullough*, *supra*; *Matson v. Abbey*, 70 Hun, 475, 24 N. Y. Supp. 284, *aff'd* 141 N. Y. 179, 36 N. E. 11 (1894); *Richards v. Wilson*, 185 Ind. 335, 112 N. E. 780 (1916); *McKinnon v. Bank*, 82 So. 748 (Fla.) (1919). See THORNTON, GIFTS, § 86.

²¹ *Cook v. Lum*, *supra*; *Burns v. Burns*, 132 Mich. 441, 93 N. W. 1077 (1903); *Duryea v. Harvey*, 183 Mass. 429, 67 N. E. 351 (1903); *Bailey v. Orange Memorial Hospital*, 102 Atl. 7 (N. J.) (1917); *Brewer's Administrator v. Brewer*, 181 Ky. 400, 205 S. W.

must manifest this intention objectively so that the law can deal with it. This is the basis of the requirement of a deed or delivery. Is a parol order to his debtor to pay another a sufficient manifestation of the creditor's donative intent? An oral gratuitous assignment of a chose in action is at least an authority to the donee to collect and to the debtor to pay the donee, but an authority is revocable and is revoked by death.²² A distinction has been suggested²³ between an authority and an order, which latter was said to be irrevocable, but this does not seem to be supported by reason or authority.²⁴ In a case where the donative intent is very clear and where there is no tangible evidence of the chose in action to deliver, should an oral direction operate as an irrevocable transfer rather than a mere authority? Such a principle would secure the interest of owners in the free transfer of their property. A requirement of clear proof in each case of actual intent to give would tend to prevent fraud and unfounded claims. The slight difference in fact between an oral gratuitous declaration of trust and an oral declaration of gift is merely technical. The vast difference in their legal effect cannot be due to equally divergent interests.²⁵ These considerations tend to support the doctrine of the Nebraska case. But the law cannot secure every interest.²⁶ The greater interest in the general security of transactions and the prevention of fraud often requires a general rule of property law that leaves some interests of owners unsecured. And although wide inroads have been made on the strict requirement of delivery, it may be questioned whether an oral direction without more is not too informal to transfer title.²⁷ On the other hand, delivery of a written declaration of gift would seem to furnish the necessary proof of the donor's intent without imposing too cumbersome formalities on the transfer.²⁸

CORROBORATIVE EVIDENCE. — "Witnesses are to be weighed, not counted." This is the general rule of the common law, in contradistinction to the numerical requirements of the civil¹ and of the canon law.² The statutory requirement of two witnesses in treason cases is almost

393 (1918); *Huenink v. Heittbrink*, 177 N. W. 796 (Neb.) (1920); *Reynolds v. Thompson*, 161 Ky. 772, 171 S. W. 379 (1914).

²² See 1 WILLISTON, CONTRACTS, § 440.

²³ See George H. Balkam, "Payment of Bill of Exchange or Check by the Drawee after the Drawer's Death," 14 HARV. L. REV. 588.

²⁴ See John M. Zane, "Death of the Drawer of a Check," 17 HARV. L. REV. 104.

²⁵ See C. B. Labatt, "The Inconsistencies of the Laws of Gifts," 29 AM. L. REV. 361.

²⁶ See Roscoe Pound, "The Limits of Effective Legal Action," 3 AM. BAR ASS'N JOURN. 55, 27 INT. JOURN. OF ETHICS, 150.

²⁷ *Van Cleef v. Maxfield*, 103 Misc. 448, 171 N. Y. Supp. 333, aff'd 186 App. Div. 906, 172 N. Y. Supp. 923 (1918); *Cohen v. Cohen*, 107 Misc. 635, 177 N. Y. Supp. 180 (1919); *Cardoza v. Leveroni*, *supra*. But see *Ebel v. Piehl*, 134 Mich. 64, 95 N. W. 1004 (1903).

²⁸ *Hawn v. Stoler*, 208 Pa. 610, 57 Atl. 1115 (1904); *Adams v. Merced Stone Co.*, 176 Cal. 415, 178 Pac. 498 (1917); *Humphrey v. Ogden*, 53 Colo. 309, 125 Pac. 110 (1912); *In re Cohn*, *supra*; *Hawkins v. Union Trust Co.*, *supra*.

¹ See DIG. 22, 5, 12; COD. 4, 20, 4.

² See CORP. JUR. CANON., DECRET. GREG., lib. 2, tit. 20, *de testibus*, c. 23.

the only exception to this rule.³ But in certain exceptional cases the testimony of a single witness is insufficient unless corroborated. First, no one can be convicted of perjury on the uncorroborated testimony of a single witness.⁴ Second, an extrajudicial confession must be supported by independent proof of the *corpus delicti*.⁵ Third, by statute in many jurisdictions no conviction can be had on the uncorroborated testimony of an accomplice.⁶ Fourth, in various offenses against women, corroboration of the complainant's testimony is often required by statute.⁷

Although the requirement of corroborative evidence is thus not uncommon, there is surprising lack of judicial definition of what constitutes such evidence; and the single statutory attempt at a complete definition is unsatisfactory.⁸ The wide divergence of judicial opinion which this unsettled state of the law may produce is well illustrated in a recent English case.⁹ There proceedings were instituted under the Bastardy Act,¹⁰ which requires that the complainant's evidence be corroborated. In attempted corroboration it was proved (1) that the complainant had served the defendant as housekeeper for three years, (2) that the defendant called a doctor when the child was born, (3) that he allowed the complainant and her child to remain in his house for five weeks after the birth, (4) that he never inquired as to the child's paternity, and (5) that he failed to answer a letter accusing him of being the child's father.¹¹ The Divisional Court held that this was sufficient corroboration;¹² but this decision was reversed by the Court of Appeal. In each court there was a division of opinion.¹³

In approaching the problem of what constitutes corroborative evidence, the policy of the statutes or rules requiring it becomes important. This policy differs in the various classes of cases. In the case of per-

³ See 3 WIGMORE, EVIDENCE, 2 ed., § 2036.

⁴ *Rex v. Gardner*, 8 C. & P. 737 (1839); *Commonwealth v. Parker*, 2 Cush. (Mass.) 212 (1848); *Whittle v. State*, 79 Miss. 327, 30 So. 722 (1901).

⁵ *Johnson v. State*, 59 Ala. 37 (1877); *Gore v. People*, 162 Ill. 259, 44 N. E. 500 (1896). The law on this point in England is still unsettled. *Cf. Rex v. White, R. & R.* 509 (1823); *Rex v. Flaherty*, 2 C. & K. 782 (1847).

⁶ For a list of these statutes, see 3 WIGMORE, EVIDENCE, 2 ed., § 2056, n. 10. They are in force in about half the jurisdictions in the United States.

⁷ Abduction: N. Y. CONSOL. LAW, PENAL, § 71; 1920 ORE. LAWS, § 1542; 1913 S. D. COMP. LAWS, § 366; 1904 VA. ANN. CODE, § 3679; 1913 NEB. R. S., § 9116. Abortion: 1912 S. C. CRIM. CODE, § 150; 1917 UTAH COMP. LAWS, 8988. Bastardy: 35 & 36 VICT., c. 65, § 4. Rape on a child under the age of consent: 48 & 49 VICT., c. 65, §§ 2-4; 1892 CANADA CRIM. CODE, § 685. Seduction: 1897 ALA. CODE, § 5503; 1891 COLO. ANN. STATS., § 1325; N. Y. CONSOL. LAW, PENAL, § 2177; 1910 OKLA. R. L., 5886; 1913 NEB. R. S., § 8793. This list is illustrative rather than exhaustive.

⁸ See 1920 ORE. LAWS, § 701, "additional evidence of a different character directed to the same point."

⁹ *Thomas v. Jones*, [1921] 1 K. B. 22. See RECENT CASES, p. 675, *infra*. See 69 UNIV. OF PA. L. REV. 180 for a view of this case differing somewhat from that expressed in this note.

¹⁰ See 35 & 36 VICT., c. 65.

¹¹ Another circumstance relied upon in the lower court as corroboration was the defendant's demeanor at the trial, but the case came up in such a way that it was impossible for the upper court to consider this.

¹² *Thomas v. Jones*, [1920] 2 K. B. 399.

¹³ In the Divisional Court, the evidence was held to be sufficient corroboration by Reading, C. J., and Roche, J., Avory, J., dissenting. This was reversed in the Court of Appeal by Bankes and Atkin, L. J. J., Scrutton, L. J., dissenting.

jury, the rule seems an historical anomaly;¹⁴ as does the rule as to confessions.¹⁵ But behind the rule as to accomplice testimony a sound public policy may be found. It is clearly dangerous to allow a conviction on the unsupported testimony of a man of admitted bad character, who may be purchasing immunity by making a false accusation. At common law, this danger could be obviated by cautions given to the jury by the trial judge, and this was the general practice.¹⁶ But under the usual American statutes which prevent the judge from commenting on the facts, such cautions cannot be given, and a hard and fast rule of law is necessary. The same general considerations apply to the fourth class of cases. Here in most cases the complainant admits her own bad character, and in all cases the charge is one easy to make and hard to disprove,¹⁷ one apt to appeal to the sentimentality of juries, and a fertile source of blackmail.

If, then, the policy behind the rule requiring corroborative evidence is sound, the rule should be interpreted so as to afford real protection from false accusations to persons coming under it. Three questions of interpretation are involved; namely, as to the object, the source, and the degree of corroborative evidence required. As to the first, the view taken by the early English cases¹⁸ and by a minority of American jurisdictions¹⁹ seems unsatisfactory. It is said that any evidence tending to support the complainant's testimony in some material part is sufficient, even though it fails to connect the defendant with the offense at all. A sounder view is taken by the later English cases²⁰ and by the weight of American authority.²¹ Under this view, there must be corroboration as to all the material elements of the offense, including the identity of the defendant. This requirement has been embodied in several statutes.²²

Secondly, the testimonial source of the corroborative evidence must be independent of the witness to be corroborated.²³ The evidence may come from the defendant himself, and it has been said that admissions may be sufficient,²⁴ though this is doubtful.²⁵ In the principal case, the

¹⁴ See 3 WIGMORE, EVIDENCE, 2 ed., § 2040; 3 STEPHEN, HISTORY OF THE CRIMINAL LAW, 245.

¹⁵ See 3 WIGMORE, EVIDENCE, 2 ed., § 2070.

¹⁶ *Re Meunier*, [1894] 2 Q. B. 415; *Cross v. People*, 47 Ill. 152 (1868).

¹⁷ See 1 HALE, PLEAS OF THE CROWN, 635.

¹⁸ *Rex v. Birkett*, R. & R. 252 (1813); *Tidd's Trial*, 33 How. St. Tr. 1483 (1820).

¹⁹ *State v. Hennessy*, 55 Ia. 299, 7 N. W. 641 (1880); *Cox v. Commonwealth*, 125 Pa. St. 94, 17 Atl. 227 (1889).

²⁰ *Rex v. Farler*, 8 C. & P. 106 (1837); *Rex v. Stubbs*, 7 Cox C. C. 48 (1855); *Rex v. Baskerville*, [1916] 2 K. B. 658.

²¹ *Miller v. Commonwealth*, 78 Ky. 15 (1879); *People v. O'Neil*, 101 N. Y. 251, 16 N. E. 68 (1888); *State v. Lawler*, 28 Minn. 276, 9 N. W. 698 (1881).

²² See 1897 ALA. CODE, § 5300; 1887 IA. CODE, § 7871.

²³ *Lopez v. State*, 34 Tex. 133 (1870). Thus, where there is a statutory requirement of corroboration in prosecutions for rape, immediate complaints of the prosecutrix, while admissible, are not sufficient corroboration. *People v. Page*, 162 N. Y. 272, 56 N. E. 750 (1900); *State v. Stewart*, 52 Wash. 61, 100 Pac. 153 (1909). Nor are letters, which no one but the prosecutrix can identify as having been written by the defendant, sufficient corroboration. *Rogers v. State*, 101 Ark. 45, 141 S. W. 491 (1911).

²⁴ *State v. Knuse*, 24 S. D. 171, 123 N. W. 71 (1909); *People v. Cascia*, 181 N. Y. Supp. 855 (1920).

²⁵ See 34 HARV. L. REV. 205. But see 30 YALE L. J. 355.

defendant's failure to answer the complainant's accusing letter was not even an admission,²⁶ and hence could not be corroborative.

With regard to the third question, the necessary degree of corroboration, it is clear that evidence of facts reasonably consistent with either innocence or guilt on the part of the defendant is insufficient. Thus evidence of opportunity to commit the offense is not corroboration.²⁷ Hence, in the principal case, the fact that the complainant had been the defendant's housekeeper was properly held insufficient corroboration. On the other hand, the corroborative evidence need not be sufficient of itself to justify a verdict,²⁸ and circumstantial evidence may be enough.²⁹ It is submitted that the test of what constitutes corroborative evidence may be laid down thus: the evidence offered in corroboration must tend to create a reasonable suspicion of the guilt of the particular defendant, independent of the complainant's testimony, although it need not be sufficient of itself to support a verdict. On the basis of this test the decision in *Thomas v. Jones*³⁰ seems clearly sound. That the defendant called a doctor to attend the complainant, and that he refrained from inquiry as to the child's paternity, are as consistent with benevolence as with guilt. That he allowed the woman and her child to remain in his house for five weeks can hardly be regarded as creating a reasonable suspicion of guilt, independently of the complainant's story, in the absence of any evidence that the complainant had recovered from her confinement before the end of that period.

RECENT CASES

ADMIRALTY — SALVAGE — VOLUNTARY SERVICE — The libellants were English and Belgian soldiers who, in February, 1920, were at Murmansk in Russia on their way to join the White Army. At that time the Bolshevik forces gained control of Murmansk. The plaintiffs escaped by boarding a vessel, which was flying the White flag, and, after forcibly resisting Bolshevik attempts at capture, took the vessel to a neutral port and surrendered her to her owners. All this was done without the assistance and partly against the will of the vessel's crew. The plaintiffs seek salvage. *Held*, that salvage be awarded. *The Lomonosoff*, 37 T. L. R. 151 (P. D.).

It is settled law that services leading to salvage must have been rendered voluntarily and not as a matter of duty. *The Francis and Eliza*, 2 Dods. 115; *Governor Raffles*, 2 Dods. 14. But the plaintiffs in the principal case may well be considered volunteers on the ground that what they did far exceeded their duty as soldiers. See *The Two Friends*, 1 C. Rob. 272; *The Cargo ex Ulysses*, 13 P. D. 205. A better objection was raised by the defense, namely, that the plaintiffs were not volunteers because they were acting to save their own lives. The court found that another way of escape was open, but it intimated that that was not essential to make the plaintiffs volunteers. However, the case

²⁶ *Wiedeman v. Walpole*, [1891] 2 Q. B. 534.

²⁷ *Burbury v. Jackson*, [1917] 1 K. B. 16; *State v. Scott*, 28 Ore. 331, 42 Pac. 1 (1895). But see *Cole v. Manning*, 2 Q. B. D. 611 (1877).

²⁸ *Ransone v. Christian*, 56 Ga. 351 (1876).

²⁹ *People v. De Nigris*, 157 App. Div. 798, 142 N. Y. Supp. 620 (1913).

³⁰ [1921] 1 K. B. 22.

cited to support the latter proposition is inadequate. See *Le Jonet*, L. R. 3 Ad. & Eccles. 556. As to the danger from which the ship was rescued, in view of what is known of Bolshevik treatment of captured ships, it is clear that the facts warranted an award of salvage. It is not necessary that the ship be rescued from the power of a nation acting under the recognized rules of war. *Talbot v. Seeman*, 1 Cranch, 1; *Kennedy v. Ricker*, 14 Fed. Cas. No. 7705.

BILLS AND NOTES — DEFENSES — ALTERATION — PART PAYMENT WITH KNOWLEDGE OF DEFENSE. — The defendant was maker and payee of a note which he indorsed in blank. Subsequent to delivery an alteration was made in the date. The plaintiff became the holder of the note but not in due course. The defendant with knowledge of the alteration made a part payment thereon. In a suit on the instrument defendant tried to set up the defense of alteration. *Held*, that he cannot do so. *Green v. Harsh*, 86 So. 392 (Ala.) 1920.

At common law ratification of an alteration is equivalent to original authorization and is binding even if given without consideration. *Goodspeed v. Culler*, 75 Ill. 534; *Humphreys v. Guillow*, 13 N. H. 385; *Matson v. Jarvis*, 133 S. W. 941. And ratification may be gathered from any words or conduct tending to prove its existence. *Canon v. Grigsley*, 116 Ill. 151; *Humphreys v. Guillow*, *supra*. The situation in most cases of alteration is not one lending itself to ratification. The courts evidently use the term to mean acquiescence or approval. On principle it would seem that such subsequent approval should not be binding unless it is given for consideration or is instrumental in producing a change of position. See 2 WILLISTON, CONTRACTS, § 1145; *cf. Ford v. Ott*, 173 N. W. 121. Under section 124 of the Negotiable Instruments Law assent to an alteration by a party bars him from setting up the plea of alteration. That law, however, fails to define what constitutes assent. It is natural therefore to find the courts applying the prevailing common-law view on the matter. Thus it has been held that assent under the new law is sufficient without consideration. *Holyfield v. Herrington*, 84 Kan. 760, 115 Pac. 546. It has also been held that payment of interest accruing on an altered instrument with knowledge of the alteration is enough ground for inferring assent. *Farmers', etc. Bank v. Pakwant Valley Land Co.*, 50 Utah, 35, 165 Pac. 462. And the principal case is in line in holding that the same inference may be drawn from part payment made under similar circumstances.

BILLS AND NOTES — DEFENSES — FRAUD — RECOVERY BY INDORSEE WITH NOTICE OF VALUE OF CONSIDERATION RECEIVED BY MAKER. — The plaintiff, as indorsee, sues the defendant, as maker of a promissory note. As a result of the payee's fraud, of which the plaintiff had notice, the defendant received only a part of the stipulated consideration. *Held*, that the plaintiff recover to the extent of the value actually received by the defendant. *Depres, Bridges & Noel v. Galloway*, 224 S. W. 998 (Mo. App.).

It is clear that fraud is ordinarily a defense to a negotiable instrument. *Mead v. Bunn*, 32 N. Y. 275. See NEGOTIABLE INSTRUMENTS LAW, §§ 55, 58; 1909 MO. REV. STAT., c. 86, §§ 10025, 10028. But by the law of contracts the defrauded person is accountable for the value of the consideration that he retains in case he sues the defrauder. *Burrill v. Stevens*, 73 Me. 395; *Ladd v. Moore*, 3 Sandf. (N. Y.) 589. So it would seem not an unfair extension of the law to allow the defrauder a quasi-contractual action for such consideration, and hence the payee in the principal case, had he been denied recovery on the note, should be entitled to recover the value of the consideration actually given. Whether an indorsement of a note amounts to an assignment of the debt is left uncertain by the Negotiable Instruments Law. See NEGOTIABLE INSTRUMENTS LAW, § 30; 1909 MO. REV. STAT., c. 86, § 10001. But one court at least has held that it does. *Goldman v. Murray*, 164 Cal. 419, 129 Pac.

462; cf. *Leach v. Hill*, 106 Iowa, 171, 76 N. W. 667; *The Chelmsford*, 34 Fed. 399. *Contra*, *National Market Co. v. Maryland Casualty Co.*, 100 Wash. 377, 174 Pac. 479. So it seems possible to say that the indorsement transferred to the plaintiff the payee's quasi-contractual right to recover the value of the consideration transferred. See 1 DANIELS, *NEGOTIABLE INSTRUMENTS*, 5 ed., § 226. Cf. *Burrill v. Stevens*, *supra*. Moreover, the case is aided in result by the analogy of another section of the Negotiable Instruments Law allowing a recovery *pro tanto* in case of a partial failure of consideration. See *NEGOTIABLE INSTRUMENTS LAW*, § 28; 1909 MO. REV. STAT., c. 86, § 9999. The decision, though not founded on the express provisions of the Negotiable Instruments Law, seems therefore to construe that statute wisely.

CHOSSES IN ACTION — GIFTS — PAROL GIFT OF A DEBT TO TAKE EFFECT IN ENJOYMENT ON THE DEATH OF THE DONOR. — A woman desired to make a gift of \$1000 to a granddaughter at the woman's death. In the presence of the girl's father she orally directed a son, who owed her \$1400, to pay \$1000 of that debt at her death to the granddaughter, unless the girl reached the age of eighteen before the creditor's death, in which case she would pay the girl herself. After payment according to these directions the son was sued by his mother's administrator for the debt. *Held*, that the action be dismissed. *Dinslage v. Stratman*, 180 N. W. 81 (Neb.).

For a discussion of this case, see NOTES, page 664, *supra*.

CONSTITUTIONAL LAW — POLICE POWER — GAME LAWS: POSSESSION OF FISH DURING CLOSED SEASON. — An Oregon statute prohibited the sale or possession, during the closed season of the year, of salmon caught beyond the three-mile line outside the Columbia River. *Held*, that this prohibition is constitutional. *Union Fishermen's Co-op. Packing Co. v. Shoemaker*, 193 Pac. 476 (Ore.).

The case involves two constitutional questions. First, is such a statute a valid exercise of the police power? The regulation of game and fish is under the police power of the state. See *Lawton v. Steele*, 152 U. S. 133, 138. And to attain the desired end, preservation of the food supply, rights in property may be restricted. *Commonwealth v. Gilbert*, 160 Mass. 157; *Magner v. People*, 97 Ill. 320. Secondly, is the statute an unwarranted interference with interstate commerce? At one time it was held that such a prohibition if applied to fish caught outside the state would be unconstitutional. *In re Davenport*, 102 Fed. 540. See *Commonwealth v. Wilkinson*, 139 Pa. 298, 305, 21 Atl. 14, 15. But finally the opposite view prevailed, the argument being that any other rule would make difficult, if not impossible, detection of evasions of the local law. *State of New York ex rel. Silz v. Hesterberg*, 211 U. S. 31 (S. C. 184 N. Y. 126, 76 N. E. 1032); *People v. Lassen*, 142 Mich. 597, 106 N. W. 143. See 14 HARV. L. REV. 288. The statute in the principal case referred only to fish caught in the sea below the Columbia River, and not, for example, to fish caught in a river in another state. This statute goes further, illogical as this may seem, than previous statutes forbidding possession of fish wherever caught. For the prohibition in the previous statutes was a mere incident of the enforcement of the law as regards domestic fish, while in this statute there is an indirect inhibition of a foreign act to increase the domestic supply. It is submitted, however, that the means are reasonable and that the statute may be supported by the application of old principles. See *In re Deininger*, 108 Fed. 623.

CONSTITUTIONAL LAW — POLICE POWER — VALIDITY OF STATUTE PROVIDING FOR DESTRUCTION OF INFECTED TREES TO PROTECT ADJACENT ORCHARDS. — The apple-growers of Virginia were seriously hampered by the

plant disease known as "cedar rust." The legislature accordingly enacted a rather elaborate statute authorizing the state entomologist to order the destruction of infected cedar trees adjacent to apple orchards. From the summary proceeding and judgment of the entomologist an appeal was allowed. In some instances damages were recoverable. A failure to destroy the trees as ordered was unlawful. (VA. ACTS 1914, p. 49.) *Held*, that the statute is constitutional. *Bowman v. Virginia State Entomologist*, 105 S. E. 141 (Va.).

Reasonable regulations to protect the agricultural industry from the ravages of pests and infection have often been upheld as within the limits of legitimate police regulation. *Los Angeles Co. v. Spencer*, 126 Calif. 670, 59 Pac. 202; *State v. Main*, 69 Conn. 123, 37 Atl. 80. And it is no objection that the regulation entails the destruction of private property. *Balch v. Glenn*, 85 Kans. 735, 119 Pac. 67; *State Board v. Tanzman*, 140 La. 756, 73 So. 854. Undeniably the methods adopted by the legislature must be reasonable. And as for this particular statute it is submitted that its detailed safeguards and provisions are commendable in every respect. To be sure, the legislature might have provided for compensation analogous to that given in eminent domain proceedings. This, however, is a consideration for the legislature alone. As has already been indicated, once having established that the destruction of private property in a particular case comes under the scope of the police power, the owner can be denied a remedy for the loss sustained. *Mugler v. Kansas*, 123 U. S. 623; *State Board v. Tanzman*, *supra*. The principal case is clearly right. Indeed the case is but another illustration of the numerous futile attacks upon legislation clearly valid under the police power.

CONSTITUTIONAL LAW — POWERS OF THE EXECUTIVE — MARTIAL LAW — TRIAL OF CIVILIAN BY MILITARY COURT. — The Governor of Texas, reciting that there had been acts of violence and danger of insurrection in Galveston and that the city authorities as well as the judge of the city court had failed to maintain order, declared the city to be in a state of martial law, suspended the city officials, and directed the general commanding the state militia to enforce order and to execute the civil law. Pursuant to this order a provost judge superseded the judge of the city court. All the other civil justices continued to perform their duties. The relator was arrested for overspeeding, tried by the provost judge, despite his request for a jury trial, sentenced to pay a fine, and committed to jail in default of payment. He now petitions for a writ of *habeas corpus*. *Held*, that the petition be denied. *United States ex. rel. McMaster v. Wollers*, 268 Fed. 69 (Dist. Ct. S. D. Tex.).

For a discussion of this case see NOTES, page 659, *supra*.

CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — ADVISORY OPINIONS — OBLIGATION OF COURTS TO GIVE SAME. — The Constitution of South Dakota empowers the governor to require the opinions of the Supreme Court justices upon important questions of law involved in the exercise of his executive powers and upon solemn occasions. The governor seeks their opinion as to the constitutionality of an act authorizing a \$250,000 state bond issue. Bonds to the amount of \$200,000 have already been issued and sold to holders. *Held*, that such opinion shall not be given. *In re Opinion of the Judges*, 180 N. W. 64 (S. D.).

The virtues and vices of advisory opinions have heretofore been minutely examined. See 3 HARV. L. REV. 228; 10 HARV. L. REV. 50; H. A. Dubuque, "The Duty of Judges as Constitutional Advisers," 24 AM. L. REV. 369. Great jurists have found the vices preponderant. See STORY, J., in MASS. CONVENTION DEBATES (1820), 72; MORTON, J., in 2 MASS. CONVENTION DEBATES (1853), 684; Greenleaf, *ibid*. Yet to-day the constitutions of several states provide that the governor or the legislature may require of the state supreme court advisory opinions on solemn occasions and on questions of law. See MASS. CONST., part

2, c. 3, sec. 2; SO. DAK. CONST., art. 5, sec. 13; N. H. CONST., part 2, sec. 73; R. I. CONST., art. 10, sec. 3; etc. If in accordance with this constitutional right the proper authority requires of a court its opinion, that court must be bound to answer. The one asking should be, in right and logic, the proper judge of the reasonableness of the demand or the solemnity of the occasion. See 26 HARV. L. REV. 655; H. A. Dubuque, "The Duty of Judges as Constitutional Advisers," *supra*, 386. But see *In re Penitentiary Com'rs.*, 19 Colo. 409, 35 Pac. 915; *In the Matter of the North Missouri R. R.*, 51 Mo. 586; *Opinion of the Justices*, 148 Mass. 623, 21 N. E. 439; *Opinion of the Justices*, 95 Me. 564, 51 Atl. 224, *contra*. Of course, if the request is patently unreasonable, frivolous, or in excess of the scope of the constitutional provision, the court may refuse, for such questions it is not bound to answer. But in the principal case the request is reasonable and within the express scope. In refusing to answer, the court flies in the face of the state Constitution. That its reasons for refusing are the excellent reasons always to be advanced against any court's giving *ex parte* advice cannot ameliorate the error. The duty of the Supreme Court is to observe the constitution as it is framed, not as it should be framed.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — KNOWLEDGE OF A DIRECTOR AS KNOWLEDGE OF A CORPORATION. — The defendant corporation, which held certain stock as pledgee and was about to exercise its power to sell to the highest bidder, appointed three directors to find a purchaser. Two other directors received a bid from a prospective purchaser and, scheming for individual profit, advised him to make a smaller bid. The smaller bid was made to the three directors and was accepted by all the directors sitting as a board. The plaintiff as assignee of the pledgor sued for the alleged conversion of this stock on the ground that the knowledge of the two directors of the larger bid was notice to the corporation. *Held*, that such knowledge is not imputed to the corporation. *Western Securities Co. v. Silver King Consol. Mining Co.*, 192 Pac. 664 (Utah).

For a discussion of this case see NOTES, page 656, *supra*.

DAMAGES — MEASURE OF DAMAGES — COMPENSATION FOR LOSS OF USE OF PERSONAL PROPERTY. — Defendant wrongfully detained plaintiff's road-making outfit. Plaintiff sued for its return with damages for the value of its use during the period of detention. Defendant requested an instruction that, in determining the "use value," the jury should "... limit the same to the reasonable value of the use of said outfit ... devoted to such use as the plaintiff had carried on prior to the seizure." This was refused. *Held*, that the instruction should have been given. *Montgomery v. Gallas*, 225 S. W. 557 (Tex.).

In an action of replevin the damages usually allowed are the interest on the capital value of the property for the period of wrongful detention. *Wadleigh v. Buckingham*, 80 Wis. 230, 49 N. W. 745; *Redmond v. American Mfg. Co.*, 121 N. Y. 415, 24 N. E. 924. See 4 SUTHERLAND, DAMAGES, 4 ed., § 1144. But, since the purpose of damages is adequate compensation, where the value of the use of the property exceeds such interest, it may be substituted therefor. *Allen v. Fox*, 51 N. Y. 562; *Forsee v. Zenner*, 193 S. W. (Mo.) 975. See WELLS, REPLEVIN, 2 ed., §§ 582, 583. The recognized test for ascertaining, with the requisite certainty, this "use value" is rental value. *Ocala Foundry Works v. Lester*, 49 Fla. 199, 38 So. 51; *MacKenzie v. Steeves*, 98 Wash. 17, 167 Pac. 50. It cannot be measured by the profits expected from the plaintiff's anticipated use of the property. *Williams v. Wood*, 55 Minn. 323, 56 N. W. 1066. See *Aber v. Bratton*, 60 Mich. 357, 362, 27 N. W. 564, 566. The principal case proposes a more definite criterion. See 1 SEDGWICK, DAMAGES, 9 ed., § 171 (b). It substitutes for the market value of the use the market value of the plaintiff's

past type of use. Though this aims at a closer approximation to actual compensation it would secure it only on the assumption that the plaintiff's efficiency is a constant. But it seems that the plaintiff should rather be entitled to charge the defendant a fair rental for the period of detention. Any clearly consequential damages arising proximately from the detention should also be recoverable. *O'Connor v. Bank of New South Wales*, 13 Vict. L. R. 820. See *Stevens v. Tuile*, 104 Mass. 328, 334.

DAMAGES — MEASURE OF DAMAGES: CONTRACTS — DAMAGES FOR BREACH OF A CONTRACT TO FARM ON SHARES. — By contract, the plaintiff was to furnish the labor in planting, cultivating, and preparing for market a crop of tobacco; the defendant was to furnish the land and materials, and the proceeds of the crop were to be divided equally. The defendant refused to allow the plaintiff to enter. Suit was brought immediately, before time for planting had arrived. *Held*, that the plaintiff cannot recover at this time. *Turpin v. Jones*, 225 S. W. 465 (Ky.).

For a discussion of the principles involved in this case, see NOTES, page 662, *supra*.

EVIDENCE — CORROBORATIVE EVIDENCE — DEGREE OF CORROBORATION REQUIRED. — The complainant brought proceedings under the Bastardy Act (35 & 36 VICT., c. 65) to charge the defendant with being the father of her illegitimate child. The act requires that the testimony of the complainant be corroborated in order to charge the putative father. It was proved in attempted corroboration (1) that the defendant called a doctor to attend the complainant when the child was born, (2) that he allowed the complainant and her child to remain in his house for five weeks after the birth, (3) that he never inquired as to the paternity of the child, (4) that he failed to answer a letter sent him by the complainant, charging him with being the father of her child. It also appeared that the complainant had been the defendant's housekeeper for three years. *Held*, that there was no sufficient corroboration of the complainant's testimony. *Thomas v. Jones*, [1921] 1 K. B. 22 (C. A.).

For a discussion of the principles involved in this case, see NOTES, page 667, *supra*.

EVIDENCE — DECLARATIONS CONCERNING INTENTION, FEELINGS OR BODILY CONDITIONS — ADMISSIBILITY OF AN UNCOMMUNICATED THREAT IN HOMICIDE CASE. — The defendant, on trial for murder, offered evidence of a threat against him made by the deceased but uncommunicated to him. Though there was great doubt as to which was the aggressor, this evidence was excluded. *Held*, that the exclusion was error. *Mott v. State*, 86 So. 514 (Miss.).

Communicated threats are relevant to show that the defendant acted reasonably in defending himself. Uncommunicated threats, which have no logical bearing to prove this, are relevant to show that the deceased was the aggressor when this point is in controversy on an issue of self-defense. *Stokes v. People*, 53 N. Y. 164. Considered as verbal acts such statements are not within the hearsay rule. But even if the hearsay rule does cover them, they come within the exception which permits such evidence to prove the speaker's state of mind. See *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285. Nevertheless danger of improper use and ease of manufacturing this kind of evidence have led to limitations on its admissibility. See 1 WIGMORE, EVIDENCE, § 111. No jurisdiction admits it where it is clear that the defendant was the aggressor. *State v. Tolla*, 72 N. J. L. 515, 62 Atl. 675. Many jurisdictions require that there be great doubt as to which was the aggressor before this evidence will be admitted. *Johnson v. State*, 54 Miss. 430. But the general and correct rule seems to be to admit it wherever there is any other evidence of an overt act by the deceased, or if there was no eyewitness to the act. Threats not directed

against the defendant, and vague, indefinite threats in general are not admissible. *Henson v. State*, 120 Ala. 316, 25 So. 23; *Carr v. State*, 23 Neb. 749. To rebut this evidence, the prosecution may offer testimony of the deceased's peaceful plan. *State v. Chaffin*, 56 S. C. 431, 33 S. E. 454.

HUSBAND AND WIFE—RIGHTS OF WIFE AGAINST HUSBAND AND HIS PROPERTY—WIFE'S RIGHT TO SUE HER HUSBAND FOR TORTS—ASSAULT.—The plaintiff sues her husband for having infected her with venereal disease during marital intercourse. *Held*, that she may recover. *Crowell v. Crowell*, 105 S. E. 206 (N. C.).

At common law the wife could not have maintained this action. See STEWART, HUSBAND AND WIFE, § 48. It was at first held that the statutes separating the personalities of the husband and wife in no way altered the inhibition. *Thompson v. Thompson*, 218 U. S. 611. See 11 HARV. L. REV. 479; 24 HARV. L. REV. 403; SALMOND, LAW OF TORTS, 5 ed., 76; COOLEY, LAW OF TORTS, 2 ed., 268. But the modern tendency has been, by liberal construction of such statutes, to permit her to sue for her husband's personal tort to her. See 28 HARV. L. REV. 109. The principal case agrees with this sounder tendency. See *Thompson v. Thompson*, 218 U. S. 611, 619 (dissent of Harlan, Holmes, and Hughes, JJ.); *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S. W. 832, 187 S. W. 460; *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335; *contra*, *Schultz v. Christopher*, 65 Wash. 496, 118 Pac. 629. Granting the wife her right to sue, has the husband a valid defense in the consent implied from the marital relation? The court barely considered this fundamental question. Consent is a recognized defense to an action for assault. *Reg. v. Wollaston*, 12 Cox C. C. 180. Where a syphilitic man had intercourse with a girl ignorant of his disease, it was held that her consent was vitiated by his deceiving her. *Reg. v. Bennett*, 4 F. & F. 1105; *Reg. v. Sinclair*, 13 Cox C. C. 28. But it is not a question of fraud, for there is in these cases no consent. The married woman consents to the battery incident to connubial intercourse, but in no wise to contact with virus, an alien element to which her mind never adverted. See J. H. Beale, "Consent in Criminal Law," 8 HARV. L. REV. 317, 319. It is a relief to observe that the erroneous and disgraceful doctrine of *Reg. v. Clarence* has not gained place in this country. See *Reg. v. Clarence*, 16 Cox C. C. 511. See 76 JOUR. AM. MED. ASSOC. 249.

ILLEGAL CONTRACTS—CONTRACTS AGAINST PUBLIC POLICY—"KNOCK OUT" AGREEMENT NOT TO BID AT GOVERNMENT AUCTION.—The plaintiff and defendant met each other at an auction of Government stores. To avoid competition they agreed that the defendant alone should bid, and, if he secured the goods, they would share the transaction. The goods were knocked down to the defendant, who refused to account to the plaintiff. *Held*, that the contract was valid. *Rawlings v. General Trading Co.*, 151 L. T. 4 (C. A.).

It seems settled in England that a "knock out" contract is enforceable. *Galton v. Emuss*, 1 Coll. 243; *In re Carew's Estate*, 26 Beav. 187; *Heffer v. Martyn*, 36 L. J. Ch. 372. This is only qualifiedly so in America. See *Gibbs v. Smith*, 115 Mass. 592, 593; see 3 WILLISTON, CONTRACTS, § 1663. Where the purpose of the contract is that the parties together secure property, all of which neither wishes for himself, the contract is valid. *Marie v. Garrison*, 83 N. Y. 14; *Kearney v. Taylor*, 15 How. 494. On the other hand, where, as in the principal case, the object is to prevent competition and reduce the price, the contract is void. *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *Boyle v. Adams*, 50 Minn. 255, 52 N. W. 860. The agreement is regarded not only as against public policy, but also as fraudulent. See *Smith v. Greenlee*, 13 N. C. 126, 128; see *Dudley v. Little*, 2 Oh. 504, 505. It might still be argued that the plaintiff should recover on analogy to the doctrine permitting an action by a

principal against an agent who holds the proceeds of an executed unlawful enterprise. See *Baldwin v. Potter*, 46 Vt. 402; *Yale Jewelry Co. v. Joyner*, 159 N. C. 644, 75 S. E. 993. Where the contract is actually fraudulent, these cases are open to question. See 3 WILLISTON, CONTRACTS, § 1786. At any rate, the principle has never been extended to partnerships. *McMullen v. Hoffman*, 174 U. S. 639; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124. Moreover, the public policy invalidating the contract would lose all force as a deterrent unless it also prevented a recovery of profits, since from the nature of the agreement that is the only way in which either party would ever want it enforced.

JUDGMENTS — EQUITABLE RELIEF — PERJURY A GROUND FOR INJUNCTION. — The defendant obtained a judgment in a state court by testifying falsely and by feigning paralysis alleged to have resulted from injuries. The plaintiff, discovering the fraud and perjury, requested the state courts to vacate the judgment, but they declined on procedural grounds. The plaintiff now petitions the federal court to enjoin the enforcement of the judgment. *Held*, that an injunction will be granted. *Chicago, R. I. & P. Ry. Co. v. Callicotte*, 267 Fed. 799.

Federal and state courts of equity will enjoin the enforcement of a domestic or foreign judgment obtained by fraud, in a matter not before the court. For example, such a situation arises when a defendant has failed to assert his defense because of the assurance of the plaintiff that the latter would not prosecute the suit until he notified the defendant. *Pearce v. Olney*, 20 Conn. 544; see HIGH, INJUNCTIONS, 4 ed., § 191. The defendant has not had his day in court. But courts generally deny injunctive relief when the fraud of the plaintiff either consists in perjured testimony at the trial or relates to issues fully argued on their merits. *Steen v. March*, 132 Cal. 616, 64 Pac. 994; *Maryland Steel Co. v. Marney*, 91 Md. 360, 46 Atl. 1077. In support of their position these courts urge that a re-examination of these issues would result in endless litigation. Furthermore, the defendant has had a day in court. These are valid reasons why equity should proceed with greater hesitation and deliberation. But once the fraud or perjury is clearly established, injunctive relief should follow no less than in the other cases of misrepresentation by the plaintiff. Of course, the defendant must show that he exercised diligence and that he has a sufficient defense on the merits. *Spokane Co-operative Mining Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165; *Village of Celina v. Eastport Savings Bank*, 68 Fed. 401; *Ableman v. Roth*, 12 Wis. 81; *Davis v. Overseer*, 40 N. J. Eq. 156. The principal case represents the minority but sound view.

MINES AND MINERALS — EASEMENTS — RIGHT OF PURCHASER OF COAL TO USE UNDERGROUND HAULWAYS FOR REMOVING COAL FROM OTHER LAND. — The defendant purchased all the coal under plaintiff's land, with the right to mine and remove the same. After removing part of this coal, he used the underground haulways under plaintiff's land to haul out coal from other land. The plaintiff seeks to have this practice enjoined. *Held*, that the injunction be granted. *Clayborn v. Camilla Red Ash Coal Co.*, 105 S. E. 117 (Va.).

A grant of minerals gives to the grantee an easement in the grantor's land for all purposes reasonably incident to their removal. *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; *Northcut v. Church*, 135 Tenn. 541, 188 S. W. 220. An easement must be restricted to the use for which it is granted. *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Crabtree Coal Min. Co. v. Hamby's Adm'r.*, 28 Ky. L. 687, 90 S. W. 226. See 2 WASHBURN, REAL PROP., 6 ed., § 1268. Consequently if the grantee gets nothing more than such an easement he can be restrained from using the underground passages for the removal of other coal. But according to many decisions the purchaser of coal acquires not only an ease-

ment in the grantor's land, but a corporeal estate in the walls containing the coal and the space occupied by it after its removal, which he can use for any purpose. *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293, 22 Atl. 1035; *Schobert v. Pittsburg Coal Min. Co.*, 254 Ill. 474, 98 N. E. 945. *Proud v. Bates*, 34 L. J. (Ch.) 406. See 3 LINDLEY, MINES, 3 ed., § 813a. But see *Ramsay v. Blair*, 1 A. C. 701. Obviously this property in the walls and space does not continue forever. See *Webber v. Vogel*, 189 Pa. St. 156, 42 Atl. 4. Ordinarily a purchaser of realty to be severed from the soil is not considered as owner of the space occupied by that realty after its removal. Nor does a corporeal estate in the containing walls seem either a necessary or a reasonable incident to the purchase of coal. It seems, therefore, that the court in the present case rightly repudiated the doctrine of these cases, and adopted a rule more in conformity with legal principles.

NEW TRIAL — SUCCESSIVE VERDICTS — SETTING ASIDE SECOND VERDICT FOR THE SAME PARTY AS AGAINST THE WEIGHT OF EVIDENCE. — A verdict for the plaintiff was set aside as against the weight of evidence and a new trial granted. At the second trial a verdict was again rendered for the plaintiff and the defendant again moved for a new trial on the same ground. *Held*, that the motion be denied. *Gutman v. Weisbarth*, 185 N. Y. Supp. 261.

It is well settled that when a verdict is manifestly against the weight of evidence, it will be set aside and a new trial granted. *Wood v. Gunston*, Style, 466; *Jones v. Spencer*, 77 L. T. R. 536; *Carney v. Stringfellow*, 73 Fla. 700, 74 So. 866. See THAYER, PRELIM. TREAT. 208. To justify a new trial it is not sufficient that the court merely disagree with the verdict, it being necessary for the verdict to be so much against the weight of evidence as to be unreasonable. *Klock Produce Co. v. Diamond Ice & Storage Co.*, 98 Wash. 676, 168 Pac. 476. In the absence of statute there is apparently no limit to the number of times successive verdicts may be set aside as being against the weight of evidence. *Gnecco v. Pedersen*, 151 N. Y. Supp. 105; *Barrett v. Lewiston, etc. R. R.*, 113 Me. 562, 92 Atl. 934; *Gross Coal Co. v. Milwaukee*, 170 Wis. 467, 175 N. W. 793. But the fact that two or more juries agree on a verdict is naturally strong evidence that the verdict is reasonable. For this reason, and in order to prevent litigation from being unduly prolonged, courts are reluctant to consider a second verdict for the same party as sufficiently against the weight of evidence to justify another submission to a jury. See *Miller v. Central of Ga. R. R.*, 16 Ga. App. 855, 87 S. E. 303; *Ilsley v. Kelley*, 117 Me. 572, 104 Atl. 631. And many states have provided by statute that a party can have but one new trial on the ground that the verdict is against the weight of evidence. See *Van Loon v. St. Joseph R. R. & Power Co.* 271 Mo. 209, 195 S. W. 737.

PARDON — NECESSITY OF DELIVERY — EFFECT OF HONEST MISREPRESENTATION. — The warden of the prison in which the petitioner was confined notified the governor through mistake that the petitioner's term would expire on November 25, 1920. In fact the term expires in April, 1921. According to his custom of pardoning worthy convicts a month before the expiration of their sentences, the governor in September, 1920, mailed to the warden a pardon for the petitioner, "to take effect on the 25th day of October, 1920." The governor, hearing of his mistake, revoked the pardon before October 25. The petitioner applies for a writ of *habeas corpus*. *Held*, that the writ be denied. *Ex parte Ray*, 193 Pac. 635 (Okla.).

A pardon is a deed, and delivery is requisite to its operation. See *United States v. Wilson*, 7 Pet. (U. S.) 150, 160. When possession is relinquished, whether or not there is a delivery depends on the grantor's intent. So in the principal case there may have been a present constructive delivery to the

petitioner, to be operative at once, but to take effect in enjoyment only on October 25. See *Ex parte Reno*, 66 Mo. 266. Or there may have been a present delivery in escrow to the warden. In either situation, the pardon, having once been delivered, would be irrevocable. *Ex parte Powell*, 73 Ala. 517; *Ex parte Reno*, *supra*. But there is a third possibility, that the pardon was sent to the warden as the governor's agent to hold it and deliver it on October 25. See *Lange v. Cullinan*, 205 Ill. 365, 68 N. E. 934. This is a possible view of the facts, and supports the court's decision. Assuming a valid delivery, the question remains whether the pardon would be void for mistake. Fraud, even that of a third party, invalidates a pardon. *Commonwealth v. Holloway*, 44 Pa. St. 210; *State v. Leak*, 5 Ind. 359; *contra*, *Knapp v. Thomas*, 39 Ohio St. 377. See 1 BISHOP, CRIMINAL LAW, 8 ed., §§ 905, 906. An English statute seems also to make pardons issued because of honest misrepresentation and mistake void. See 27 EDW. 3, st. 1, c. 2. See 4 BLACKSTONE, COMMENTARIES, 400. Whether that statute is part of the common law in this country is doubtful. See *Commonwealth v. Holloway*, *supra*, 219; *Knapp v. Thomas*, *supra*, 385. But some American cases show a tendency to treat mistake as vitiating, even in the absence of statute. See *State v. McIntire*, 1 Jones (N. C.), 1. But see *Ex parte Rice*, 72 Tex. Cr. R. 587, 162 S. W. 891. Undoubtedly fraud may be inferred from the fact of misinformation, if no other facts appear. *Rosson v. State*, 23 Tex. App. 287, 4 S. W. 897. However, it seems unlikely that American courts would go so far as to hold a pardon invalid because of mistake caused by the honest misrepresentation of a person totally unconnected in interest with the prisoner.

PAROL EVIDENCE RULE — CONSTRUCTION OF DOCUMENTS — SUPPLEMENTING THE MINUTES OF A CITY COUNCIL BY PAROL. — Plaintiff sues the defendant city for injuries sustained while attending a horse show on the street. The minutes of the council showed an application for permission to use a street for a horse show, but showed no action by the council. Parol evidence of such action was admitted by the trial court. *Held*, that this was error. *City of Mt. Vernon v. Alldridge*, 128 N. E. 934 (Ind.).

In proving the proceedings of public bodies, trustworthiness and certainty are best secured by the exclusion of all parol evidence and reliance solely upon the record. And when a record is required by statute, many courts exclude all parol evidence contradicting or extending it. *Dunn v. Cadiz*, 140 Ky. 217, 130 S. W. 1089; *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946. Nor is parol evidence admissible to vary the plain and clear language of the record. *Marshall v. Midland Valley R. Co.*, 96 Kan. 470, 152 Pac. 634; *Bailey v. Des Moines*, 158 Ia. 747, 138 N. W. 853. But parol evidence is admissible to explain ambiguous language in the record, in the absence of a statute making the record final. *Watts v. Levee District*, 164 Mo. App. 263, 145 S. W. 129; *Beattie v. Roberts*, 156 Ia. 575, 137 N. W. 1006. And liberal courts admit parol evidence to supplement the minutes of public bodies. *Gilmer v. School District*, 41 Okla. 12, 136 Pac. 1086; *Horning v. Canby*, 188 Pac. (Ore.) 700. *Contra*, *Kidson v. Bangor*, 99 Me. 139, 58 Atl. 900. Since every addition a litigant would urge is substantially a variation, this is going far. Yet when the statute merely directs the keeping of a record, rights of third parties should not be lost through the negligence of a city clerk. *Cf. Chicago R. Co. v. Pulnam*, 36 Kan. 121, 12 Pac. 593. *Contra*, *Lebanon Water Co. v. Lebanon*, 163 Mo. 254, 63 S. W. 811. Where the record is obviously incomplete or ambiguous, justice would seem to require the use of parol evidence to protect the interests of third parties.

PUBLIC OFFICERS — NATURE OF PUBLIC OFFICE — ACTION FOR DISMISSAL WITHOUT CAUSE. — The plaintiff contracted to serve five years as superin-

tendent of industries in Bengal. He was dismissed without cause. By the terms of the contract it was not to be terminated except for misconduct. *Held*, that the plaintiff has no cause of action. *Denning v. Secretary of State for India in Council*, 37 T. L. R. 138 (K. B.).

It is settled in England that servants of the Crown can be dismissed at pleasure. *Shenton v. Smith*, [1895] A. C. 229; *Dunn v. The Queen*, [1896] 1 Q. B. 116. A special contract does not alter this. *Hales v. The King*, 34 T. L. R. 589. However, the right can be abrogated by statute. *Gould v. Stuart*, [1896] A. C. 575. In the United States a distinction is taken between public officers and public employees. In the absence of special provisions in state constitutions the former can be removed at any time. An office is not property. *Taylor v. Beckham*, 178 U. S. 548; *Conner v. The Mayor*, 5 N. Y. 285; *Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961, overruling *Hoke v. Henderson*, 4 Dev. (N. C.) 1. And designation to office does not create a contract right. *Butler v. Pennsylvania*, 10 How. (U. S.) 402; *Jones, Purvis & Co. v. Hobbs*, 4 Baxt. (Tenn.) 113; see COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 388. On the other hand, a public employee is protected from arbitrary dismissal by the contract clause. *Hall v. Wisconsin*, 103 U. S. 5. There is considerable confusion as to the distinction in any particular case. See *David v. Portland Water Committee*, 14 Ore. 98, 117; cf. *In re Corliss*, 11 R. I. 638. All offices must be created either by the constitution or the legislature. *United States v. Maurice*, 2 Brock. (U. S.) 96; *Miller v. Warner*, 42 App. Div. 208, 59 N. Y. Supp. 956; *State v. Spaulding*, 102 Ia. 639, 72 N. W. 288. But the converse is not true; a legislative act may create a mere employment. *Bunn v. People*, 45 Ill. 397. The criterion mostly stressed is whether the individual performs some governmental function. See *McArdle v. Jersey City*, 66 N. J. L. 590, 598, 49 Atl. 1013, 1016; MECHEM, PUBLIC OFFICERS AND OFFICES, 1 ed., § 4. The scope of such a definition has perhaps not always been realized. See Eugene Wambaugh, "The Present Scope of Government," 20 AMER. BAR ASS. REP. 307, 81 ATLANTIC MONTHLY, 120. At any rate, the plaintiff in the principal case would probably be considered a public officer, so a like result would be reached in this country.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — POWER OF COMMISSION TO FIX RATES WHEN A STATUTORY MAXIMUM RATE HAS BEEN HELD CONFISCATORY. — The New York Public Service Commission "may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute. . . ." (N. Y. L. 1910, c. 480, § 72.) The courts having declared the statutory maximum confiscatory as to the defendant, the defendant obtained an order from the commission fixing higher rates. The plaintiff, a consumer, claimed that the order was void as beyond the power of the commission and sought to enjoin the defendant from enforcing those rates. *Held*, that an injunction *pendente lite* be granted. *Morrell v. Brooklyn Borough Gas Co.*, 113 Misc. 65, 184 N. Y. Supp. 651.

The decisive question in this case is whether the Public Service Commission Law confers on the commission a limited power to fix rates for gas or a general power with a limitation. See N. Y. L. 1910, c. 480, art. 4. The court takes the former interpretation, that the power is only to fix rates less than the statutory maximum. See *Brooklyn Borough Gas Co. v. Public Service Commission*, 17 State Dept. Rep. (N. Y.) 81, 116. It follows that when all such rates are invalid, as where the statutory maximum has been found confiscatory, the commission has no power to fix rates at all. This leaves the anomaly of one company, freed from all expert administrative supervision, fixing its own rates on common-law principles. Higher rates previously fixed by statute or the commission are repealed by a statute fixing a lower maximum. See *Brooklyn Borough Gas Co. v. Public Service Commission*, *supra*, 115, 119; *Matter of*

Brooklyn Borough Gas Co., 18 State Dept. Rep. (N. Y.) 70, 86; *contra*, *Public Service Commission v. Brooklyn Borough Gas Co.*, 104 Misc. 315, 171 N. Y. Supp. 937. The *dictum* in the principal case that the court will fix rates cannot be supported. *Bronx Gas & Electric Co. v. Public Service Commission*, 108 Misc. 180, 178 N. Y. Supp. 172; see *Bronx Gas & Electric Co. v. Public Service Commission*, 190 App. Div. 13, 20, 180 N. Y. Supp. 38, 44. And the ingenious decree of Judge Learned Hand in a similar situation impounding the excess above the invalid statutory maximum to be distributed retroactively according to the new rate to be fixed by the legislature depends of necessity on early legislative action. See *Consolidated Gas Co. v. Newton*, 267 Fed. 231, 270. The case commonly relied on by the court as laying down this narrow construction dealt with a rate which no court had found confiscatory. *People ex rel. Municipal Gas Co. v. Public Service Commission*, 224 N. Y. 156, 120 N. E. 132. See *Public Service Commission v. Brooklyn Borough Gas Co.*, 104 Misc. 315, 328, 171 N. Y. Supp. 937, 944. The more reasonable interpretation of the words of the act as fortified by its whole scheme and purpose would confer a general power of rate regulation subject to a limitation by statute. Then when the limitation is invalid as to any company the commission could still fix reasonable rates for that company under its general power. See *Bronx Gas & Electric Co. v. Public Service Commission*, 190 App. Div. 13, 21, 180 N. Y. Supp. 38, 45; *Matter of Brooklyn Borough Gas Co.*, 18 State Dept. Rep. (N. Y.) 70, 83.

SURETYSHIP — SURETY'S DEFENSES — ALTERATION OF SURETY'S CONTRACT BY AMENDING CAUSE OF ACTION. — The plaintiff sued X and the defendant and attached X's property. X gave a bond for the release of the attachment, on which the defendant became surety for the amount of the judgment in case plaintiff recovered "in said action." Plaintiff in fact had no cause of action against X but was the agent of the Y company which did. With X's consent the Y company assigned its claim to plaintiff. Defendant consented to the assignment "without prejudice to any rights against plaintiff." Plaintiff recovered judgment and now sues the defendant as surety on his bond. *Held*, that the defendant is released. *Michelin Tire Co. v. Bentel*, 193 Pac. 770 (Cal.).

It is a fundamental proposition that any material variation of a surety's obligation without his consent discharges him. This principle is applicable to sureties on a bond given to release an attachment. If the plaintiff discontinues as to certain defendants while recovering against the others, or if parties plaintiff are added or eliminated in such a way as essentially to alter the surety's liability, he is released. *Andre v. Fitzhugh*, 18 Mich. 93; *Furness v. Read*, 63 Md. 1; *Quillen v. Arnold*, 12 Nev. 234. And if, as in the principal case, the plaintiff substantially amends his cause of action, substituting a good for a bad one, the surety's liability ceases. *Cassidy v. Saline Bank*, 7 Ind. Terr. 543, 104 S. W. 829; *Wood v. Denny*, 7 Gray (Mass.), 540. But if the alteration is merely one of form, such as a correction of a misdescription of claim, the obligation of the surety continues binding. *Morton v. Shaw*, 190 Mass. 554, 77 N. E. 633; *Warren Bros. v. Kendrick & Roberts*, 113 Md. 603, 77 Atl. 847. Should the sureties consent to the alteration they are not discharged. *Hellman v. City Trust Co.*, 111 App. Div. 879, 98 N. Y. Supp. 51; *Mundy v. Stevens*, 61 Fed. 77. The fact that the defendant in the principal case assented to the amended action "without prejudice to any rights" tends to support the court's finding that the consent bound him only as a party in the original suit and did not prevent him from setting up the defense of alteration of his suretyship obligation.

TITLE, OWNERSHIP AND POSSESSION — CHATTELS — RIGHTS OF ADVERSE HOLDER — BANKRUPTCY. — X, bought, in good faith, a stolen automobile.

Being insolvent, he transferred it to one of his creditors. *Held*, that this was an act of bankruptcy. *In re Schenderlein*, 46 Am. B. Rep. 128.

To constitute an act of bankruptcy under the section of the Act here involved, the debtor must transfer "property." See BANKRUPTCY ACT OF 1898, § 3 a (2). This is the same expression used in section 70 of the Act in specifying what is to pass to the trustee. Under this latter section money obtained by larceny passes to the trustee. *Lord v. Seymour*, 85 App. Div. 617, more fully reported in 83 N. Y. Supp. 88, aff'd 177 N. Y. 525, 69 N. E. 1126. Analogously, if the bankrupt has property of another in his possession, and is using it as his own, it will pass to the trustee, though subject to the rights of the third party. *In re Beal*, Fed. Cas. No. 1156; *In re Moses*, 1 Fed. 845. The principal case accords with this broad use of the term "property," and such liberality is in harmony with the policy of the Act, since disposing of any property that would otherwise pass to the trustee should constitute an act of bankruptcy. But it is here equivalent to a holding that a stolen chattel may be, at least for some purposes, the "property" of a *bona fide* purchaser from the thief. There was a period when such holders had large rights, and when the chattel was often spoken of as their property. See Y. B., 30 & 31 Edw. I. 512-514; Y. B., 8 Edw. III. 10-30. The propriety of such an expression under existing conditions has been much discussed. See James Barr Ames, "The Disseisin of Chattels," 3 HARV. L. REV. 23, 313, 337; Percy Bordwell, "Property in Chattels," 29 HARV. L. REV. 374; see *In re Wellmade Gas Mantle Co.*, 233 Fed. 250, 252.

TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — INDUCING SALE OF JUDGMENT AS INJURY TO LAWYER CONTRACTUALLY INTERESTED IN REALIZING UPON THE JUDGMENT. — The plaintiff, a lawyer, had a contract with his client, by which he was to receive one half of all money recovered in a suit conducted for his client. Judgment was recovered in the suit, and the plaintiff brought an action to set aside certain alleged fraudulent conveyances made by the judgment debtor to the defendant. The defendant, according to the allegations, then "maliciously and to annoy and harass the plaintiff, and to deprive the plaintiff of the fruits of the litigation," induced the client to transfer the judgment to him. The court below sustained the demurrer to the complaint. *Held*, that the judgment be reversed. *Hogue v. Sparks*, 225 S. W. 291 (Ark.).

It is established that one who intentionally and without justification induces another to break his contract becomes liable to the person injured by the breach. *Lumley v. Gye*, 2 El. & Bl. 216; *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225; *Knickerbocker Ice Co. v. Gardner Dairy Co.*, 107 Md. 556, 69 Atl. 405; *contra*, *Boulter Bros. v. Macauley*, 91 Ky. 135, 15 S. W. 60. A difficulty raised by the principal case is whether the act of the defendant, resulting in the protection of his own interest, was not justified. But malice in fact, amounting to actual spite, was admitted as the motive on demurrer. And it is recognized in many cases that an act otherwise unobjectionable may become actionable when motivated simply by the desire to injure. *Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co.*, 97 Miss. 148, 52 So. 454; *Dunshee v. Standard Oil Co.*, 152 Iowa, 618, 132 N. W. 371; see J. B. Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411. The objection to such a rule is the difficulty of proving motive. But this difficulty is removed when the case arises on demurrer. Moreover there is no social interest in protecting an act prompted solely by the desire, not to benefit one's self, but to injure another. Accordingly as the wrongful motive of the defendant negated any justification for his act, the case is thus supportable. Furthermore, the plaintiff's claim might be enforceable on the theory that by his contract he had acquired in the judgment an equitable interest, which an assignment with notice could not destroy.

TRIAL — TAKING CASE FROM JURY — DIRECTING VERDICT ON EVIDENCE RAISING A PRESUMPTION SUPPORTING THE BURDEN OF PROOF. — A bailor sued a bailee for negligently injuring a horse hired to the bailee. He introduced evidence that the horse was in good condition when delivered to the bailee and was badly injured when returned, and then rested. The bailee offered no evidence. A motion by the bailor for a directed verdict was refused. The jury returned a verdict for the bailee. *Held*, that judgment be reversed and a new trial granted. *Sheriff-Street Stables v. Mandel*, 185 N. Y. Supp. 83.

A bailee for hire is liable for an injury to the property hired due to ordinary negligence. *Buis v. Cook*, 60 Mo. 391. See STORY, BAILMENTS, 9 ed., § 399. By the great weight of authority the burden of establishing negligence rests upon the bailor. *Sanford v. Kimball*, 106 Me. 355, 76 Atl. 890; *Stone v. Case*, 34 Okla. 5, 124 Pac. 960. But where the property is delivered to the bailee in a good condition and is returned damaged, negligence is presumed, thus placing upon the bailee the burden of producing evidence of some other cause of injury. *Davis v. Taylor & Son*, 92 Neb. 769, 139 N. W. 687; *Jackson v. McDonald*, 70 N. J. L. 594, 57 Atl. 126; *Lyons v. Thomas*, 68 N. Y. Supp. 802. See 4 WIGMORE, EVIDENCE, § 2508. It is now well settled that a verdict may be directed for the proponent, *i. e.* the party having the burden of establishing the issue. *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727; *Harding v. Roman Catholic Church*, 113 App. Div. 685, 99 N. Y. Supp. 945, *aff'd* 188 N. Y. 631, 81 N. E. 1165. See 4 WIGMORE, EVIDENCE, § 2495. Where the proponent's evidence clearly establishes the issue and the opposing party offers no evidence, a directed verdict is proper. *Rasch v. Bissell*, 52 Mich. 455, 18 N. W. 216; *Mellon Nat. Bank v. People's Bank*, 226 Pa. St. 261, 75 Atl. 363. The rule should be the same where the proponent produces evidence raising a presumption sustaining the burden of establishing the issue. *Cf. Magoffin v. Missouri Pac. Ry. Co.*, 102 Mo. 540, 15 S. W. 76. See 6 HARV. L. REV. 125, 129. See 4 WIGMORE, EVIDENCE, § 2495. The court was clearly right in holding that there was error. A new trial, however, is an expensive and cumbersome form of relief. The desirable way of correcting such an error is by entering a judgment notwithstanding the verdict. See *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 102 N. E. 665. Under the New York CODE OF CIVIL PROCEDURE, § 1317, however, a new trial must be granted unless it is manifest that no possible proof applicable to the issue would entitle the defeated party to recover. *New v. Village of New Rochelle*, 158 N. Y. 41, 52 N. E. 647.

BOOK REVIEWS

THE LIFE OF JOSEPH HODGES CHOATE. By Edward Sandford Martin. New York: Charles Scribner's Sons. 1920. 2 vols. pp. viii-471; vii-439.

Biographies are of various kinds. There is the philosophical anecdotal form, such as Plutarch's Lives, at which Montaigne said "I eternally fill," and concerning which he observed: "Plutarch had rather we should applaud his judgment than commend his knowledge, and had rather leave us an appetite to read more than glutted with that we already read." There is the day-by-day chronicle of a faithful admirer, such as that by which James Boswell made himself almost more famous than Dr. Johnson. There are the biographies written by one who has mastered every detail of the life and time of his subject, absorbed himself with increasing ardor in his personality, and then given such a picture of the man as to create a living personality whom the reader feels he has known and loved (or hated) in actual life. Such is Pro-

fessor Bosworth Smith's *Life of Lord Lawrence of India*, Wm. Roscoe Thayer's *Life of Cavour*, or Albert Beveridge's *Life of Marshall*. Finally, there is the "Life and Letter" type of biography, usually made up shortly after a man's death, under the supervision of his family, by taking such of his letters as they consider prudent at the moment to publish, and stringing them together on a slender thread of narrative, augmented by extracts from speeches and obituary notices or memorials. Such, for example, is the *Life and Letters of John Hay* by Professor Thayer.

The *Life of Joseph H. Choate* "as gathered chiefly from his letters," by the genial editor of *Life*, Mr. Edward S. Martin, is of the last mentioned class. In his introduction Mr. Martin frankly avows that "the reader will promptly discover that this life of Mr. Choate is not so much a biography after the manner of Plutarch, as a compilation." A compilation assuredly it is, with very little comment by the compiler. It would have been made more interesting if Mr. Martin had allowed his charming philosophic mind to play about his subject with comment and characterization. At best, the book will be classed among the *Mémoires pour servir*. Probably it is too soon after Mr. Choate's death to expect any satisfactory story of his life, or appraisal of its value to his generation or to posterity. Mr. Theron G. Strong, a few weeks after Mr. Choate's death, published a sketch,¹ — which presents him more as his friends and contemporaries at the Bar knew him than a layman could do, and which, while superficial, possesses a considerable anecdotal interest.

Mr. Martin's labors, at the outset, were made supremely difficult by placing, as the introduction to his book, Mr. Choate's own captivating autobiography, written, as he records, after "a long confinement to my room and bed, for the first time in more than eighty years!" Unfortunately, Mr. Choate only brought this narrative down to the time of his marriage. It is not surprising that Mr. Martin, after reading this self-told story of Mr. Choate's ancestry and early life, abandoned any idea of attempting a personal interpretation of Mr. Choate's character and achievements, and contented himself with the task of selection and compilation from letters, speeches, and contemporary newspaper comments.

The letters which make up this collection are chiefly domestic in character. Many of them are of such purely temporary and personal interest that one cannot help regarding them as too trivial and unimportant to be employed even as mortar in building a monument to Mr. Choate's career. This comment applies to a number of the letters written in the Nineties (Chap. VI; see particularly pp. 406, 407, 409, 413, 416, 419, 420, 437, 458), as well as to those written from London, while he was Ambassador, to Mrs. Choate and Miss Choate. Yet Mr. Martin tells us that while in London "Mr. Choate was in constant communication with Secretary Hay. In the season when diplomatic business was being transacted, he wrote to him usually with his own hand and often at considerable length, about concerns of government and especially about diplomatic negotiations, first with Lord Salisbury and afterwards with Lord Landsdowne. The letters copied here," says Mr. Martin, "are on subjects of relatively less diplomatic importance than the main part of this correspondence. It should not be inferred from them that the Ambassador's time and thought were chiefly taken up with social matters, addresses and lighter duties. An important mass of correspondence running over six years attests the contrary and shows him as a diligent official, skilled and practised in the law, and in all researches that are connected with it; devoting his talents, his energies, and his acquired knowledge to promoting the causes and the interests of the United States."

¹ "Joseph H. Choate, New Englander, New Yorker, Lawyer, Ambassador." Dodd, Mead & Co., 1917.

This "important mass of correspondence," which Mr. Martin states would have exhibited Mr. Choate in the character of a skilled and useful public servant, is withheld, and we are permitted only to read the personal letters, written, many of them, in haste, at the end of busy days, to wife, daughter, or son, telling of luncheons, dinners, or week-end visits to country houses, — well enough in themselves, but, showing *un héros en pantoufles* rather than the skilled Ambassador, devoting his accumulated wisdom and lawyer's ability to the service of his country in her international relations.

The extracts from Mr. Choate's speeches on various occasions, and the tributes paid him by such men as Mr. Balfour, Lord Bryce, and Mr. Root in the addresses reproduced in this work, together form a picture of Mr. Choate very admirable and very inspiring, but the reader cannot help feeling that a more accurate, instructive, and interesting revelation of the value of Mr. Choate's life would have been made had the editor given less of the purely domestic and social side, and more concerning Mr. Choate's really great work in the New York State Constitutional Convention of 1894, of his services at the Second Hague Peace Conference or before the Behring Sea Arbitration Tribunal and something more of his conduct of the important litigation in which he was engaged at the Bar, and of his official correspondence while Ambassador to London or Delegate to the Hague Conference.

The foundations of Mr. Choate's success in life were laid at Harvard College, where, as he records in his own narrative, the best and happiest period of his life was spent, and at the Harvard Law School, where, while he received very little systematic instruction, he formed an intimate acquaintance with his great kinsman, Rufus Choate, then at the head of the profession in Massachusetts, if not in the whole country. Attendance, during this period, upon the trials in the Supreme Court of Massachusetts, where Rufus Choate, Sidney Bartlett, and Charles G. Loring always were engaged, completed the preliminary education of the young man who, in September, 1855, presented himself at the office of William M. Evarts, in the city of New York, armed with a letter of introduction from Rufus Choate, certifying to his "high reputation for scholarship and all worth," and adding: "There is no young man whom I love better, or from whom I hope more, or as much, and if you can do anything to smooth the way to his first steps the kindness will be most seasonable and will yield all sorts of good fruits." This recommendation was more than justified by the event, and the prophecy was amply fulfilled. For many years the firm of Evarts, Southmayd and Choate stood at the very head of the American Bar, — a unique association of lawyers of extraordinary learning, skill, and character.

Nature was prodigal in her gifts to Mr. Choate. He had a noble face, splendid physique, a sound constitution, a rare capacity for long continued labor, an acute mind, and a voice of extraordinary melodiousness. His portrait, reproduced from a daguerreotype taken at the age of seventeen and prefaced to the first of these volumes, is enthralling in its manly beauty. That despite advancing years he still retained great beauty of feature and majesty of form, is demonstrated by the photograph taken at the age of sixty-six, given in Volume II. To the very end of his life his voice was musical and sonorous — a perfect instrument for his matchless oratorical art.

To all who enjoyed a friendship or even an acquaintance with Mr. Choate, his distinguished success seemed but the normal, the inevitable result of his personality, his character, and his accomplishments. Always he was a hard worker. He never relied upon his ready wit and personal charm for his success. These qualities contributed in large measure to the results he attained, but back of and underlying them were hours of intense application in the study of the facts and the law applicable to every task he undertook. It was only when he had mastered these that he came into court with an easy, self-con-

fidant, calm, and humorous manner, which in itself half won his cases. Good humor was perhaps Mr. Choate's most striking and constant characteristic as a trial lawyer. He never lost his temper.

As Mr. Martin says: "He went through life laughing at a foolish world. His cases were serious to him, in so much as they involved responsibility. If he accepted a trust he was faithful to it. He toiled enormously when labor was necessary. When he made fun it was in the interest of his own case and his own client; but cases of law, though serious, seemed very seldom to be solemn to him."

Other lawyers might be solemn, or vexed, or angry, but Mr. Choate's serene, smiling, half-cynical, and imperturbable nature was a rock upon which most of his opponents broke or were broken.

During his active career at the Bar, until his appointment at the age of sixty-seven to the post of Ambassador to Great Britain, except during the summer vacations, he was almost continuously engaged in the actual trial and arguments of cases in court. This left him no time for scholarly research in or exposition of the law. He was not a jurist, in the sense that Kent and Story and Marshall or Dillon were. He left no legal literary monument to preserve the memory of his achievements at the Bar. He did not pay the customary debt of a lawyer to his profession by writing a work on any legal subject. He was not even an occasional contributor to any law review. His memorial in the active life of his chosen vocation must largely be sought in the recollections of his contemporaries and the traditions which they have preserved and are passing on to the coming generations of lawyers.

A very remarkable review of Mr. Choate's activity during his forty years' practice at the Bar, written by William V. Rowe, for years his associate in practice, printed as a footnote in Volume II, at page 80, gives a vivid picture of the intensity of his labors, the importance and diversity in character of the controversies in which his professional skill was enlisted, the recognition of his ability on the part of the government of his country and the representatives of the greatest property interests. He was employed in cases involving the whole range of law — from testamentary controversies to questions of transportation or concerning patents; from great constitutional questions, such as those involved in the income tax case of 1894, to proceedings before courts martial or international tribunals. In all and every of these he exhibited an easy mastery. As his active professional life was drawing to a close, on the eve of his appointment as Ambassador to Great Britain he answered an interviewer, who inquired of him whether his great successes had brought him content and happiness, by saying: "Constant labor is happiness and success simply means ability to do more labor, — more deeds far reaching in their power and effect. Such success brings as much happiness as the world provides."

Mr. Choate's first conspicuous public service was rendered in the citizen's fight against the Tweed ring in 1871. With great courage and signal ability he threw himself ardently into that contest, and enjoyed the satisfaction of knowing that his services very greatly contributed to driving from power a gang of the most unblushing scoundrels that ever secured control of the government of an American city. He demonstrated the power of the good citizenship of a community when aroused, organized, and intelligently and fearlessly led.

In November, 1893, Mr. Choate was elected one of the delegates-at-large to the Convention called to revise the Constitution of the State of New York. The Convention met at Albany and organized by choosing him as its President. In his opening speech he said it was "a momentous event when the delegates of a State of many millions of people gather together after an interval of almost fifty years, for the purpose of revising and amending the fundamental law of the State." He showed the conservative character of

his mind by declaring that the Convention was not called upon to treat the Constitution "with any rude or sacrilegious hands." The people, he said, had become accustomed to its provisions, and the Convention would be false to its trust if it "entered upon any attempt to tear asunder this structure which, for so many years, has satisfied, in the main, the wants of the people of the State of New York."² The Convention sat for four months. It thoroughly revised the Constitution. There were many hot debates during the period of its labors. Mr. Choate by his calm, imperturbable good nature poured oil on many troubled waters. At times he left the chair and spoke from the floor in support of, or opposition to, measures in which he felt too much interest to remain a mere spectator. In his closing address he thus summed up the character of the results achieved: "We have demonstrated that this, at least, was a conservative convention, mindful of the value of the experience of the past, of the precious value of the institutions which our fathers had handed down to us."³ The Constitution thus framed was submitted to the people and adopted by a majority of upwards of 115,000 votes. Mr. Choate wrote with great satisfaction: "My summer's work has not gone for naught, and instead of perishing in the night, it has now become a part of the history of the State."

Yet only two or three pages of trivial notes are given by Mr. Martin to this very great work of Mr. Choate. Not a single one of the speeches made by him during the life of the Convention is given: speeches such as those he delivered on other formal occasions, in which, as Mr. Root said in his memorial address, "he expressed so clearly the underlying spirit and purpose of the American Bar, he represented with such cogency and command the Bar at its best of real devotion to justice and liberty, that the finest thought and feeling of the profession came to follow him and to look to him as a leader, not merely because he tried causes more skilfully, or argued them more powerfully than others; but also because he put the power and prestige of his great reputation in the court room behind the thrust of advocacy for the honor and public service of the bar as well."

Mr. Choate's *insouciance*, his constant humor, his love of "fun," combined to create the impression that he was not profoundly stirred by great passion, even when other men were deeply moved to righteous indignation. But in the successful proceeding to reverse the court-martial's judgment against Fitz-John Porter, and, above all, in the suit which challenged the constitutionality of the federal income tax law of 1894, he displayed a fervor of conviction and an intensity of advocacy which dispelled any impression of indifference. The conservatism of his nature, which had found expression in his addresses before the New York Constitutional Convention, was thoroughly aroused at a measure which he regarded as violating the fundamental principles of the federal Constitution and as the first step towards populism. He was successful in winning a decision — by a sadly divided court — declaring the law to be unconstitutional, thus postponing until the adoption of the Sixteenth Amendment, in 1912, the exercise by Congress of the power to impose a graduated tax upon incomes, without regard to apportionment among the states in proportion to population — a power which, however much it sometimes may be abused, is now recognized to be essential to enable Congress to meet the growing fiscal requirements of the nation in times of peace and, above all, in the emergencies of war.

In May, 1907, two years after his retirement from the Ambassadorship to London, he was appointed one of the American delegates — the leading delegate — to the Second Hague Peace Conference.

² Lincoln's Const. Hist. of N. Y., Vol. III, p. 24.

³ 3 Lincoln, 677.

Dr. James Brown Scott, in an article quoted by Mr. Martin, says that at the Conference Mr. Choate devoted his energies to the creation of two international tribunals for the interpretation and application of principles of law, — "the International Court of Prize and the Court of Arbitral Justice. Through his timely intervention and conciliatory attitude in the question of the prize court, he was able to adjust apparently irreconcilable differences. . . . But the Prize Court deals with questions arising out of a state of war. It is essential to the ordinary administration of justice between nations that an international tribunal exist for the decision of controversies arising in time of peace . . . therefore Mr. Choate urged upon the Conference, in season as well as out of season, the creation of a truly permanent Court composed of judges 'acting under a sense of judicial responsibility' to quote the happy phraseology of Secretary Root's instructions." After much discussion, a project for such a court was agreed upon, with a recommendation that the court be established when the Powers had agreed, through diplomatic channels, upon a method of appointing the judges.

An effort, led by Mr. Choate, to secure a general treaty of Arbitration, pledging the nations to submit to arbitration differences of a justiciable nature, was less successful. The establishment of an Arbitral Court split upon the rock of the mode of selecting judges. Mr. Choate thus describes it in an address delivered before the University of Pennsylvania upon the occasion of receiving the degree of LL.D. on Washington's Birthday, 1908: "It was upon this last feature that the Conference found itself hopelessly divided — the method that had been unanimously adopted for the Court of Appeal in Prize — for a graded distribution of the judges by years among the different nations, in some proportion to their relative importance, giving to the eight great powers each a judge all the time in the prescribed period of twelve years, and the others, graded periods for eleven years down to one, as in the case of Panama, was now rejected by all the smaller powers, who claimed that as they were equal in sovereignty, and had equal votes in the Conference, they must have an equal judicial voice in this Court of Arbitration. The greater powers could not agree that technical equality of Sovereignty made substantial equality of power, and so this knotty question was left for the powers to settle and establish the Court as I have no doubt they will do in the quieter atmosphere of diplomacy."

Twelve years were to elapse and a great world war to intervene before this prophecy was realized. The "knotty question" has been solved by Elihu Root, the man who, as Secretary of State, drafted the instructions to Mr. Choate and his colleagues at the Hague Conference, by utilizing the machinery established in the Covenant of the League of Nations, and requiring the selection of the judges of the Court of International Justice to be made by the unanimous vote of the Council of the League, in which the preponderance of the "great powers" is recognized, and the Assembly, in which technical Sovereignty is the criterion of action, and every nation, great or small, has the same voice.

On his way home from the Hague Conference, Mr. Choate attended the annual dinner given by the Benchers of the Middle Temple, of whom he was one, to those of the Inner Temple. None of the honors showered upon Mr. Choate during his official life in London had been so highly appreciated by him as his election as one of the Benchers of the Middle Temple. His speech, if he delivered one on that occasion, is not given by Mr. Martin, but at a banquet in his honor at Lincoln's Inn given by the Bench and Bar of England, on April 14, 1905, he told the audience that "these ancient Inns of Court, and above all, Westminster Hall with its far more ancient and historic associations, which have been the nurseries and the home of the Common Law for ages, have been very near and dear to my countrymen, and especially to the Bar in America."

He expressed the wish "to acknowledge that infinite debt of gratitude that we owe, that the whole world owes, to the Bench and Bar of England, who have been working out with untiring patience through whole centuries the principles of the Common Law which underlie alike the liberties of England and of America."

These principles he summarized in a paragraph so compact with historical truth and philosophical excellence that it should be read, pondered over, committed to memory, and taken to heart by every American. "That there is no such thing as absolute power, that King, lords and commons, President, Congress and people, are alike subject to the law, that before its supreme majesty all men are equal; that no man can be punished or deprived of his dearest, or any of his rights, except by the edict of the law, pronounced by independent tribunals who are themselves subject to the law; that every man's house is his castle, and though the winds and the storms may enter it, the King and the President cannot. In other words, and the sublime words of the great Sydney, that ours, on both sides of the water, is 'a government of laws and not of men.'"

He pointed out that five of the signers of the Declaration of Independence had been bred to the law in the Middle Temple and three of the framers and signers of the Constitution of the United States in the same Inn, one of whom afterwards was nominated by President Washington to be Chief Justice of the United States, and he added, "So you may well imagine with what delight I was informed a day or two ago that I had been made a Bencher of the great American Inn, the Middle Temple."

The principles of the Common Law and the Anglo-Saxon conception of liberty under law always were close to Mr. Choate's heart.

At the farewell banquet given him by the Lord Mayor of London at the Mansion House, he referred to the delightful personal memories he would carry away with him. But, he added, "I shall carry away something better than that. I shall carry away the highest appreciation of those great traits and qualities which make and mark your national life — the reign of law absolutely sovereign and supreme in all parts of the land; individual liberty carried to its highest perfection, perfected by law and subject to it; that splendid and burning patriotism which inspires your young men when their country calls to risk life and all they hold dear for her sake. . . . I shall carry with me the recollection of that splendid instinct for public life which animates and pervades those classes here from whom public duty is expected, and the absolute purity of your public life which is the necessary result."

With advancing years, Mr. Choate's fervor of conviction respecting policies of government in which he was interested increased. He had outspoken scorn for the effort to exempt American Coastwise Shipping from the payment of tolls in the Panama Canal. He ridiculed the notion that there could be any honest difference of opinion concerning the meaning of the Hay-Pauncefote treaty. "If ever two men," he wrote to the *New York Times*, "deserved the gratitude of their respective nations, and each of the other's nation, those men were John Hay and Lord Pauncefote, perfectly plain, straightforward men who believed that it was their part to say what they meant and to mean what they said, and to express in perfectly clear English what was in their own minds. And when they said that the ships of all nations should have free and equal passage through the canal without any discrimination whatsoever, they meant just that. They lived and died without ever once suspecting that their words were capable of any other meaning than was borne on the face of them."

Mr. Choate followed with growing interest and intensity the events of the great war. In July, 1915, he wrote to his daughter expressing the wish that the President would "end his 'parlez-vous-ing' with the Germans and give them plainly to understand that unless they give a prompt and favorable

answer, our diplomatic relations with them must come to an end." In September of that year, on the occasion of the conferring upon him of the honorary degree of LL.D. by the University of Toronto, he delivered an address, in the course of which he said: "Is it a fact that a century of united labors on the part of all the universities of the world . . . have all been for nothing? Has civilization been thrown to the winds? Has liberty been entirely forgotten? Has justice ceased to be respected among men? . . . Well, by and by peace will come. . . . There is only one thing that can hold civil society together. There is only one rule which can hold the nations of the world together in peace, and that is the law of good faith, and nobody knows it better than the men who are fighting in the trenches on your side and on the other side."

He rejoiced greatly when the United States finally declared war against Germany. "At last," he wrote Lord Grey, "Americans at home and abroad can hold up their heads with infinite pride."

He threw himself unreservedly into the work of organizing the reception of the British and French Missions that arranged to visit this country immediately following the declaration of war. At the reception to the British Mission at the New York City Hall on May 11, 1917, he spoke of America's past doubts and hesitations as to how and when to take the right path. "I feared at one time," he said, "that we might enter into it for some selfish purpose, for the punishment of aggressions against our individual, national, personal rights, for the destruction of American ships or of a few American lives, ample ground for war; but we waited wisely, because we were able at last to enter into this great contest, this great contest of the whole world, for noble and lofty purposes such as never attracted nations before. We are entering it under your lead, sir," — addressing Mr. Balfour — "for the purpose of the vindication of human rights, for the vindication of free government throughout the world, for the establishment by and by — soon, we hope, late, it may be — of a peace which shall endure and not a peace which shall be no peace at all."

He attended all the functions incident to the reception of the visiting Delegations — French and English. Never did he appear more splendid nor speak with greater vigor than at the farewell banquet to the two Missions at the Waldorf-Astoria Hotel on Friday evening, May 11th. He closed his address with a cry to the national administration to hasten to the aid of the Allies. His last words before he sat down were, "And for God's sake, hurry!" On Sunday, May 13th, he attended Divine Service at the Cathedral of St. John the Divine, in company with Mr. Balfour, parting with him after the service with the words, "Remember, we shall meet again to celebrate the Victory." On the evening of the following day he passed away quietly. Death was swallowed up in Victory.

"If at the end of such a life," said Solon to Croesus, "his death be fortunate, this, O King, is the truly happy man. . . . Call no man happy 'till you know the nature of his death; he is at best but fortunate."

Measured by this standard, the life of Joseph H. Choate was indeed a happy one. He had not been spared some sorrow. But he had enjoyed an abundance of prosperity and honor, and he died while his great mental power was yet unabated, his capacity to enjoy and give enjoyment and inspiration undiminished. He was recognized as easily the first citizen of America when he stepped out of life,

"Like one that wraps the drapery of his couch
About him, and lies down to pleasant dreams."

GEORGE W. WICKERSHAM.

NEW YORK.

FREEDOM OF SPEECH. By Zechariah Chafee, Jr. New York: Harcourt, Brace & Howe. 1920. pp. 431.

Professor Chafee presents a well-written and thoughtful discussion of a difficult and important subject. Those who will disagree with some of his conclusions will admit the thoroughness and fairness of his reasoning and the aptness and force of his historical illustrations. As an argument designed to secure adherents to views at present unpopular it might with advantage have been briefer. "Most souls are saved during the first thirty minutes of the sermon." But its painstaking fullness constitutes a formidable challenge to those who would disagree with the author upon rational and permanent grounds.

The book is divided into seven chapters, comprising an account of the historical background of our guaranties of free speech, with discussions of their application to opposition to the war with Germany, to legislation against sedition and anarchy, to the deportation of radical aliens, to unauthorized searches and seizures, to the right of a legislature to exclude duly elected members for political utterances, and to the control of teachers. A separate chapter is devoted to *United States v. Abrams*. The appendices contain useful bibliographies, indices, and statutory texts. To the general bibliography might be added the searching and candid article by Walter Lippman, "What Modern Liberty Means," 124 *Atlantic*, 616 (November, 1919).

Professor Chafee's position regarding the application of the guaranties of free speech to opposition to the war with Germany apparently is that it was unconstitutional or at least extremely unwise to forbid utterances that fell short of direct incitement to resist the draft or to refrain from volunteering, and that even such utterances were not properly punishable unless there was a clear and present danger of their success. And, furthermore, granting, though dubiously, the constitutionality of forbidding utterances falling short of such direct incitement, even when intended to produce results that Congress could forbid, a "clear and present danger" of such results must exist — meaning by this, apparently, more than that they should have a "natural and reasonable effect" in producing the results, as judged under the circumstances existing or supposed to exist at the time of the utterances.

The principal reasons for these views are: (1) the difficulty of proving the requisite bad intent with certainty, and the consequent likelihood that unpopular persons will be erroneously found by excited juries to have bad intents on evidence sufficient to sustain the verdict; and (2) the desirability of having opinions and statements that might conceivably help the public to form its judgments laid before it, regardless of the motives or intentions of the utterers. However strong, *prima facie*, are these reasons, there is also to be considered the grave danger that in time of war ill-disposed persons, by utterances cleverly designed to keep just within any objective tests, will actually interfere, intentionally, with the success of governmental operations. The entire setting of modern war, physical and psychological, with its complex military, economic, social, and political factors, renders this easy and likely of accomplishment, unless dealt with by methods so searching and drastic as to be readily susceptible of mistakes and even abuse. In ordinary times the social interest in free discussion so plainly outweighs all possible gains from its suppression that only somewhat direct incitements to illegal or injurious conduct may be forbidden, but in the emergency of a great war the advantages and disadvantages of suppression are at least evenly enough balanced to make a decision either way within the legitimate bounds of legislative discretion.

Free speech is not the only or the predominant interest enshrined in our constitutions. Life, liberty, and property in ordinary times are also expressly and adequately protected. And just as "due process of law" in time of war means something different as regards governmental control over life, liberty,

and property from its meaning in time of peace, so permissible "freedom" of speech in war time is different from that in peace time. The reasonable necessities of the situation qualify the war-time application of all our constitutional guaranties save a few that are obviously intended to be perfectly precise and absolute, and the right to free speech is no exception. Candidly recognizing the force of this reasoning in general, Professor Chafee suggests that the *social* interest in free speech as contrasted with the *individual* interests in other constitutional guaranties entitle the former to more consideration. But surely liberty and property are protected, not merely for the sake of the individual, but also for the social interest in the individual's freedom to use his faculties and acquisitions as he will; and, if there be a difference in the extent of the protection to be given social and individual interests, one might well think, when Congress and public opinion overwhelmingly acquiesce in the temporary subordination of the social interest in somewhat dangerous free speech to the social interest of speedily winning the war, that this determination by those who are most representative of the social interests involved is more entitled to respect than a like determination against the strictly individual interests of a minority of large property holders, who are overridden by a majority *not* representative of the individual interests affected. The only practical view seems to be that, in the emergency of war, all social and individual interests may be restricted so far as is reasonably necessary to accomplish the ends of the war, and that here, as in other cases, the legislature gets the benefit of the doubt in deciding what is reasonable.

To the suggestion that advantage might be taken of a war with Haiti or Liberia to impose the same restrictions on free speech as in the war with Germany, the obvious answer is that it is not alone a technical state of war but a reasonably conceived necessity for the restrictions that justify them. During an important war, and for a reasonable period thereafter, while the passions engendered are still hot and the disturbances of the economic and social order unhealed, the state may lawfully limit the ordinary freedom of speech and of transactions, if this can be thought reasonably necessary for the public welfare; but the mere existence of distant or trifling military operations that have no sensible effect upon our economic or social fabric would not justify such interferences.

Nor is too much to be made of Mr. Justice Brandeis's dissenting *dictum* in *Schaefer v. United States*, 251 U. S. 468, that the probable effect of words is properly to be weighed only by "men judging in calmness." The meaning that may reasonably be placed upon language and the effects that may reasonably be feared to result from it depend largely upon the circumstances under which it is uttered, including the states of mind of its hearers and the public. One who is repelling assault and battery is not required at his peril to judge of the proper limits of self-defense with the detachment of a bystander. In appraising the correctness of his decision the court will take into account his naturally excited state of mind. He need only decide as well as could fairly be expected from the average man under such circumstances of provocation and excitement. At least as much latitude must be allowed in estimating the probable effect of words in war time. It is doubtless true that, during the late war, men of average intelligence and credulity believed there was much greater danger from pro-German and treasonable activities than was in sober truth the case, but this did not stamp such beliefs as unreasonable, considering the emergency and the imperfect information available. If public opinion of average intelligence generally shared the belief that certain types of utterances were reasonably likely substantially to interfere with the effective conduct of the war, it was well within a proper legislative discretion to forbid such utterances, and to take the verdict of a jury upon this inference of fact and upon the intention of the defendant in making the utterance. The practical

certainly that some mistakes and abuses would occur in the administration of such a law was to be weighed by Congress against the practical certainty that without it a good deal of ill-intentioned and actually mischievous propaganda could not be checked by lawful means, and was pretty certain to be dealt with by unlawful violence. To the reviewer it seems impossible fairly to say that the judgment Congress passed upon this question was in its essential features unreasonable, in view of the existing information and temper of the country; and, if not, its action was constitutional, unless free speech is subject in time of war to qualifications of a markedly different character from those of other important constitutional rights. For the latter view there seem to be no historical, logical, or practical arguments so conclusive as to remove the matter from the proper sphere of legislative discretion.

Perhaps an undue amount of space has been given to a criticism of the author's views upon a single topic, but Professor Chafee's argument is so candid and forceful that it seems worth while to sketch with some fullness the opposing view. And, in regard to some other topics of the book, where a seriously reasoned dissent from his position is possible, it rests upon substantially similar grounds, *i. e.*, a belief that he attributes too great a relative value to a somewhat dangerous degree of freedom of speech as compared with other war-imperiled social interests, and that he underestimates the war-time power for ill of the engines of modern publicity in cunning and unscrupulous hands. The correctness of such a belief is manifestly not susceptible of demonstration, and it is impossible to deny that its foundations may be largely temperamental, but so long as it is widely shared the validity of legislation based upon it seems fairly clear. See *Jacobson v. Massachusetts*, 197 U. S. 11, 34-35; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 364-366.

It is of course not difficult to find some regrettable errors and excesses in both the judicial and the executive administration of the Espionage Acts. Professor Chafee very properly points these out. His criticism of much that was done by the Department of Justice under the Deportation Act, and by the Postoffice Department under its power to exclude from the mails, will be generally approved by thoughtful men and women. And of course the expulsion of the Socialist members from the New York Assembly is too vulnerable to find defenders among the judicious.

To the reviewer the greatest value of Professor Chafee's book lies not in his specific conclusions upon controverted topics, but in the admirable manner in which he presents the arguments of policy for freer speech than a legislature need constitutionally grant in troubled times. Whether such arguments should prevail or not is always debatable, but it is a matter of the first importance that the legislature should have all that can be said against repression well presented before it comes to a decision. From this standpoint the author's views, both as to the substantive and the administrative features of laws limiting free speech, are worthy of the most careful consideration. And, finally, it is a pleasure to bear witness to the fine spirit and temper of the book, its fairness, its scholarship, its flashes of humor, and (most grateful to the reader) its forceful good English.

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INTERNATIONAL LAW AND THE WORLD WAR. By James Wilford Garner. In two volumes. 8vo. London and New York: Longmans, Green and Company. 1920. pp. xviii, 524; xii, 534.

This is a serviceable book. It is true that at least three impossibilities threaten the author's path toward perfection. On one side is the impossibility

of covering the whole of the facts and literature now known. On the other side is the impossibility of covering the facts and the literature to be discovered when to the innumerable documents already published and the newspapers of the time of the World War are added the more or less confidential reports of government officials, discussions by scientific men, reminiscences, and private correspondence. The third impossibility is found in the inability of any person, whether belligerent or neutral, to treat these problems without bias. The author shows in his preface an appreciation of the impossibilities; and he battles with them creditably.

The topics are selected with skill. The footnotes abound in references. The discussion is certainly written from the point of view taken by the Allied and Associated Powers, and especially by the United States; but there is an obvious attempt to present the other side, and as the work progresses this attempt becomes increasingly successful. The result is a book readable at the present time and useful permanently as a starting point for future investigators.

The nature of the ground covered is best indicated by mentioning a few of the many topics. Among the most important are: the force of the Hague Conventions of 1899 and 1907 in the World War, the force of the Declaration of London of 1909, the treatment of enemy diplomatic and consular representatives, the treatment of enemy aliens as regards liberty and property and access to the courts, enemy vessels in belligerent ports, transfer of merchant vessels to neutral flags, trade with the enemy, including corporations under enemy control and enemy persons in neutral countries, effect of war on contracts and partnerships, employment of civilians as shields against attack, devastation of enemy territory, submarine mines and war zones, submarine torpedo boats, the *Lusitania*, defensively armed merchant vessels, bombardment of undefended towns, destruction of the University of Louvain and the cathedral at Rheims, aerial warfare, bombing hospitals and sinking hospital ships, treatment of prisoners, military government in Belgium, requisitions and forced labor, deportation from occupied territory, the invasion of Belgium and Luxemburg, the violation of Chinese territory, the occupation of Greece, destruction of neutral merchant vessels, contraband, continuous voyage, the German submarine blockade of England, the Anglo-French blockade of Germany, the system of rationing neutrals, interference with mails and enemies on neutral vessels, exportation of arms and munitions to belligerents, loans to belligerent governments, internment of belligerent warships in neutral ports, taking of prizes into neutral ports, punishment of crimes committed in foreign territory or on the high seas, trial of offenders in their absence, and the decision of the Peace Conference regarding the trial of the German Emperor.

That is only a partial list. It is long enough to show the scope of the book, and also long enough to protect the author from any suspicion that in selecting topics he has omitted those of great difficulty. Any one acquainted with the subject can point to omissions; but the same person must recognize that the omissions are vastly less important than this impressive list of topics covered.

The discussion is usually adequate and clear. Now and then, especially when dealing with general subjects rather than with those of a narrow nature, it omits something which may be obvious to the author but which is not quite obvious to the ordinary reader.

For example, in dealing with the general question whether the Hague Conventions of 1899 and 1907 were in force throughout the World War, the author leaves something to be desired. He explains (§§ 16-18) that throughout the greater part of the war the Hague Conventions of 1907 were not in force, the reason being that some of the belligerent countries have thus far failed to give ratification or adhesion, and that thus those Conventions were inoperative by reason of their own express provisions. Nevertheless, he says (§ 17) that the Hague Convention of 1899 containing the regulations respecting the laws and cus-

toms of war on land was in force, but he fails to explain that this Convention contains a similar clause of suspension and that, as a comparison of the list of belligerents with a list of ratifying and adhering powers shows, there were at least three small belligerents — San Marino, Liberia, Costa Rica — not parties to this earlier Convention (§ 26; and Scott's Hague Conventions, 230-232). Further, he gives no specification showing that this Convention of 1899 was actually treated as binding. On the contrary, his facts show that as regards the pay of captive officers, the corresponding Convention of 1907 was appealed to, and that both the Convention of 1899 and the Convention of 1907 were disregarded (§ 335). Is the real truth that the Hague Conventions were not binding, and were not believed to be binding, but that they were frequently, and almost constantly, cited as mere evidence of sound international doctrine?

Again, the discussion of the Declaration of London of 1909, concerning the laws of naval war, seems to need clarification. The author perceives, but does not emphasize (§§ 20-24), that early in the World War Great Britain and France, though they had not ratified the Declaration, professed to adopt such of its novel provisions as were favorable to belligerents and simultaneously professed to reject such of its novel provisions as were favorable to neutrals, and that this mode of dealing with a compromise document was both questionable on general principles and contrary to one of the express provisions of the document itself. He also states that eventually the Declaration was wholly abrogated. What he might have brought out more clearly is that the Declaration as Declaration was never binding at all, that the parts of it already parts of international law were binding irrespective of this unratified Declaration, that the novel parts of it never became binding, and that from a recognition of the old parts and an occasional insistence upon the novel parts it is a mistake to infer any recognition of the Declaration as Declaration at any time.

On the other hand, when dealing with specific instances, the author usually gives such thorough and careful discussion as to deserve nothing but praise.

For example, when discussing with admirable fullness and fairness the German invasion of Belgium (§§ 431-452), he emphasizes a fact often forgotten, namely, that at the time of the invasion of Belgium the Hague Convention of 1907 respecting the rights and duties of neutral powers was binding as "at that moment all the belligerents were parties to the Convention, and it was, therefore, in accordance with the general participation clause binding upon all of them" (§ 448); and further that this Convention covered the case by saying in its first article that "the territory of neutral Powers is inviolable," and in its second article that "belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power."

Similarly, throughout the book the thorough presentation of individual instances discloses details which render the text interesting and valuable. For example, the discussion of attacks on hospitals and on hospital ships abounds in concrete facts (§§ 314-327). This is important. In dealing with frightfulness, concreteness is of the essence; for otherwise the outrageousness of the outrage cannot be appreciated. Regarding one hospital ship mentioned by the author — the *Glenart Castle* (§ 326) — it is now possible to add some picturesque details from a spectator, an American naval officer who was skilled in international law and thus took professional interest of two sorts. His hitherto unpublished account says:

"A short time ago we passed a hospital ship at night; and she was lit up like a Christmas tree — lights all over her, and a huge red cross in red lights, at least ten feet high, on each side. We recognized her for a hospital ship at about ten miles distance; and around here any ship that shows lights is out of the ordinary. Well, we passed her, and one of the men said to me, 'Gosh, would n't she make a fine target.' He was right, and she did; for they got her shortly

after, and she sank in four minutes. We found some of the survivors, though only a few. They were floating about on little rafts and on boxes. Only one had on more than pajamas. He had an overcoat as well. They had been drifting for nearly ten hours in a rough sea and were about done in. We found them scattered all over, only one or two to a raft, and each raft thought it held the only survivors. It took two hours to get them in, the sea was so rough and they were so helpless. Three of our men went overboard after one poor cuss who fell off his box just as we got to him. Well, I reckon you can see why we don't want to go home now. That sort of thing must not happen."

Such, then, are some of the concrete facts underlying any discussion of international law in the World War. If one looks at the facts alone, one is tempted to say that international law was wholly disregarded and that it is now dead. That, however, is a too pessimistic view. This book shows clearly that even those belligerents who most glaringly disregarded international law made denials and excuses, and that thus in a way they recognized the existence of international law and the duty of obeying it. That is the reason why the author of this book is entitled to close with a somewhat optimistic "outlook for the future" (§ 595). Indeed, he might have chosen as a proper motto for the title page his quotation from Sir Frederick Pollock: "Law does not cease to exist because it is broken or even because for a time it may be broken on a large scale."

EUGENE WAMBAUGH.

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THE UNIFORM ACT ON DECLARATORY JUDGMENTS

THE National Conference of Commissioners on Uniform State Laws at its session in St. Louis in August, 1920, approved the first draft of a Uniform Act on Declaratory Judgments. At the next session of the Conference in 1921 the Act will probably receive final approval and be recommended to legislatures for enactment. The importance of the recommendations of this august body in promoting the enactment of legislation in our states warrants some comment upon the draft they have approved.

Although a few instances of statutory authorization for the rendering of declaratory judgments may be found in our state legislation prior to 1918, such as the California Act of 1850,¹ the Rhode Island Act of 1876,² the New Jersey Act of 1915,³ the Connecticut

¹ CALIFORNIA PRACTICE ACT, § 527: "An action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation." See *King v. Hall*, 5 Cal. 83 (1855). Cf. the action of jactitation, still used in many countries adopting the civil law, 28 YALE L. J. 1, 20.

² RHODE ISLAND, ACTS & RESOLVES, 1876, ch. 563, § 17, GEN. LAWS 1909, ch. 289, § 19: "No suit in equity shall be defeated on the ground that a mere declaratory decree is sought; and the court may make binding declarations of right in equity, without granting consequential relief." In *Hanley v. Wetmore*, 15 R. I. 386, 6 Atl. 777 (1886), this was construed narrowly, like the English Act of 1852 (28 YALE L. J. 26), and was deemed to require the existence of a possibility of obtaining coercive relief, which merely is not claimed. Sections 20-22 of the GENERAL LAWS of 1909 deal with declarations on the construction of written instruments; they have been used principally for the construction of wills.

³ NEW JERSEY, LAWS 1915, ch. 116, § 7, p. 185: "Subject to rules, any person

Act of 1915,⁴ and other isolated cases,⁵ it was not until 1918 that the movement acquired renewed momentum in the United States and now seems destined to sweep the country.⁶ Within the last

claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such a right, and for a declaration of the rights of the persons interested." This statute is based, not on the broad power granted to the English courts under Supreme Court Rules of 1883, Order XXV, rule 5, but on the more restricted provisions of the rule of 1893, Order LIV, A.

This also is the basis of the Florida Act of 1919, LAWS 1919, ch. 7,857 (No. 75), p. 148, which adds the words "or corporation" after "any person." See *In re Ungaro's Will*, 88 N. J. Eq. 25, 102 Atl. 244 (1917); *Renwick v. Hay*, 90 N. J. Eq. 148, 106 Atl. 547 (1919); *Mayor of Bayonne v. East Jersey Water Co.*, 108 Atl. (N. J. Eq.) 121 (1919), 29 YALE L. J. 545-549. The English Order XXV, rule 5, of 1883, reads: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is, or could be claimed, or not." Order LIV, A, of 1893, reads: "In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

⁴ CONNECTICUT, PUB. ACTS, 1915, ch. 174, § 1, 2 GEN. STAT. 1918, § 5113: "An action may be brought by any person claiming . . . any interest in . . . real or personal property . . . against any person who may claim . . . any interest . . . adverse to the plaintiff . . . for the purpose of determining such adverse . . . interest . . . and to clear up all doubts and disputes, and to quiet and settle the title to the same." See *Ackerman v. Union & New Haven Trust Co.*, 90 Conn. 63, 96 Atl. 149 (1915), 91 Conn. 500, 506, 100 Atl. 22 (1917), where the court, Case, J., was most reluctant to admit the fact that this statute was in effect analogous to the English Order XXV, rule 5.

⁵ See references to various statutes and decisions which may be deemed to have authorized or involved declaratory judgments in 28 YALE L. J. 1, 3, 30-32; and in manuscript brief of Professor Edson R. Sunderland as *amicus curiae* in the case of *Anway v. Grand Rapids Ry.*, 179 N. W. (Mich.) 350 (1920).

⁶ Sunderland, "A Modern Evolution in Remedial Rights — the Declaratory Judgment," 16 MICH. L. REV. 69 (1917); Borchard, "The Declaratory Judgment — a Needed Procedural Reform," 28 YALE L. J. 1, 105 (1918); Sunderland, "The Courts as Authorized Legal Advisers of the People," 54 AMER. L. REV. 161 (1920); "The Declaratory Judgment," 20 COL. L. REV. 106 (1920); Harrison, "The Declaratory Judgment in California," 8 CAL. L. REV. 133 (1920); Kerr, "Declaration of Rights without Consequential Relief," 53 AMER. L. REV. 161 (1919); Vinje, "Declaratory Relief," 4 MARQUETTE L. REV. 106 (1920); Borchard, "Recent Declaratory Judgments," 29 YALE L. J. 545 (1920); Schoonmaker, "Declaratory Judgment," 5 MINN. L. REV. 32 (1920); Dodd, "Progress of Preventive Justice," 6 AM. BAR ASSN. J. 151 (Nov., 1920); Gates, "Declaratory Relief," PROCEEDINGS OF TENNESSEE BAR ASSN. 41 (1920); Medina, "Some Phases of the New York Civil Practice Act and Rules," 21 COLUMBIA L. REV. 113 (1921).

two years Michigan,⁷ Wisconsin,⁸ Florida,⁹ New York,¹⁰ and Kansas¹¹ have empowered their courts, with varying limitations, to

⁷ MICHIGAN PUBLIC ACTS 1919, No. 150, p. 278:

"Section 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will, or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

"Sec. 2. Declarations of rights and determinations of questions of construction, as herein provided for, may be obtained by means of ordinary proceedings at law or in equity, or by means of a petition on either the law or equity side of the court, as the nature of the case may require, and where a declaration of rights is the only relief asked, the case may be noticed for early hearing, as in the case of a motion.

"Sec. 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order.

"Sec. 4. When a declaration of rights, or the granting of further relief based thereon, shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with such instructions by the court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case.

"Sec. 5. Unless the parties shall agree by stipulation as to the allowance thereof, costs in proceedings authorized by this act shall be allowed in accordance with such special rules as the supreme court may make, and in the absence of such rules, the practice followed in ordinary cases at law or in equity shall be followed wherever applicable, and when not applicable, the costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party.

"Sec. 6. This act is declared to be remedial, and is to be liberally construed and liberally administered with a view to making the courts more serviceable to the people."

The Act of Kansas, approved February 17, 1921, is modeled upon the Michigan Act. See 19 MICH. L. REV. 537, 7 AMER. BAR ASSN. J. 107 (Mar., 1921).

⁸ WISCONSIN, LAWS 1919, ch. 242, § 2687 m., p. 253: "Equitable actions to obtain declaratory relief may be brought and maintained in the circuit court, and in matters of which the supreme court has original jurisdiction in the supreme court, and it shall be no objection to the maintenance of such an action that no consequential relief is sought or can be granted if it appears that substantial doubt or controversy exists

⁹ FLORIDA, LAWS 1919, ch. 7857, No. 75, p. 148. This Act resembles closely the New Jersey Act of 1915, quoted *supra*, note 3.

¹⁰ Civil Practice Act 1919, § 473, NEW YORK LAWS, 1920, ch. 925, p. 172: "The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

The bill pending in Connecticut is practically identical with the New York Act; so also is the federal bill conferring this power on federal courts of equity.

¹¹ Act of February 17, 1921, printed in 19 MICH. L. REV. 538, and 7 AMER. BAR ASSN. J. 107 (Mar. 1921).

render declaratory judgments, and the legislative sessions of 1921 will doubtless add several other states to the list. No organized

as to the rights or duties of parties, and that either public or private interests will be materially promoted by a declaration of the right or duty in advance of any actual or threatened invasion of right or default in duty. The judgment rendered in such an action shall bind all the parties thereto and be conclusive and final as to the rights and duties involved." See the discussion of this statute by Justice Vinje of the Wisconsin Supreme Court in 4 MARQUETTE L. REV. 106 (1920). The Wisconsin Act curiously seems to confine its authority to the making of declarations "in advance of any actual or threatened invasion of right or default in duty." There is no reason thus to restrict the scope of the power, for declarations ought to be made as well after a wrong has been committed. Possibly the limitation was unintentional; it can be cured by amendment.

The amendment proposed by the Massachusetts Judicature Commission to chapter 214 of the GENERAL LAWS, follows in substance the Wisconsin Act. It reads as follows:

AN ACT TO ESTABLISH PROCEDURE FOR DECLARATORY JUDGMENTS

Be it enacted, etc., as follows:

Section three of chapter two hundred and fourteen of the General Laws is hereby amended by adding at the end thereof the following:—(11) Equitable actions to obtain declaratory relief, in which it shall be no objection to the maintenance of such action that no consequential relief is sought or can be granted, if it appears that substantial doubt exists as to the alleged rights or duties of parties, [or] that an actual controversy has arisen as to such rights or duties which cannot be settled in any pending suit, and that either public or private interests will be materially promoted by a declaration of right or duty in advance of any actual or threatened invasion of right or default in duty. The judgment rendered in such an action shall bind all parties thereto and be conclusive as to the rights and duties involved. [*italics mine*]

Possibly the word "or," inserted by the writer in brackets, was unintentionally omitted. If not, the Act is seriously defective in making an "actual controversy" a condition precedent. This would deprive the declaratory judgment of some of its most useful functions in resolving doubts and uncertainties in legal relations before a controversy has arisen or where a controversy merely may arise. SECOND AND FINAL REPORT OF THE MASSACHUSETTS JUDICATURE COMMISSION, Jan., 1921, House No. 1205, pp. 113, 154.

For the same reason, the Amendment to the federal bill (§ 4808) proposed by the Committee on Jurisprudence and Law Reform of the American Bar Association, to meet the objection of the Michigan Supreme Court in the *Anway* case, namely, "when there is an actual controversy between the parties," is greatly to be regretted. Not only does it give undue weight to an absurd decision, but it restricts unnecessarily a common function of the declaratory judgment. All that English and other courts have required is a serious doubt or a potential controversy. See 7 AMER. BAR ASSN. J., p. 62 (Feb., 1921). The same criticism may be directed to the recent Act of Kansas, approved February 17, 1921; the clause in section 6 to the effect that it is the purpose of the Act "to afford relief from uncertainty and insecurity attendant upon controversies over legal rights" was probably not well thought out. The procedure for the removal of clouds from title, which bears close resemblance to one phase of declaratory judgment procedure, does not necessarily require an "actual controversy" (Kansas Act, section 1). The defect is hardly cured by the attempted definition of "actual controversy" in the Kansas Act, namely, "actual antagonistic assertion and denial of right." 7 AMER. BAR ASSN. J. 107 (Mar., 1921).

propaganda is responsible for the general acceptance and widespread adoption of this procedural reform; its intrinsic merits in effecting the removal of clouds from legal relations, in simplifying the adjudication of contested issues, and in preventing rather than merely curing legal injury and the accrual of damages, have served to gain for it the almost spontaneous approval of Bar associations and legislative committees. The movement has been immeasurably aided by the fact that the reforms promised are not confined to the realm of theory or speculation but have had the case-hardened test of nearly fifty years of British and continental judicial experience. While the practice of rendering judgments on contested issues of law or fact, without further coercive relief in the form of money damages, injunction, etc., goes back to the Roman law,¹² its appeal to the American Bar has been based largely upon the fact that other countries having relatively the same industrial, economic, and social development as our own have found the declaratory judgment increasingly useful as an instrument of preventive and remedial justice. Wherever the procedure has been adopted, it has constantly grown in favor and utility. If history is any guide, therefore, it justifies the belief that the procedure for declaratory relief will soon be adopted by most of our states, and will be used to the same extent that it now is in England and many of its colonies and in several countries of continental Europe. The Commissioners on Uniform State Laws, doubtless anticipating the rapid spread of the movement, have sought to regularize it by the recommendation of a uniform statute. Whether the Uniform Act can be adopted in the various states without amendment, or qualification remains to be seen.

Before commenting upon the draft of the Uniform Act, it may be well to note the apparent obstacle to the extension of the reform interposed by a recent decision of the Michigan Supreme Court holding unconstitutional the Michigan Act authorizing the courts of that state to render declaratory judgments.¹³ The ground of the decision was that the rendering of declaratory judgments was not the exercise of "judicial power" in a constitutional sense, because the judgment was not followed by an executory decree for damages, injunction, etc., and because the courts cannot be con-

¹² 28 YALE L. J. 1, 10 *et seq.* (1918).

¹³ *Anway v. Grand Rapids Ry.*, 179 N. W. (Mich.) 350 (1920).

stitutionally empowered to decide moot cases or render advisory opinions or judgments not final. Several of the leading law journals, which have assumed the important function of examining critically the decisions of the courts from the standpoint of their adherence to law and principle, have been unanimous in condemning the Michigan decision as devoid of foundation in law or reason.¹⁴ Indeed, while the case presented to the court was probably inappropriate for a declaratory judgment, as there was no issue or difference of opinion between the parties,¹⁵ no justification was thereby afforded for the court's adventure into the domain of the irrelevant, especially as their essay, in seeking support for an undisguised prejudice, involved an inexcusable confusion of ideas between the declaratory judgment and the advisory opinion, the moot case and the judgment not final. Every reviewer of the decision, as well as the minority opinion in the case, has pointed out the court's fundamental misconceptions in ignoring the most obvious distinctions, and hence in mistaking the essence of judicial power and of the declaratory judgment. It seems hardly likely, therefore, that the decision will be followed in any other jurisdiction or that it will ultimately survive in Michigan itself.

The most notable feature of the draft of the Uniform Act is its length. It contains fourteen sections, whereas the longest of the statutes already passed, that of Michigan, contains but six; and in several states, Wisconsin, New Jersey, and New York, one section has been deemed sufficient to confer on the courts the power to render declaratory judgments. Florida's statute covers three sections, of which the first grants the power, the second provides for the making of court rules, and the third prescribes the date of its coming into force.

The effective part of the Uniform Act granting to the courts the power to make declarations is section one, which reads:

"SECTION I. *Scope.* The Courts of this State having jurisdiction in equity, shall have power in any suit in equity or in any independent or interlocutory proceeding, to declare rights and other legal relations on written request for such declaration, whether or not further relief is or could be claimed; and such declaration shall have the force of a final judgment or decree."

¹⁴ 19 MICH. L. REV. 86, 30 YALE L. J. 161, 21 COLUMBIA L. REV. 168, 5 MINN. L. REV. 172, 6 AM. BAR ASSN. J. 145 (Nov. 1920), 7 *ibid.* 141 (Mar., 1921).

¹⁵ The facts of the case are presented in the comments cited in note 14.

This language is almost identical with section 473 of the New York Practice Act, which comes into effect April 1, 1921,¹⁶ and with the bill now pending in the Connecticut legislature and in the federal Congress. The differences are as follows: the Uniform Act confers the power on courts "having jurisdiction in equity." The Wisconsin Act also provides for "equitable actions." In New York and Connecticut, where one court has jurisdiction in law and in equity, it was unnecessary to make a distinction in forum or form of action. But as the Uniform Act looks to states having separate courts of law and equity, and inasmuch as both legal and equitable relief can be granted by a declaration, the restriction of the forum to courts "having jurisdiction in equity" would seem to have been induced by considerations looking to facilities in trial procedure, the discretionary nature of the relief making it more appropriate to equity jurisdiction. A special verdict on disputed issues of fact may be taken by the court on submission to a jury.¹⁷ That both legal and equitable relief may be granted is indicated by the fact that the request for a declaration may be made "in any suit in equity or in any independent or interlocutory proceeding." The absence of the word "independent" from the New York Act and from the Connecticut bill has given rise to the question whether a hostile court might not interpret the provision that the court shall have power to declare rights "in any action or proceeding" to mean that such power exists only as incidental to actions or proceedings already begun and not in an independent proceeding especially brought to obtain a declaratory judgment. Such an interpretation would be distinctly contrary to the intention of the draftsmen, which contemplated the broadest methods of requesting declarations, both as incidental to actions or proceedings seeking a coercive judgment and in independent proceedings in which nothing but a declaration is sought. This appears more clearly from the clause "whether or not further relief is or could be claimed," and from the section of the New York Practice Act which provides that "This Act shall be liberally construed,"¹⁸ as well as from the

¹⁶ *Supra*, note 10.

¹⁷ Section 10 of the Uniform Act. Of the six rules adopted by the New York Supreme Court to carry into effect section 473 of the Civil Practice Act, one (Rule 213) provides for the taking of the special verdict of a jury to settle questions of fact.

¹⁸ The Uniform Act (§ 12) contains a similar provision.

terms of Rule 210 which provides that "in matters of procedure . . . the forms and practice prescribed in the civil practice act and rules for *other* actions" in the supreme court, shall be followed, and of Rule 212 which enables the court to decline a declaration in its discretion if it believes "the parties should be left to relief by *existing* forms of actions." (*italics mine*)

The first clause of section one of the Uniform Act providing for equitable jurisdiction may have to be modified in states having no separate courts of equity. In any event, to preclude doubt on the question whether suits at law may be brought for a declaration, the section might be amended to read: "in any suit *at law* or in equity or in any independent or interlocutory proceeding."

The clause "to declare rights and other legal relations," also incorporated in the New York Act and in the Connecticut and federal bills, was induced by the fact that "rights" is a term used with various meanings. The effort of an English court to restrict it to its correct meaning, namely, a legally sustainable claim to the performance of a duty by another, nearly served to bar the suit for a declaration by the Guaranty Trust Company that they were not under a duty to repay Hannay and Company certain sums of money which Hannay had advanced on certain forged bills of lading. They really sought, therefore, not a declaration of *right* but of freedom from duty, *i. e. privilege*. Only by the most technical construction of two clauses of Order XXV, Rule 5, did the English Court of Appeal, by a majority of one, decide to make the declaration requested.¹⁹ Inasmuch as it seems clear that "right" is but one of several jural relations which the court is empowered to declare, it seems preferable by exactness of language to forestall the difficulties which might arise, as they did in England, out of the use of the loose and broad term "rights," although no court should construe this so narrowly and literally as to exclude duty, privilege, no-right, power, liability, immunity, disability.²⁰ The assumption that the term "and other legal relations" was intended to cover the declaration of such relations of status, involving complex jural

¹⁹ Guaranty Trust Co. v. Hannay (C. A.), [1915] 2 K. B. 536, 565, 574. The case is more fully discussed in 28 YALE L. J. 1, 9 (1918).

²⁰ The Hohfeld tables of jural relations, to the clear analysis of which the declaratory action is peculiarly adaptable, are described in the valuable articles of the late Professor Hohfeld in 23 YALE L. J. 16 (1913), and 26 *ibid.*, 710 (1917); also in two notable articles by Professor Arthur L. Corbin: "Legal Analysis and Terminology," 29

(legal) relations, as owner, wife, partner, agent, etc., is not well founded, although there is no reason to exclude these from the jurisdiction conferred by the term "legal relations."

The last clause, "such declaration shall have the force of a final judgment or decree," clearly indicates its dissimilarity from the advisory opinion or the judgment not final.

The subsequent sections of the Uniform Act are concerned with a detailed prescription of rules of construction, procedure, and practice. There are twelve different sections, and while the second, which provides for the declaration of rights "or duties" under the construction of written instruments, may be deemed a proper extension, by specific description, of the more general power conferred in section one, most of the other sections cover rules which ordinarily would be incorporated in rules of court. The elaboration of these rules in the Uniform Act is explained by the Chairman of the Committee, Judge Caton, a distinguished leader of the Virginia Bar, by the fact that many states, especially in the South, do not confer on their courts any rule-making authority. In such states, therefore, the rules would have to be embodied in the statute. In New York, six simple rules were adopted by the Supreme Court to give effect to the Act, and in most states giving their courts the power to make rules the general power embraced in section one of the Uniform Act, together with rules such as have been adopted in New York,²¹ would probably suffice. It will be recalled that the

ibid., 163 (1919), and "Jural Relations and their Classification," 30 *ibid.*, 226 (1921). For the sake of completeness, they may be presented here:

Jural:	right	privilege	power	immunity
Opposites:	no-right	duty	disability	liability
Jural:	right	privilege	power	immunity
Correlatives:	duty	no-right	liability	disability

²¹ The New York rules to carry into effect § 473 of the Civil Practice Act are as follows (Wilson, Civil Practice Manual of the State of New York, "Rules"):

"TITLE 25 — DECLARATORY JUDGMENTS

"RULE 210. PRACTICE ASSIMILATED. An action in the supreme court to obtain a declaratory judgment, pursuant to section four hundred and seventy-three of the civil practice act, in matters of procedure shall follow the forms and practice prescribed in the civil practice act and rules for other actions in that court.

"RULE 211. PRAYER FOR RELIEF. The prayer for relief in the complaint shall specify the precise rights and [or?] other legal relations of which a declaration is requested and whether further or consequential relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated.

"RULE 212. JURISDICTION DISCRETIONARY. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may

present declaratory judgment procedure was adopted in England in 1883 and 1893 by Rules of Court alone.

Section 2 of the Uniform Act reads:

"SECTION 2. *Construction.* Any person interested under a deed, will, contract, or other written instrument, or whose rights are affected by a statute, municipal ordinance or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance or franchise, and a declaration of rights or duties thereunder."

It will be observed that this section is derived from Order LIV, A, of the English Rules of 1893 and resembles the New Jersey and Florida Acts. With the addition of the words "municipal ordinance or franchise" it follows closely the proposed model Rules of Civil Procedure published by the American Judicature Society.²² The Michigan Act, very practically, incorporates in its first section the provisions of sections one and two of the Uniform Act.

The purpose of section two, of course, is to enable parties to obtain a judicial construction of any written instrument. While some of our states provide for the construction of wills, very few go beyond. No power of the courts in England has been more valuable to business men, especially during the war, than the power to determine the rights or other legal relations of parties under contracts. Section one authorizes the declaration of rights and other legal relations under verbal contracts.

Section two enables the constitutionality of a statute or municipal ordinance to be drawn in question by a declaratory action. Section five provides for notice to the Attorney General or corporation counsel; and in any event, the relief being discretionary, and open to denial in the absence of the necessary parties interested or of sufficient argument, there is no more danger than now of snap

decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised.

"RULE 213. VERDICTS OF JURY ON FACTS. In order to settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury. Such verdict may be taken by the court before which the action is pending for trial or hearing. The provisions of sections four hundred and twenty-nine and four hundred and thirty of the civil practice act apply to a verdict so rendered.

"RULE 214. COSTS. Costs in such an action shall be discretionary and may be granted to or against any party to the action.

"RULE 215. APPEALS. Appeals may be taken in such actions as in other causes."

²² BULLETIN XIV. Rules of Civil Procedure, supplementary to the State-wide Judicature Act (BULLETIN VII-A) of the American Judicature Society, 1919. Article 14, Declaratory Relief, § 2, p. 55.

judgments being rendered on questions of constitutionality. Possibly the word "franchise," when the franchise is not embodied in a statute or ordinance, should more properly be inserted after the word "contract" in line 2, as merely one type of written instrument.

The last clause, "declaration of rights *or duties* thereunder," might be improved by the omission of the words "or duties." Either this phrase should be replaced by the clause in section one, "other legal relations," which seems preferable, or else it should be omitted altogether. In the latter event, the term "rights" would probably receive the broad construction embracing all jural relations; whereas if the term "duties" were included, it might narrow "rights" to its proper technical use, and thus exclude from the declaration powers, privileges, immunities, etc. Uniformity in the Act would be better served by maintaining throughout the form "rights" and/or "other legal relations." The Wisconsin Act, the California bill, the Massachusetts draft of the Judicature Commission, and the draft of the American Judicature Society are open to the same criticism.

Section 3 of the Uniform Act reads:

"A contract may be construed before there has been a breach thereof." This follows section 3 of the proposed Rules of the American Judicature Society, which in turn was influenced by the Ontario Rule 605. The insertion of this rule of jurisdiction brings up the question of policy of seeking by statute to limit or define the broad jurisdiction conferred in sections one and two. The practice of construing contracts before breach is one of the most useful functions of the English declaratory judgment procedure,²³ and any court acting under the powers conferred by sections one and two could hardly, in view of the origin and history of those sections, decline to construe a contract before breach. If the general powers of sections one and two are limited by the outline in later sections of specific fields of jurisdiction, there is danger that the functions of the court will be restricted to the specific types of cases provided for and that the growth of this remedial procedure will be hampered rather than aided. It was this consideration which persuaded the Supreme Court of New York not to limit the broad powers conferred in the Act by confining the jurisdiction to specific subjects, but to permit the procedure to grow empirically.

²³ See the cases discussed in 28 YALE L. J., 131 *et seq.* (1918).

With forty years of English experience to guide the court, and jurisdiction being discretionary, it seemed preferable to permit the process of judicial inclusion and exclusion to dictate the scope of the remedy. Section 12 of the Uniform Act seeks by express provision to avoid the danger of a limited construction of the general powers conferred in section one by reason of an enumeration of specific powers in other sections.

The provision of the New York Rule 212, by which the court, when declining in its discretion to make a declaration requested, must state "the grounds on which its discretion is so exercised," enables an appellate court to determine whether the discretion was properly exercised according to rule; and here the English precedents are certain to prove a valuable guide.

Section 4 of the Uniform Act reads as follows:

"Executor, etc. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or duties in respect thereto.

"(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

"(b) To direct the executors, administrators, or trustees, to do or abstain from doing any particular act in their fiduciary capacity; or

"(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings or instruments."

With the exception of the final words, "of wills and other writings or instruments," this section is taken verbatim from the proposed Rules of the American Judicature Society. It has its source in the English Order 55, rule 3, which it amends and abridges. The power embraced in this section is now generally exercised by courts of equity and in several states is expressly conferred. It enables those occupying fiduciary relationships to obtain judicial guidance and protection in the performance of their duties and the exercise of their privileges and powers. Whether it was necessary to add the phrase "of wills and other writings or instruments" at the end of the section, seems questionable in view of the provisions of section 2. The section also includes the clause "rights or duties," which has been criticized in the discussion of section 2.

Section 5 of the Uniform Act reads as follows:

"Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a statute, the Attorney-General of the state shall, before judgment is entered, be notified by the party attacking the statute, and shall be entitled to be heard upon such question. In any proceeding which involves the validity of a municipal ordinance, the law officer of the municipality shall be notified by the party attacking the ordinance or franchise, and shall be entitled to be heard upon such question. And if the ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the state shall also be notified and be entitled to be heard."

This section is derived from sections 6, 7, and 8 of the draft of the American Judicature Society. The fact that the joinder of all parties "who have or claim any interest which would be affected" is made mandatory, may greatly hamper the extension of the relief. It would seem advisable to leave such joinder to the discretion of the court, as is usual in equity cases. The New York Supreme Court has adopted a much better rule, it would seem, by the broad provision that "in matters of procedure . . . the forms and practice prescribed in the civil practice act and rules for other actions" shall be followed. Relief being always discretionary, the English courts have felt free to decline the declaration where necessary parties affected were not joined or heard.²⁴ That persons not parties to the proceeding shall not be prejudiced thereby hardly requires express mention. Inasmuch as declaratory relief has received a wide extension in England without any such rule as is embodied in the first sentence of section 5, a rule which might be construed by a hostile court to limit the relief, it might have been well to leave such requirement to the ordinary principles of due process of law and to the discretion of courts exercising equitable jurisdiction.

Cases involving the constitutionality of statutes or ordinances are not chosen even now with any view to the presentation of a fair case testing the statute, but may embody operative facts of a most unusual kind. Yet upon the haphazard nature of the first

²⁴ *Bright v. Tyndall*, 4 Ch. D. 189 (1876); *Curtis v. Sheffield* (C. A.), 21 Ch. D. 1, 3 (1882).

case presented the constitutionality of legislation will often be determined. There is, therefore, no reason why the declaratory procedure — an issue with contesting parties appearing — should not be used as freely to determine the validity or constitutionality of legislative enactments. The Uniform Act prescribes the necessity for notice to the law officers of the municipality or state, and opportunity to be heard before such statute or ordinance is held invalid or unconstitutional. Such necessity would, in states not adopting the Uniform Act, and depending on court rules or the general principles of due process of law, probably be enforced in the exercise of the court's discretion. There is no harm in making the requirement express and specific.

Section 6 of the Uniform Act reads:

"Discretionary. The Court may refuse to exercise the power to declare rights or other legal relations in any proceeding where a decision under it would not terminate the uncertainty or controversy which gave rise to the proceeding, or in any proceeding where the declaration or construction is not necessary, and proper, at the time under all the circumstances."

This section is derived from section 4 of the draft of the American Judicature Society, which in turn was guided by Order LIV, A, rule 4 of the English Supreme Court. That Order, however, applies only to the construction of written instruments, whereas section 6 covers all declarations of "rights or other legal relations in any proceeding." For that reason it seems unnecessary to add the words "or construction" near the end of the section. In New York, Rule 212 expresses the discretionary power of the court more broadly by providing that "if, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised." The requirement for stating grounds preserves the power of appellate courts to review the exercise of the court's discretion and to reverse its action if not properly exercised under the circumstances; for, as is apparent from the English practice, the discretion is not arbitrary, but is limited pretty strictly by rule derived from precedents.

While the making of declarations has always been subject to the court's conceptions, enlightened by a liberal social and judicial

consciousness, of the utility of the declaration in a particular case, it was not until the case of *Austen v. Collins*²⁵ that an expression of the court's attitude was announced; the *dictum* then uttered was much narrower in its statement of the practice than both the earlier and the later cases justify. Chitty, J., in that case said:

"The rule leaves it to the discretion of the court to pronounce a declaratory judgment when necessary; but it is a power which must be exercised with great care and jealousy."

It is this formula, with some of the precedents under it, that section 6 of the Uniform Act seeks to codify. The formula has traveled to the ends of the world, to Australia, to India, to British Columbia, to Ontario, and to the state of Connecticut;²⁶ like most formulas, affording an opportunity for evading analysis and reasoning, it has enabled courts to refuse a declaratory judgment when they could not justify their action on some better ground. But the cases show that the discretion is far from arbitrary, and has been in practice hardened into rule. The declaration has been declined where it will not serve a practical purpose,²⁷ where the court is without jurisdiction,²⁸ or where the law has provided a more appropriate remedy.²⁹ But where the declaratory action or a regular action is optional, the English courts practically always give the plaintiff his choice. The attitude has changed from one of pronounced conservatism in the rendering of a declaratory judgment to one of enlightened recognition of its value; and if the cases of the last few years are any criterion, obstacles to its issue are now avoided rather than sought. The judicial discretion in making declarations hardly constitutes any greater limitation on the rendering of declaratory judgments than that involved in the exercise of any other of the well-defined fields of equitable jurisdiction.

Section 7 of the Uniform Act provides:

"*Relief, Affirmative or Negative.* When declaratory relief is sought, the declaration may be either affirmative or negative in form and effect."

²⁵ 54 L. T. 903, 905 (1886).

²⁶ *Ackerman v. Union & New Haven Trust Co.*, 91 Conn. 500, 507, 100 Atl. 22 (1917).

²⁷ *Bourgon v. Township of Cumberland*, 22 Ont. L. Rep. 256 (1910); *Lewis v. Green*, [1905] 2 Ch. 340. See 28 YALE L. J., 109, 111 (1918).

²⁸ *British South Africa Co. v. Companhia de Mocambique* (H. L.), [1893] A. C. 602.

²⁹ *N. E. Marine Engineering Co. v. Leeds Forge Co.*, [1906] 1 Ch. 324. See cases discussed in 28 YALE L. J. 114 (1918).

This section was primarily designed to authorize a negative form of the request for a declaration, *e. g.*, that the plaintiff is under "no duty" to repay money to the defendant;³⁰ that the defendant has "no power" to compel the plaintiff to furnish certain information;³¹ that the plaintiffs were under "no liability" to submit to the defendant's exactions.³² These jural relations expressed in negative form have, of course, their affirmative equivalents, *e. g.*, "no duty" = privilege, "no power" = disability, "no liability" = immunity. For that reason, it may be deemed unnecessary to include the section. But some of the continental codes of procedure make special provision for the declaration in negative form, and it has thus found its way into the literature and legal thought on the subject; it may, therefore, be regarded as unobjectionable.

Section 8 of the Uniform Act provides:

"Procedure. Declaratory relief may be obtained by means of the ordinary process and proceedings in equity, or by means of a request or petition in equity, as the nature of the case may require, and where a declaration of rights or other legal relations is the only relief asked, the case may be noticed for early hearing as in the case of a motion."

This section is derived from section 2 of the Michigan Act, except that it omits the provision for proceedings at law contained in that Act. The procedure under the Uniform Act is therefore confined to the equity side of the court, regardless of the nature of the relief sought, legal or equitable. In New York, the declaratory judgment procedure has merely been assimilated to the forms and practice in other actions (rule 210); the prayer for relief, however, must "specify the precise rights and [or ?] other legal relations of which a declaration is requested and whether further relief is or could be claimed. If further relief be claimed in the action, the nature and extent of such relief shall be stated."

It is not apparent why the plaintiff should be compelled to state that further relief "could be claimed." If further relief is claimed, *e. g.*, an injunction, he should of course request it, and it is desirable that he should be privileged to request it in conjunction with the declaration; the court should then in its discretion make the dec-

³⁰ Guaranty Trust Co. v. Hannay, *supra*, note 19.

³¹ Dyson v. Attorney-General (C. A.), [1912] 1 Ch. 158.

³² China Mutual Steam Navigation Co., Ltd. v. MacLay, [1918] 1 K. B. 33.

laration even if, for technical reasons, it deems it improper to grant the coercive relief sought, *e. g.*, injunction. By determining the legal relations of the parties, injunction or other coercive relief may indeed become unnecessary, for each party will have had an authoritative judicial decision of his legal position in the premises. The combination of the request for a declaration with a prayer for further relief in one petition has proved valuable in England.

The New York rules have not embodied the provision for "early hearing as in the case of a motion." This would doubtless have increased greatly the popularity of this form of recourse.

Section 9 of the Uniform Act provides:

"*Executory Relief.* Where further relief based upon a declaration of rights or other legal relations shall become necessary or proper after such declaration has been made, application may be made on request or by petition to the Court having jurisdiction to grant such relief for an order directed to any party or parties whose rights or other legal relations have been determined by such declaration, to show cause why such further relief should not be granted forthwith upon such reasonable notice as shall be prescribed by the Court in its order."

This section is likewise derived from the Michigan Act, and is designed to provide for the case of a recalcitrant party who refuses to conform his conduct to the declaration pronounced by the court. If further coercive relief, therefore, becomes necessary, this section is designed to afford it, on an order to show cause. The declaratory judgment, of course, is *res judicata* as to the substantive legal relations involved.

The New York rules fail to provide for any ancillary executory relief after the declaratory judgment has been rendered. Perhaps the necessity for stating such relief as might be but is not claimed, is covered by the requirement of stating such "further or consequential relief" as "could be claimed." Whether this is so or not, it may well be that by seeking and obtaining a declaratory judgment, the plaintiff is barred from requesting further executory relief if only one cause of action is involved. This thought is aroused by the case of *Hahl v. Sugo*,³³ where, under the code of civil procedure, a legal action brought for the recovery of a strip of specific land was held to bar a subsequent action in the nature of a suit in

³³ 169 N. Y. 109, 62 N. E. 135 (1901).

equity to compel the unsuccessful defendant to remove an encroaching wall from the land; the decision was based upon the ground that the plaintiff should have sought all his relief, legal and equitable, in one action, there having been but one wrong, and that the first judgment operated as a bar to the second. Unless the New York practice avoids this same conclusion with respect to a declaratory judgment, thereby barring further executory relief, the new procedure will be considerably limited in its benefit to the community; for it is very important to a declaratory plaintiff to know that he has available a means of enforcing a declaratory judgment in his favor. The obviousness of this conclusion will, it is hoped, persuade the New York courts, by interpretation or special rule, to provide for carrying into effect a declaratory judgment, when necessary, on an order to show cause.

In the bill for declaratory judgments recommended to the California legislature by the California Bar Association, a special section provides:

"Section 1062 a. Cumulative. The remedies provided by this chapter are cumulative and shall not be construed as restricting any other remedy provided by law; and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

Section 10 of the Uniform Act provides:

"*Trial by Jury.* In any suit or proceeding under this act in which an issue of fact is involved, and a trial by jury of such issue is required by the constitution or the laws of this state, such issue may be submitted to a jury in the form of interrogatories, with such instructions by the Court as may be proper, whether a general verdict be rendered or required or not, and such interrogatories and answers shall constitute a part of the record of the case."

This section is derived from section 4 of the Michigan Act, except that it leaves the necessity for the submission of issues of fact to a jury subject to the constitutional requirement in each state. The Michigan, the New York, and the Uniform Acts do not make such submission obligatory, but leave it to the court to determine when the issue of fact, if triable by jury, must be submitted constitutionally. The equitable nature of the relief would tend to diminish the number of submissions to a jury, but the requirements of constitutionality doubtless demand that the courts shall have

power to honor requests for jury trial on issues of fact. The submission in the form of interrogatories will tend to narrow the issues and hasten the findings of the jury.

Section 11 of the Uniform Act provides:

"Costs. Unless the parties shall agree by stipulation, as to the allowance thereof, costs in proceedings authorized by this act, shall be allowed in accordance with the rules of practice, followed in proceedings in equity, wherever applicable, and when not applicable costs or such part thereof as to the court may seem just, in view of the particular circumstances of the case, may be awarded to either party, or apportioned between them."

This section is likewise derived from the Michigan Act (section 5), but embodies a general rule which would have to be adapted to the practice in the individual states. In effect, it leaves the allowance of costs to the established practice in each state or to the discretion of the courts. In New York, Rule 214 provides that costs "shall be discretionary and may be granted to or against any party to the action."

Section 12 of the Uniform Act provides:

"Act Remedial, etc. The enumeration of specific powers of the Courts under this act shall not be held or construed to limit or restrict in any manner the general powers conferred upon the Courts by the first section of this act. This act is declared to be remedial, and is to be liberally construed and liberally administered with the view of making the Courts more serviceable to the people."

This section was designed to avoid the inference deducible by a customary rule of construction that the enumeration of specific powers limited the scope of the general powers conferred on the courts by the first section of the Act. These specific powers are designed merely to furnish a guide to the courts; they constitute merely codifications of the judicial precedents or rules of court established in England, where the declaratory judgment has had a long and increasingly successful career.

The last sentence of the Act is taken almost literally from section 6 of the Michigan Act, and is designed to show the legislative intent that the Act is remedial and is therefore to be liberally construed and administered. Aside from their other grievous errors,

the majority of the Michigan Supreme Court in the Anway case³⁴ failed entirely to notice or give effect to this section. The New York Practice Act provides that the entire Act "shall be liberally construed."

The last section of the Uniform Act, except that relating to the time when the Act is to come into force, provides:

"Words Construed. The word person wherever used in this act, shall be construed and held to include and mean any person, partnership, joint stock company, incorporated association, or society, or municipal or other corporation of any character whatsoever."

This section is designed to insure a liberal construction to the word "person" used in sections 2, 4, and 5 of the Act. It is not found in any other Act or draft.

It will be evident that the Uniform Act affords a model or draft statute which is capable of adaptation to the procedure already existing in the various states. Those states conferring on their courts a liberal rule-making authority may confine their statutes to section one or at most to sections one and two and incorporate the remainder of the sections of the Uniform Act in rules of court. States whose courts do not possess such power can adopt the whole Act, with but slight modifications to fit local conditions, as a statute amending their practice acts or codes of procedure or otherwise.

British and continental practice has demonstrated that the courts have not exhausted their usefulness by the employment of their curative functions, but that there remains a large field for the application of their preventive functions which in this country has barely been touched. Under the procedure authorizing declaratory judgments, with its simplicity, its capacity to serve important ends of corrective justice without legal hostilities, its utility in deciding many questions which cannot now be brought to judicial cognizance, and its efficacy in removing uncertainty from legal relations before it has ripened into a bitter litigation, the American public may look forward to a more amicable and simple method of adjusting many conflicts of interest and to an enlarged social service from its courts.

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³⁴ *Supra*, note 13.

SEISIN AND DISSEISIN (*Concluded*)

V

CHATTELS

IT would have been strange if the importance of seisin in the transfer and devolution of land had not been reflected in the law of chattels. Pollock and Maitland think it fairly certain that in the time of Bracton the ownership of a chattel could not be transferred from one person to another, either by way of gift or by way of sale, without a manual delivery.³³⁸ No such elaborate titles had to be proved as in the case of land, but it was a common form to allege that one had been possessed of the chattels as of his own goods and had then bailed or lost them.³³⁹ "An executor counting on his title regularly stated that the testator died seised."³⁴⁰ Again, marriage was an absolute gift to the husband of all chattels personal in possession which the wife held in her own right.³⁴¹

On the other hand, the elaborate system of assizes and writs of entry by which the royal courts had wrested jurisdiction from the courts of the lords³⁴² was based on seisin of freehold alone, and seisin of freehold was applicable only to land as was the whole law of estates. And while land could not be transferred by will, there was no such restriction in the case of chattels. In truth the acquisitiveness of the king's courts and the exigencies of the feudal tenure gave seisin of freehold a unique position in the law of land entirely beyond anything attained by seisin in the law of chattels. Otherwise it would not have taken a great historian like Mait-

³³⁸ 2 POLLOCK AND MAITLAND, 180.

³³⁹ The classic count in trover is the most familiar instance of this and seems to have been based on a similar count in *detinue sur trover*. See COKE'S ENTRIES, 169b, and AMES, 3 SELECT ESSAYS, 417, 440. Such an allegation was not frequent in *detinue* on a bailment (see *Whitehead v. Harrison*, 6 Q. B. 423 (1844)), but in Y. B. 6 HEN. VII, 7-4, in an action of trespass, the defendant pleaded that one J. S. had been possessed of the chattels as of his own goods and had bailed them to the plaintiff.

³⁴⁰ AMES, 3 SELECT ESSAYS, 541, 557, and see Maitland, 1 L. QUART. REV. 329.

³⁴¹ CO. LIT. 351b.

³⁴² 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 146, 172; 2 *Id.*, 65, 77; Maitland, 4 L. QUART. REV. 27.

land to discover that there had been such a thing as seisin of chattels.

One element, and an important one, the law of chattels owed to these new remedies as to land, and that was the notion of an action of damages which seems to have originated with the assize of novel disseisin.³⁴³ Otherwise their influence on detinue, trespass, and replevin, the three actions as to chattels, seems to have been slight. Detinue was of the type of the old proprietary writ of right;³⁴⁴ the writ of trespass said nothing as to seisin or possession, and trespass de bonis was associated with the appeal of robbery rather than with the assize,³⁴⁵ while the rule in replevin that the plaintiff did not have to reply to the avowry if the defendant were *still seised* of the chattels seems to have antedated the assize.³⁴⁶ It was because of the shortcomings of the assize that trespass gradually developed into a distinctly possessory action itself,³⁴⁷ until finally, as we have seen,³⁴⁸ trespass-possession supplanted assize-possession altogether.³⁴⁹

There could of course be no 'tortious freehold' in the case of chattels, but right could be separated from the property just as right could be separated from the land, and to a slight extent this notion prevailed. As in the case of land such separation did not follow from a lease, so in the case of chattels it did not result from a bailment,³⁵⁰ nor where goods were taken by way of distress.³⁵¹ The two examples of it that we have are cases of theft and trespass.³⁵² The difficulty in its application to chattels was that there was no such convenient term as freehold to indicate the possession of the wrongdoer. When property was used in this sense it was used to indicate the tangible thing and the rights arising from the hostile possession thereof in contrast with the right of property from which the property itself had become separated. But this use of 'prop-

³⁴³ 2 POLLOCK AND MAITLAND, 522-525.

³⁴⁴ 2 POLLOCK AND MAITLAND, 173, 177, 206.

³⁴⁵ See 29 HARV. L. REV., 388, 392, 507.

³⁴⁶ Maitland, 1 L. QUART. REV., 327; 2 POLLOCK AND MAITLAND, 47; 29 HARV. L. REV. 391.

³⁴⁷ 34 HARV. L. REV. 595.

³⁴⁸ 34 HARV. L. REV. 600.

³⁴⁹ The phrases are Maitland's. See 3 SELECT ESSAYS, 591, 606.

³⁵⁰ 2 POLLOCK AND MAITLAND, 176; 29 HARV. L. REV. 501.

³⁵¹ 29 HARV. L. REV. 393.

³⁵² Ames, 3 SELECT ESSAYS, 541, 542.

erty' to indicate possessory right as distinct from proprietary right seems never to have become quite natural.³⁵³ When the defendant in a replevin proceeding claimed the 'property' in the goods he was making a claim of right of property or ownership, and that this was the generally accepted meaning of property, even in the time of Edward III, is evident from the anxiety the lawyers showed that the juries would not understand that the tortfeasor had 'property' at all.³⁵⁴ Such use was technical and no doubt influenced by the rigid prohibition of self-help in the time of Edward I which extended to chattels as well as to land.³⁵⁵

That the use of 'property' as analogous to 'tortious freehold' ever had much positive influence in the law is doubtful.³⁵⁶ It may have had some influence in restricting the use of trespass and replevin against one who held subsequent to the first converter,³⁵⁷ but if so it only cleared the way for conversion in such cases. It was not long applied to theft, for the appeal of larceny lay against the second thief,³⁵⁸ and except for Brian, C. J., the judges of the 1400's saw in it nothing more than that trespass was an action for damages and that by the proceedings in trespass the property in the chattel might be lost.³⁵⁹

In the 1400's, chattels came to be transferable by deed without delivery,³⁶⁰ and also it would appear by sale.³⁶¹ Sixty years and more, therefore, before the Statute of Uses destroyed the dominance of the feoffment in the transfer of land, the necessity for a delivery in the transfer of a chattel had been obviated without statutory

³⁵³ T. Cyprian Williams (11 L. QUART. REV. 224-226) argues that "property, in the strict sense of the word, cannot exist apart from the possession of corporeal things." But he admits that 'property' was used more extensively to include the right of one "from whom goods had been wrongfully taken" as early as the 1400's. See also his note (5), p. 234.

³⁵⁴ 29 HARV. L. REV. 374, 375.

³⁵⁵ *Id.*, 374.

³⁵⁶ That it had a very pernicious influence in entailing upon us a confused vocabulary, see 2 P. OLLOCK AND MAITLAND, 168.

³⁵⁷ But see 29 HARV. L. REV. 382.

³⁵⁸ *Id.*, 380.

³⁵⁹ *Id.*, 385.

³⁶⁰ Y. B. 7 ED. IV. 20-21; 2 POLLOCK AND MAITLAND, 181; *Cochrane v. Moore*, L. R. 25 Q. B. D. 57, 67 (1890).

³⁶¹ BLACKBURN, SALE, 283 *et seq.*; Y. B. 17 ED. IV. 1-2. Sergeant Manning's assertion that the transfer of title by sale without delivery is a comparatively modern rule (2 MAN. & RY. 567) would seem to have been successfully refuted by Lord Blackburn. But see Maitland, 3 SELECT ESSAYS, 595, 610 n., and *Cochrane v. Moore*, *supra*, p. 71.

aid. The diversity between land and chattels as to the need of an entry to base an action or effect a transfer soon appeared in the cases.³⁶²

That the one who had bailed his own goods could transfer them to a stranger seems to have been accepted as a matter of course during the 1400's.³⁶³ The doubt lay as to whether he could make an oral gift of them to the trespasser after the latter had taken them from the bailee. Littleton, as counsel, made the point that in such a case the gift was void,³⁶⁴ and Brian, as chief justice, later argued to the same effect.³⁶⁵ The numerical weight of judicial authority at least was that such a right was transferable.³⁶⁶ All seemed to agree to the notion so prevalent in the later law that 'property' was something inherently transferable, but Brian stubbornly adhered to the distinction between property and right of property and argued that they were not the same thing. Occasional statements are to be found since Brian of the non-transferability of a chattel taken by a trespasser,³⁶⁷ but they are in the main

³⁶² Y. B. 14 HEN. VIII, 23b; BRO. ABR., *Chose in Action*, pl. 14; 29 HARV. L. REV. 515.

³⁶³ See Y. B. 11 HEN. IV, 23-46; Y. B. 2 ED. IV, 16-18; Y. B. 6 HEN. VII 7-4. Mr. Cyprian Williams (11 L. QUART. REV. 223, 227, n. 5) suggests that the right to transfer did not exist where the bailment deprived the bailor of the right to immediate possession, but in the first of the above cases the bailment was for a year. Hankford, C. J., was very emphatic that even in such a case it was the bailor who had the property and not the bailee.

³⁶⁴ Y. B. 2 ED. IV, 16-8.

³⁶⁵ Y. B. 6 HEN. VII, 7-4; Y. B. 10 HEN. VII, 27-13. In each of these cases, Keble, as counsel, argued that the gift to the trespasser would be good,—first, because a gift to a stranger would be good; second, as a release by parole. In the first case Vavisor, J., agreed as to the first point but denied that a release might be by parole even in the case of chattels. Brian, C. J., denied both propositions, but to support his case had to make the following inadmissible contentions: First, that although the bailment or trover in detinue was no longer traversable, detinue was not available where there had been a trespass; second, that in replevin, property in the plaintiff at the time of action brought was not sufficient and that he must have had property at the time of the taking; third, that if goods had been taken from one, the goods would not be forfeited on his attainer; fourth, that there would be no escheat if the disseisee died without heir; fifth, that if the lord had no writ of escheat, he could have no entry. As to the exact point in both cases, that of a gift or sale to the trespasser, the law was definitely settled contrary to Brian's opinion. See PERKINS, PROFITABLE BOOK, § 92; SHEPPARD, LAW OF COMMON ASSURANCES, 12. As to the gift or sale to a stranger, Brian did not speak with his wanted assurance. In the second case, he said: "It seems to me that the gift made to a stranger is void."

³⁶⁶ Danby, C. J., Needham, J., and Vavisor, J., as against Brian, C. J.

³⁶⁷ Dictum by Manwood, C. B., in *Russel v. Prat*, 4 Leon. 44, 46. SHEPPARD, TOUCH-

reflections of the rule that had become crystallized under the Pretended Title Act that rights of entry were not alienable. The one from whom chattels had been taken had 'property,'³⁶⁸ and property was inherently transferable, but their transfer might yet be invalid because of maintenance.

Not much of a case could have been made for the subsequent importance of Brian's 'right of property' in the law had it not been for the assumption running all through *The Disseisin of Chattels* that his 'right of property' and the chose in action of the later law³⁶⁹ were the same thing, or rather that 'right of property' as used by Brian was one kind of chose in action. Ames would also have included the right of the reversioner, of the remainderman, and of the bailor in the list.³⁷⁰ On the other hand, in Warren's long list of those things which on good authority have been deemed to be choses in action,³⁷¹ he mentions none of these.³⁷² And of the use of the term 'chose in action' to indicate either the right to a chattel in the hostile possession of another or the chattel itself there is very little, if any, evidence in any of the English authorities. Warren mentions the right of action for trespass for goods taken away as a chose in action,³⁷³ and there are many instances of this,³⁷⁴ but to identify the right to an action for goods taken away with Brian's 'right of property' would seem to be a pure assumption. It ignores the right of recaption and is directly opposed to Littleton.³⁷⁵

STONE, 6 ed., 240, 241; Ames, 3 SELECT ESSAYS, 541, 556. See also JACOB, LAW DICT., tit. Chose.

³⁶⁸ The law is so stated in the passage which Ames quotes from SHEPPARD'S TOUCHSTONE, but the statement is explained away by Preston, from whom Ames derived his doctrine of disseisin.

³⁶⁹ Two instances of the use of the term chose in action are to be found in the Year Books, 9 HEN. VI, 64-17, and 37 HEN. VI, 13-3, cited by Sweet, 10 L. QUART. REV. 304, but it owed its currency in the later law to its use by BROOKE in his ABRIDGMENT as a part of the title-head '*Chose en Action & Chose en Suspence*.' See Sweet, *id.*

³⁷⁰ 3 SELECT ESSAYS, 541, 581.

³⁷¹ WARREN, CHOSSES IN ACTION, 19-26.

³⁷² On page 25 he mentions "the reversionary interest under a will or settlement" but his citations show that he is not referring to the common-law reversion.

³⁷³ *Ibid.*, 20.

³⁷⁴ See the definitions of chose in action in TERMES DE LA LEY and in BLOUNT'S, COWELL'S and JACOB'S LAW DICTIONARIES.

³⁷⁵ Section 497. Ames complains that here Littleton's view savors of scholasticism (3 SELECT ESSAYS, 572), but to the writer this criticism would appear to apply rather to Ames' own view.

Chose in action was broader than right of action, for it included things lying only in action, such as a debt not yet due and a right to land after the right of entry was gone.³⁷⁶ Sometimes, it is true, chose in action was used to indicate any unassignable right³⁷⁷ and in this sense the right of entry was sometimes referred to as a chose in action,³⁷⁸ but in such a case the right was not unassignable because it was a chose in action but was a chose in action because it was unassignable. Its unassignability might be due to the privity or personal relationship between the parties to the obligation, as in the case of the chose in action proper,³⁷⁹ or have been influenced by the Pretended Title Act, as in the case of the right of entry,³⁸⁰ and in either case bear witness of a time when things were transferable and rights were not.³⁸¹ But the use of chose in action in this broad sense of the word neither went very deep nor lasted very long.³⁸² The chose in action³⁸³ and the right of entry³⁸⁴ both date from the late Middle Ages, and except for the fact that they were both unassignable their histories were quite distinct.³⁸⁵

Blackstone's Commentaries gave currency to another use of the term 'chose in action,'—to indicate one class of personal property.³⁸⁶ In contrast with the chose in action was the chose in possession.³⁸⁷ This classification has been judicially determined to be exhaustive.³⁸⁸ Here 'property' has gone far beyond the meaning given it by Brian's opponents so as to include a vast number of

³⁷⁶ T. Cyprian Williams, 10 L. QUART. REV. 143, 11 L. QUART. REV. 223, 228-230, especially note 2, page 230; Charles Sweet, 10 L. QUART. REV. 303, 304.

³⁷⁷ Sweet, 10 L. QUART. REV. 303, 307.

³⁷⁸ Williams, 11 L. QUART. REV. 223, 232, note 2.

³⁷⁹ POLLOCK, CONTRACTS (Wald and Williston's ed.), Appendix, Note F.

³⁸⁰ 34 HARV. L. REV. 615.

³⁸¹ *Infra*, p. 724.

³⁸² This is shown by the fact that the chose in action survived its non-assignability. The application of the term to rights in land ceased to have vogue in the 1700's. See Sweet, 10 L. QUART. REV. 303, 308.

³⁸³ *Supra*, n. 369.

³⁸⁴ *Supra*.

³⁸⁵ The difference in their histories is brought out by Sweet in his contrast between choses in action real and choses in action personal. 10 L. QUART. REV. 303, 308-311.

³⁸⁶ Bk. II, pp. 389, 396.

³⁸⁷ Blackstone himself does not seem to use the term 'chose in possession,' but it has been used extensively since his time in contrast with 'chose in action.'

³⁸⁸ See the opinion of Fry, L. J., in the Court of Appeals in *Colonial Bank v. Whinney*, L. R. 30 Ch. D. 261, 285 (1885), approved in the House of Lords, L. R. 11 A. C. 426 (1886).

contractual and even non-contractual rights which they would never have thought of as 'property.'³⁸⁹ Neither 'choses in action' nor 'choses in possession' is a fitting term to designate many of the rights which have to be included under them, if this classification is to be considered exhaustive. Thus it is hard to include a right to a chattel in the adverse possession of another as a chose in possession,³⁹⁰ just as it is hard to include under choses in action such incorporeal rights as patents, copyrights, and trade names which have none of the ephemeral characteristics of rights of action.³⁹¹ Yet it would seem that when replevin came to be concurrent with trespass, it would still have been allowed to the husband in his own name to recover a chattel belonging to his wife which had been taken from her before marriage despite the fact that replevin now lay where the taking had been by way of trespass,³⁹² and if so the chattel must have been considered one of the wife's choses in possession,³⁹³ for the test in such a case was the ability of the husband to bring the action in his own name.³⁹⁴ And the decided weight of authority and reason would seem to be that if this classification is exhaustive, patents, copyrights, and trade names must be considered as choses in action.³⁹⁵ With the passing of the right of the husband to the wife's chattels, choses in possession has fallen into the background, but choses in action would seem to be too deeply rooted for there to be much chance of its early extinction. Its broad use to indicate incorporeal personal property in general rather than the right to recover something has this support in the

³⁸⁹ This is brought out by Lindley, L. J., in his opinion in the Court of Appeals in *Colonial Bank v. Whitney*. See also Williams, 11 L. QUART. REV. 223, 227.

³⁹⁰ See Brodhurst, 11 L. QUART. REV. 68.

³⁹¹ *Id.*, 75. See also on the same page the editorial note of Sir Frederick Pollock.

³⁹² FITZ., NAT. BREV. 69 K; *Powes & Uxor v. Marshall*, 1 Sid. 172, 1 Keb. 641; *Bearn & Ux. v. Mattaire*, Cas. T. Hard. 111 (1735); COM. DIG. "Pleader," 3 K; BULLER, NISI PRIUS, 53; BAC. ABR. "Baron & Feme," (K).

³⁹³ See Williams, 10 L. QUART. REV. 143, 153, 11 L. QUART. REV. 223, 234, n. 5.

³⁹⁴ See Co. LIT. 351b and 16 HALSBURY, LAWS OF ENGLAND, 329. Ames recognizes the right of the husband to bring an action in his own name as the test of a chose in possession (3 SELECT ESSAYS, 541, 559), but in this connection does not refer to the change wrought by the concurrence of replevin and trespass.

³⁹⁵ Elphinstone, who raised the question, regarded the matter as doubtful. (9 L. QUART. REV. 311, 315). Williams (11 L. QUART. REV. 223, 237) and Sweet (*Id.*, 283) regarded a copyright as a chose in action, while Brodhurst and Pollock (11 L. QUART. REV. 75) were inclined to consider it a chose in possession.

old 'right of property' that it too was broader than a right to recover something, for it might coexist with the seisin itself.³⁹⁶

Maitland did not identify the chose in action with the right of the disseised owner,³⁹⁷ but he believed that the inalienability of both went back to a time when things could be transferred but mere rights could not be.³⁹⁸ Such would appear to have been the necessary meaning of the old rules as to the importance of seisin in the transmission of property as long as seisin remained a reality. Possession or the thing itself could be transferred, the right apart from the possession could not be. But so far did the Middle Ages carry the conception of a thing and of a thing of which one could be seised that to the layman rights must have seemed as transferable as the land. Incorporeal things, in which the Middle Ages were rich, reversions, and remainders, could be transferred,³⁹⁹ and even the lawyers seem to have been clear that this was in reality the transfer of a right and not of a thing. At least this must have been so as far back as the recognition of the innocent operation of the grant as compared with the tortious operation of the feoffment, and this goes back at least as far as the reign of Edward II.⁴⁰⁰ To the writer the necessity of the attornment to complete a grant would seem not so much an indication that the transfer was regarded as the transfer of a thing as that in the Middle Ages great stress was laid on the formal receipt by the transferee, whether of the land itself or of some right therein. The attornment corresponded to the entry in the case of an exchange or of a livery within the view.⁴⁰¹ In the case of the freehold, as in that of the lease, entry was the *sine qua non* of a transfer.⁴⁰² From this it followed that if one's entry was lost, no transfer was possible. But however it may have been at law, in equity the transfer of a right without the transfer of a thing seems to have been taken for granted from the first.⁴⁰³

Enlightening as Maitland's theory is, while it may not "take us

³⁹⁶ 34 HARV. L. REV. 605.

³⁹⁷ 3 SELECT ESSAYS, 591, 609.

³⁹⁸ *Id.*, 602.

³⁹⁹ 34 HARV. L. REV. 593.

⁴⁰⁰ Maitlands Note (1) to Sel. Soc. Y. B. 3 ED. II. p. 7. See also 34 HARV. L. REV. 593.

⁴⁰¹ 34 HARV. L. REV. 594.

⁴⁰² 2 POLLOCK AND MAITLAND, 2 ed., 105.

⁴⁰³ WARREN, CHOSSES IN ACTION, 32.

back to a merely hypothetical age of darkness,"⁴⁰⁴ it would seem to take us back to a time antedating the grant⁴⁰⁵ and therefore beyond the confines of the traditional common law.⁴⁰⁶ However this may be, to Maitland it seemed that a very large part of the history of Real Property Law is the history of the process whereby Englishmen thought themselves free of that materialism which would have made a change of possession an essential of transfer.⁴⁰⁷ To Ames this materialism was a necessary principle for all time.⁴⁰⁸ Maitland spoke as a legal historian, Ames as an historical jurist.

VI

IN THE UNITED STATES

The rout of seisin had already occurred at the time of the first settlement of the English colonies in America. The real actions had given way to ejectment as the common method of trying titles to land in the reign of Elizabeth⁴⁰⁹ and the transfer of the freehold by lease and release without entry was formally recognized the year the Pilgrims landed on Plymouth Rock.⁴¹⁰ The fictions of ejectment did not appeal to the Puritan sense of righteousness and so an action on the case was used extensively for the recovery of land.⁴¹¹ Later, writs of entry were used in Massachusetts⁴¹² and New Hampshire,⁴¹³ and a writ of disseisin in Connecticut.⁴¹⁴ In Massachusetts, after it had become a state, the attempt was even made to revive all the intricacies of the old English writs of entry,⁴¹⁵ but this was unsuccessful and a single statutory writ was established in their stead.⁴¹⁶ In Connecticut the writ of disseisin took

⁴⁰⁴ 3 SELECT ESSAYS, 591, 602.

⁴⁰⁵ That the requirement of a deed for the creation and transfer of non-tenurial rents was probably aboriginal, see 2 POLLOCK AND MAITLAND, 132.

⁴⁰⁶ "A tradition, which is in the main a sound and truthful tradition, has been maintained about so much of English legal history as lies on this side of the reign of Edward I." 1 POLLOCK AND MAITLAND, xxxiv.

⁴⁰⁷ 3 SELECT ESSAYS, 591, 602.

⁴⁰⁸ 3 SELECT ESSAYS, 541, 564, 582, 590.

⁴⁰⁹ 34 HARV. L. REV. 600.

⁴¹⁰ 34 HARV. L. REV. 599, n. 90.

⁴¹¹ STEARNS, REAL ACTIONS, p. 396, n., p. 491, n. A.

⁴¹² Sedgwick and Wait, 3 SELECT ESSAYS, 611, 638.

⁴¹³ *Id.*, 642.

⁴¹⁴ *Id.*, 643.

⁴¹⁵ See the remarks of Judge Jackson in 2 AMERICAN JURIST, 65.

⁴¹⁶ Sedgwick and Wait, 3 SELECT ESSAYS, 611, 642.

the place of writs of right, writs of entry and ejectment alike.⁴¹⁷ These served to keep alive the terminology of seisin and disseisin in the New England states, but there was no such graduated series of actions as marked the medieval land law and the net result was more like ejectment stripped of its fictions than it was like the medieval system.⁴¹⁸ Outside New England, the old real actions seem to have been even less in evidence, either in substance or form, than in England during the same period.⁴¹⁹

In the forms of conveyance, the revolution was even more thoroughgoing than it had been in England. There the feoffment, fine, and recovery continued to be used for their peculiar effects after the lease and release had superseded them in common practice.⁴²⁰ In the United States livery of seisin seems to have been almost unknown,⁴²¹ the common recovery was rarely resorted to except to dock an entail,⁴²² and the fine seems to have been used only in New York, where it was occasionally resorted to to clear up titles. Both

⁴¹⁷ Sedgwick and Wait, 3 SELECT ESSAYS, 643.

⁴¹⁸ For instance, instead of allowing the recovery of land with damages in a writ of entry, it was necessary to bring a subsequent action for mesne profits, as in ejectment. See STEARNS, REAL ACTIONS, 396 n.

⁴¹⁹ The contrast between the Massachusetts practice and that in New York and other states is noticed by STEARNS, REAL ACTIONS, 62.

⁴²⁰ 34 HARV. L. REV. 602.

⁴²¹ For a case where the old ceremony of livery was carried out with great formality, see *McGregor v. Comstock*, 17 N. Y. 162 (1858), where this was done as a preliminary to levying a fine. The case seems to be unique. In 1844 (*Bryan v. Bradley*, 16 Conn. 474) a Connecticut judge said that there were early instances of livery of seisin as appeared by endorsements on deeds but none of recent date. In 1823 (*Lyle v. Richards*, 9 Serg. & R. (Pa.) 322) Tilghman, C. J., said that he had never heard of one in Pennsylvania. In 1837 (*Dehon v. Redfern*, Rice, L. 464) there was a tender of livery and the court held that the livery would have destroyed a contingent remainder, but the court admitted that no previous case of livery had arisen in South Carolina for a long time. It had been argued that the practice was obsolete from long disuse. In 1883, 18 SOUTH CAROLINA L., 430, the South Carolina legislature enacted that feoffment with livery of seisin should not defeat a remainder. This was apparently the result of two cases decided in 1877, — *Faber v. Police*, 10 S. C. 376 (1877), and *McElwee v. Wheeler*, 10 S. C. 392 (1878), which upheld the tortious feoffment.

⁴²² Common recoveries seem to have been in vogue at one time in New Jersey for barring contingent estates. (*Den v. Crawford*, 3 Halst. L. 90, 109 (1825)). They were abolished in 1799. In *Lyle v. Richards*, *supra*, the Supreme Court of Pennsylvania, over the vigorous dissent of Gibson, J., allowed the barring of a contingent remainder by a common recovery. This case was followed in *Abbott v. Jenkins*, 10 Serg. & R. (Pa.) 296 (1823); *Stump v. Findlay*, 2 Rawle (Pa.) 168 (1828), *Waddell v. Rattew*, 5 Rawle (Pa.), 231 (1835). *Quaere* whether they would be followed to-day.

finer and recoveries were abolished there in 1829.⁴²³ Under statutes dispensing with livery of seisin a deed was often,⁴²⁴ and sometimes still is,⁴²⁵ considered to have the effect of a feoffment, but this was for the purpose of supporting the conveyance and not to effect the peculiar results produced by a conveyance operating by transmutation of possession.⁴²⁶ In most of the colonies a statutory deed was the accepted form of conveyance from the first.⁴²⁷ At the present time the Statute of Uses is sometimes resorted to to support some instrument as a bargain and sale or a covenant to stand seised, but this is usually because the instrument fails to meet the requirements of the statutory deed and not because the statutory deed would not have been equally efficacious.⁴²⁸

In Maryland, Massachusetts, New Hampshire, New Jersey and Pennsylvania, the cases show that common recoveries were once used to bar entails (see 26 Am. Dec. 725), but it was held (*Jewell v. Warner*, 35 N. H. 176 (1857)) that estates tail had been abolished by implication in New Hampshire in 1789 and both fines and recoveries were expressly abolished in New Jersey in 1799. It was enacted that estates tail might be docked by simple deed in Maryland, in 1782, in Massachusetts in 1792, and in Pennsylvania in 1799. Pennsylvania seems to be the only state where common recoveries ever found any favor. Fines and recoveries to bar entails are still given statutory recognition there (2 PURDON'S DIGEST, 13 ed., 1483), and in Delaware (REV. CD. DEL. 1915, p. 1494).

⁴²³ 4 KENT. COM. 497. "Fines, as a mode of conveyance, do not appear ever to have been adopted in the country; and common recoveries, though resorted to for other purposes, are not known to have been used for the transfer of the estates of *femes covert*." Story, J., in *Durant v. Ritchie*, 4 Mass. (U. S.) 45, 55, Fed. Cas. 4190 (1825).

⁴²⁴ *Emery v. Chase*, 5 Me. 232 (1828); *Cheney's Lessee v. Watkins*, 1 Har. & J. (Md.) 527 (1804); *Thatcher v. Omans*, 3 Pick. (Mass.) 522; *Perry v. Price*, 1 Mo. 553 (1825).

⁴²⁵ *Rogers v. Sisters of Charity*, 55 Atl. 318, 97 Md. 550 (1903); *Carr v. Richardson*, 157 Mass. 576, 32 N. E. 958 (1893); *Johnston v. Kramer Bros. & Co.*, 203 Fed. 733 (1913).

⁴²⁶ *Dennett v. Dennett*, 40 N. H. 498, 505 (1860).

⁴²⁷ The case of Massachusetts may be taken as fairly typical. 4 DANE, ABRIDGMENT, 85, says: "This whole system of conveyance by deed recorded, that so well enables every man usually to know every man's title, has grown out of a few statutes, predicated on a few sound and plain principles, and passed by the legislature of the colony in its early settlement: In this system, a deed duly signed, sealed, delivered, and acknowledged, is made the ground work in every conveyance of any importance; and in the first settlement of the country this deed, [was] accompanied either by livery and seisin on the land conveyed, or by a public record of the deed in the county in which the land conveyed is situated. But after the use of such deed recorded, was well ascertained and understood, this livery of seisin was discontinued, and this deed recorded, properly viewed as the best evidence of conveyance and the best sort of notoriety. This public record of deeds naturally led to other records equally useful, as the records of devises and of executions levied on lands."

⁴²⁸ 3 WASHBURN, REAL PROPERTY, 6 ed., 347.

The universal form of tenure in the colonies was free and common socage. Thus the colonists escaped from the burdensome incidents of military tenure which were not formally abolished in England until after the restoration of Charles the Second.⁴²⁹ In some states all tenures in fee simple were abolished by statute, while in others this was considered to have resulted from the change from a monarchical to a republican form of government.⁴³⁰ Certainly the feudal relationship was a personal one and there would be little left of the theory of feudal tenure in England today with the king left out. It might be tenure but it would hardly be feudal. Gray argues that in theory a tenant in fee simple holds of the state,⁴³¹ but he gives no judicial determination of a state court in support of his contention of as recent a date as the case of *Matthews v. Ward*,⁴³² in 1839, which held to the contrary. The only state case he gives in his support⁴³³ was subsequently overruled.⁴³⁴ If it were desirable to revive tenure one might be inclined to give more weight to his argument,⁴³⁵ but as tenure was perhaps the most striking instance of the artificial differentiation between the law of chattels and the law of land, its revival would seem distinctly undesirable.

In avoiding the artificialities of seisin and disseisin and tenure the American colonies had a distinct advantage over their English neighbors of the same period. They were making a fresh start, and under conditions vitally different from those of England. The social order was not favorable to entailed estates or family settlements or primogeniture. It was not favorable to a professional

⁴²⁹ 1 STORY, CONST., § 172.

⁴³⁰ See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 23.

⁴³¹ *Id.*, § 22.

⁴³² 10 G. & J. (Md.) 443, 451 (1839). Gray also cites *United States v. Repentigny*, 5 Wall. (U. S.) 211, 267 (1866), but there the continuance of tenure is assumed rather than discussed.

⁴³³ *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337 (1836).

⁴³⁴ *Wallace v. Harmstad*, 44 Pa. 492 (1863).

⁴³⁵ Gray cites Sharswood and Hoffman in support of his contention of the survival of tenure in the United States, but their views are obviously so effected by the natural but regrettable tendency of law teachers to stress their learning as living law rather than the history it in fact is, as to be of little weight. See especially SHARSWOOD, LAW LECTURES, 190, and HOFFMAN, LEGAL OUTLINES, 591. Kent, Story, Washburn, and Cooley regarded every real vestige of tenure as wiped out. See 4 KENT, COM. 24, 3 *id.*, 509-514; 1 STORY, CONST., § 172; 1 WASHBURN, REAL PROPERTY, 6 ed., § 118; 2 COOLEY'S BLACKSTONE, 102, n. 22.

class of lawyers. Even though the colonists had attempted to transplant the English law in its entirety, much of it would have gone by the board. But except perhaps in Maryland they made no such attempt. In all the colonies except Maryland there were early codifications of the essential features of the law and in many respects these codes departed radically from the common law.⁴³⁶ This was especially true of the law of property. Land was to be conveyed by deed⁴³⁷ and to be subject to execution.⁴³⁸ In some cases prescription for land was established and a short period of from five to seven years instituted.⁴³⁹ The American system of recording deeds dates from this early period,⁴⁴⁰ as does most of what is characteristic in our modern American property law. The most striking change was in the law of intestate succession as to land. In 1692 Massachusetts passed a law dividing the land among all the children with a double portion for the oldest son, and a similar law was adopted in Connecticut in 1699.⁴⁴¹ But these laws merely embodied the practice which had been in vogue for over sixty years.⁴⁴² The Privy Council refused to acknowledge the validity of the Connecticut law in an appeal that managed to reach it,⁴⁴³ but the law continued in force despite the decision.⁴⁴⁴

In Massachusetts, Connecticut, and New Haven, and to a certain extent in New Jersey, it was declared at an early period that the law of the Scripture, rather than the common law, was subsidiary law,⁴⁴⁵ and although, in absence of colonial legislation, the common law was expressly recognized at an early date in Maryland, Virginia, and the Carolinas,⁴⁴⁶ no general reception of the common law was possible until the rise of a trained bar in the 1700's.⁴⁴⁷ Writing of a period as late as 1799, Kent, J., says:

⁴³⁶ Reinsch, 1 SELECT ESSAYS, 367, 410.

⁴³⁷ See *supra*, p. 727.

⁴³⁸ Reinsch, 1 SELECT ESSAYS, 367, 412.

⁴³⁹ *Id.*

⁴⁴⁰ See Beale, "Recording Deeds in America," 19 GREEN BAG, 335.

⁴⁴¹ Andrews, 1 SELECT ESSAYS, 431, 437.

⁴⁴² *Id.*, 437, 438.

⁴⁴³ *Winthrop v. Lechmere*, 1 THAYER, CASES CONST. LAW, 34. See Andrew's 1 SELECT ESSAYS, 431, 445 *et seq.*

⁴⁴⁴ Andrews, 1 SELECT ESSAYS, 367, 462.

⁴⁴⁵ Reinsch, 1 SELECT ESSAYS, 367, 411.

⁴⁴⁶ *Id.*, 411.

⁴⁴⁷ See *Id.*, 369, 415, and Pound, 27 W. VA. L. QUART. 1, 5.

"We had no law of our own, and nobody knew what it was . . . I made much use of the *Corpus Juris* & as the Judges (Livingston excepted) knew nothing of French or civil law I had immense advantage over them. I could generally put my Brethen to rout & carry my point by mysterious want (*sic*) of French and civil law. . . . English authorities did not stand very high in those feverish times."⁴⁴⁸

These words of Kent give some indication of the break in legal tradition from the settlement of America to the first publication of the reports. There was a reception of the common law, no doubt, but the qualification that only such of the common law was adopted as was suited to the condition of the colonies is sometimes overlooked. Survivals of medieval law, which were not looked on with favor even in England, were likely to fare badly. So it was with such of the old law of seisin and disseisin as still survived in England. Seisin and disseisin had come to be looked on as distinctly feudal⁴⁴⁹ and had to bear that opprobrium in a new country after the telling assaults which Lord Mansfield had directed against them.⁴⁵⁰ The extent to which five of the old rules were adopted in this country will be briefly examined. They are: (1) seisin a stock of descent, (2) seisin a prerequisite of a devise, (3) of dower, (4) of curtesy, and (5) of a conveyance *inter vivos*.

(1) In only three states—New York, North Carolina, and Maryland—does the rule, *seisina facit stipitem*, seem ever to have had anything like its old English place in the law of the courts. In New York this was changed by the Revised Statutes⁴⁵¹ (1828), and in North Carolina the decision in 1854⁴⁵² that the old rule was in force was promptly met by a provision in the Revised Code of 1854⁴⁵³ substituting right title and interest for seisin as the stock of descent. In Maryland alone did the rule thrive.⁴⁵⁴ There it continues to flourish.⁴⁵⁵ Outside of Maryland, traces of the old

⁴⁴⁸ 1 SELECT ESSAYS, 837, 843, 844.

⁴⁴⁹ See the definitions of seisin given by Sweet, 12 L. QUART. REV. 239.

⁴⁵⁰ 34 HARV. L. REV. 621.

⁴⁵¹ Pt. II, Chap. II, §§ 1, 27.

⁴⁵² *Lawrence v. Pitt*, 46 N. C. (1 Jones, L.), 344 (1854).

⁴⁵³ C. 38, § 1. See *Early v. Early*, 134 N. C. 258, 46 S. E. 503 (1904).

⁴⁵⁴ *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.), 456 (1812); *Buck v. Lantz*, 49 Md. 439 (1879); *Chirac v. Reinecker*, 2 Pet. (U. S.) 613 (1829); *Conner v. Waring*, 52 Md. 724 (1879).

⁴⁵⁵ *Garrison v. Hill*, 79 Md. 75, 28 Atl. 1062 (1894); *Jenkins v. Bonsal*, 116 Md. 629, 82 Atl. 229 (1911).

rule are to be found in determining who shall succeed to a possibility of reverter⁴⁵⁶ or have the right to enforce a right of entry for condition broken.⁴⁵⁷ In four states — Iowa,⁴⁵⁸ Maine,⁴⁵⁹ Mississippi,⁴⁶⁰ and New Jersey⁴⁶¹ — the statutes of descent are similar to that of Maryland⁴⁶² and provide for the disposition of the estate of which the intestate "died seized," but at an early date⁴⁶³ Mr. Justice Story interpreted similar words in a Massachusetts statute to mean "owning," or otherwise the land of which one had been dis-seised would not pass. The New Jersey courts adopted this view in interpreting their own statute,⁴⁶⁴ and it would seem likely that the courts of Iowa, Maine, and Mississippi would do the same. Instead of tracing descent from the one last seised the almost universal rule in the United States has been to trace descent from the one last entitled.⁴⁶⁵

The only departure from the rule tracing descent from title which threatens to attain the dignity of a general exception is that already mentioned as to possibilities of reverter and rights of entry for condition broken,⁴⁶⁶ although in one case the descent of an execu-

⁴⁵⁶ *Adams v. Chaplin*, 1 Hill Eq. (S. C.) 265 (1833); *Deas v. Horry*, 2 Hill Eq. (S. C.) 244 (1835); *Seabrook v. Seabrook*, McMullan Eq. (S. C.) 201, 206 (1841); *Church v. Young*, 130 N. C. 8, 40 S. E. 691 (1902); *Puffer v. Clark*, 202 Mich. 169, 168 N. W. 471 (1918); *contra*, *North v. Graham*, 235 Ill. 178, 85 N. E. 267 (1908). See note to *North v. Graham*, *supra*, 18 L. R. A. (N. S.) 624.

⁴⁵⁷ *Upington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359 (1896).

⁴⁵⁸ *CD.* (1897), § 3378; *COMP. CD.* (1919), § 7903.

⁴⁵⁹ *REV. STAT.* 1916, c. 80, § 1, subs. 1. But see c. 94, § 4.

⁴⁶⁰ *HEMINGWAY'S ANN. MISS. CD.* (1917), § 1381.

⁴⁶¹ *COMP. STAT.* (1910), 1917.

⁴⁶² *ANN. CD.* (1911), Art. 46, § 1.

⁴⁶³ *Cook v. Hammond*, 4 Mason (U. S.), 467 (1827), *Fed. Cas.* 3159. See also *Miller v. Miller*, 10 Metc. (Mass.) 393 (1845).

⁴⁶⁴ *Moore v. Rake*, 26 N. J. L. (2 Dutcher) 574, 582, 591 (1857).

⁴⁶⁵ Some of the more important decisions not already cited are: *Hillhouse v. Chester*, 3 Day (Conn.) 166, 210 (1808); *Bush v. Bradley*, 4 Day, 298, 305 (1810); *Kean's Lessee v. Hoffecker*, 2 Har. (Del.) 103 (1836); *Thompson v. Sandford*, 13 Ga. 238 (1853); *Oliver v. Powell*, 114 Ga. 592, 600, 40 S. E. 826 (1901); *Parker v. Nims*, 2 N. H. 460 (1822); *Prescott v. Carr*, 29 N. H. 453 (1854); *Lakey v. Scott*, 15 N. Y. WEEKLY DIGEST, 148 (1882); *Cote's Appeal*, 79 Pa. 235 (1875); *Gardner v. Collins*, 2 Pet. (U. S.) 58 (1829); *Hicks v. Pegues*, 4 Rich. Eq. (S. C.) 413 (1852); *Guion v. Burton*, Meigs (Tenn.) 565 (1838); *Guion v. Anderson*, 8 Humph. (Tenn.) 298 (1847); *Medley v. Medley*, 81 Va. 265 (1886); and see *KALES, CASES ON FUTURE INTERESTS*, 184 n.

⁴⁶⁶ *Supra*.

tory devise⁴⁶⁷ and in another the descent of a contingent remainder was traced from the last purchaser.⁴⁶⁸

(2) The rule that a man had to be seised of land at the time of his death in order to devise it found formal recognition in a number of the early statutes, and in Rhode Island this was not changed until 1896,⁴⁶⁹ but in only two states, Massachusetts⁴⁷⁰ and Virginia,⁴⁷¹ do wills seem to have been declared void because of the rule, and in Massachusetts the rule was changed by statute in 1836,⁴⁷² and in Virginia, in 1785.⁴⁷³ In New York the rule was recognized as applicable to a technical disseisin, but not to an adverse possession,⁴⁷⁴ and was discarded altogether in the Revised Statutes of 1828.⁴⁷⁵ The principle there laid down,⁴⁷⁶ that every interest in real property descendible to heirs may be devised, has been generally accepted in the United States,⁴⁷⁷ so that in devise and descent alike seisin has been definitely displaced by title.

(3) Twenty-six states still make seisin a statutory prerequisite of either dower or curtesy or both. Of these, only four—Arkansas,⁴⁷⁸

⁴⁶⁷ *Payne v. Rosser*, 53 Ga. 663 (1875).

⁴⁶⁸ *Golladay v. Knock*, 235 Ill. 412, 85 N. E. 649 (1908). It is by no means clear, that the court meant to depart from the rule laid down in *North v. Graham*, *supra*, tracing descent from the person last entitled (see note by Professor Kales, 3 ILL. L. REV. 373, 378), but the case is taken by Professor Freund to revive the common law, regarding the descent of remainders and he argues that the older rule is preferable (33 HARV. L. REV. 526). His argument would seem to indicate a general preference for the present English rule tracing descent from the first purchaser rather than from the one last entitled. It seems extremely doubtful to the writer that the Illinois courts will hold that *Golladay v. Knock* has in any way affected the generality of the rule laid down in *North v. Graham* which is reported in the same volume.

⁴⁶⁹ PUBLIC LAWS, c. 203, § 4.

⁴⁷⁰ *Poor v. Robinson*, 10 Mass. 131 (1813). In *Smithwick v. Jordan*, 15 Mass. 112 (1818), the rule was recognized but the facts did not call for its application. See also *Lincoln v. Parsons*, 5 Dane Abr. 565 (1795).

⁴⁷¹ *Davis v. Martin*, 3 Munf. (Va.) 285 (1812).

⁴⁷² REV. STAT. 1836, c. 62, § 2.

⁴⁷³ Act of 1785, c. 61. See *Hyer v. Shobe*, 2 Munf. (Va.) 200 (1811); *Watts v. Cole*, 2 Leigh (Va.) 653, 664 (1830); *Taylor's Devises v. Rightmire*, 8 Leigh (Va.), 468 (1836).

⁴⁷⁴ *Varick v. Jackson*, 2 Wend. (N. Y.) 166 (1828). See also *Jackson v. Rogers*, 1 John. Cas. (N. Y.) 33 (1799), and *McMahon v. Allen*, 12 Abb. Pr. 275, 280 (1861).

⁴⁷⁵ Part II, chap. VI. Tit. 1, Art. 1, § 2.]

⁴⁷⁶ *Id.*

⁴⁷⁷ 1 JARMAN, WILLS, 6 ed. Bigelow, 48; 2 REEVES, REAL PROPERTY, 1546; 1 UNDERHILL, WILLS, 57; 4 KENT COMM. 513.

⁴⁷⁸ KIRBY AND CASTLE'S DIG., § 2901 (1916).

Missouri,⁴⁷⁹ Montana,⁴⁸⁰ and Oregon⁴⁸¹—are west of the Mississippi River, while there are only four states east of that river—Connecticut,⁴⁸² Indiana,⁴⁸³ Maryland,⁴⁸⁴ and Ohio⁴⁸⁵—which are not included in the number that do. Notwithstanding these statutes there seems to be no case in the United States where a widow has been denied dower in lands belonging to her husband because they were in the adverse possession of another during coverture.⁴⁸⁶ And the requirement of seisin has not generally been held to preclude the widow from dower in an equitable fee.⁴⁸⁷ On the other hand, the common-law rule has been invoked to deny the widow dower in reversions and remainders held by the husband during coverture where the prior freehold did not determine until after his death.⁴⁸⁸

(4) Seisin in deed was required at common law for curtesy, whereas only seisin in law was necessary for dower.⁴⁸⁹ Notwithstanding this there has been a tendency to allow the husband curtesy in land held adversely during coverture⁴⁹⁰ on the ground that immediate right to seisin, notwithstanding an adverse possession, gives seisin in law.⁴⁹¹ This carries fictitious seisin farther than Maitland said it had ever been carried in the English courts,⁴⁹² and if generally

⁴⁷⁹ REV. STAT., § 345 (1909).

⁴⁸⁰ REV. CD. § 3308 (1907).

⁴⁸¹ LORD'S OREGON L., §§ 7286, 7315 (1910).

⁴⁸² GEN. STAT. (REV. OF 1918), § 5055.

⁴⁸³ BURNS ANN. IND. STAT. (REV. OF 1914), §§ 3014, 3016.

⁴⁸⁴ ANN CD. (1911), ART. 35, §§ 6, 7.

⁴⁸⁵ BATES, ANN. ST. (1899), § 4188.

⁴⁸⁶ Apparently the only judicial utterance in the United States supporting the contention that an adverse holding during coverture will preclude the owner's widow from dower is to be found in *Thompson v. Thompson*, 46 N. C. (1 Jones L.) 430 (1854). This was by way of illustration. Dower was allowed in land agreed to be conveyed to the husband. In *Ellis v. Kyger*, 90 Mo. 600, 3 S. W. 23 (1886), a right to enter for condition broken was involved, quite a different thing. As only seisin in law was required for dower, while seisin in deed was required for curtesy, wherever the latter would be allowed notwithstanding a hostile holding, *a fortiori*, the former would be. See 1 TIFFANY, REAL PROPERTY, 2 ed., 738, and *infra*, n. 489.

⁴⁸⁷ 1 REEVES, REAL PROPERTY, 669; TIFFANY, REAL PROPERTY, 2 ed., 748.

⁴⁸⁸ 1 TIFFANY, REAL PROPERTY, 2 ed., 755; REEVES, REAL PROPERTY, 682.

⁴⁸⁹ However, the distinction between seisin in law and seisin in deed has had little place in the law in the United States. 1 SCRIBNER, DOWER, 2 ed., 254. Perhaps the best example of this is in the law of curtesy. See 1 TIFFANY, REAL PROPERTY, 2 ed., 828.

⁴⁹⁰ The authorities pro and con are cited in TIFFANY, REAL PROPERTY, 2 ed., 829, nn. 83, 84.

⁴⁹¹ See *Borland's Lessee v. Marshall*, 2 Ohio St. 308 (1853).

⁴⁹² 3 SELECT ESSAYS, 591, 597.

accepted, would go far towards making seisin a mere incident of ownership.

(5) The transferability of land in the hostile occupation of another has not been generally associated in the United States with seisin and disseisin, but rather with adverse possession. There has been much in the books on the alienability of land in the adverse possession of another, but relatively little as to the alienability of a right of entry arising from a disseisin. In one form or the other, however, the matter has been the subject of either legislative or judicial pronouncements in all but two states.⁴⁹³

In twenty-six⁴⁹⁴ out of the remaining forty-six states such lands have been alienable from the first,⁴⁹⁵ and among these twenty-six are included six of the original thirteen colonies. In Georgia,⁴⁹⁶ Michigan,⁴⁹⁷ and Wisconsin,⁴⁹⁸ judicial determinations of the non-transferability of such lands were promptly met by legislative action to the contrary. Of the remaining seventeen states, the

⁴⁹³ Arizona and Washington. There is little likelihood of the adoption of the rule of non-alienability in these two states. That such rule was ever in force west of the Mississippi River was due to the adoption into the Dakota Codes, of Civil Code, § 681, Penal Code, § 189, based on the New York law. Penal Code, § 189, became § 7002, Penal Code of North Dakota, 1895, and § 2260, REV. LAWS, Oklahoma, 1910.

⁴⁹⁴ Arkansas, California, Colorado, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, West Virginia, Wyoming.

⁴⁹⁵ In no one of these states, it is believed, has the rule of non-alienability ever received judicial or legislative sanction. On the other hand, there have been either judicial utterances declaring that such rule was never adopted or statutes of such an early date allowing alienation as to have made that the rule from the beginning. The authorities for the various states are collected in an able note to *Huston v. Scott*, 35 L. R. A. (N. S.) 729, 758. For New Mexico see *Gurule v. Duran*, 20 N. M. 348, 353 (1915).

⁴⁹⁶ In *Cain v. Monroe*, 23 Ga. 82 (1857), the court ruled in favor of alienability but on a change in the majority of the court, *Cain v. Monroe* was expressly overruled in *Gresham v. Webb*, 29 Ga. 320 (1859). The legislature immediately restored the rule of alienability, Acts of 1859, p. 24, but in the Code, adopted the following year, there was a provision, § 2524, making void sales by an administrator of lands held adversely, and this has not since been repealed.

⁴⁹⁷ In *Bruckner's Lessee v. Lawrence*, 1 Doug. (Mich.) 19, 38 (1843), the court ruled against alienability, but this struck the profession so unfavorably that the law was changed by REV. STAT. 1848, p. 263, § 7. See *Crane v. Reeder*, 21 Mich. 24, 82 (1870).

⁴⁹⁸ In *Whitney v. Powell*, 2 Pinney (Wis.) 115 (1849), the court ruled against alienability. The law was immediately changed. REV. STAT. 1849, c. 59, § 7. The rule of non-alienability was restored by REV. STAT. 1858, c. 86, § 7, but in 1865 the legislature readopted the rule of 1849.

alienability of such lands was established by statute in Alabama in 1907,⁴⁹⁹ Indiana in 1881,⁵⁰⁰ Maine in 1841,⁵⁰¹ Massachusetts in 1891,⁵⁰² Mississippi in 1857,⁵⁰³ Rhode Island in 1896,⁵⁰⁴ South Dakota in 1899,⁵⁰⁵ Vermont in 1884,⁵⁰⁶ and Virginia in 1849.⁵⁰⁷ In North Carolina, the act of 1875 seems to assume the continued invalidity of the transfer but allows the grantee to sue in his own name.⁵⁰⁸ This leaves only seven states—Connecticut, Florida, Kentucky, New York, North Dakota, Oklahoma, and Tennessee—where the rule of non-transferability is still in force. In two of these states, North Dakota and Oklahoma, the sections of the property law making such lands non-transferable were repealed,⁵⁰⁹ but the corresponding sections of the penal law were apparently overlooked⁵¹⁰ and the courts held that the law had not been changed.⁵¹¹ In Tennessee such lands were at one time transferable⁵¹² and there was judicial authority to the same effect in Kentucky,⁵¹³ but statutes modeled after 32 Hen. VIII, c. 9, were enacted in Tennessee in 1821⁵¹⁴ and in Kentucky in 1824,⁵¹⁵ and they have remained in force since.⁵¹⁶ Only in Connecticut,⁵¹⁷ Florida,⁵¹⁸ and New York,⁵¹⁹

⁴⁹⁹ CD. 1907, § 3839; *Gilchrist v. Atchison*, 168 Ala. 215, 52 So. 955 (1910).

⁵⁰⁰ REV. STAT. 1881, § 1073; *Peck v. Sims*, 120 Ind. 345, 22 N. E. 313 (1889).

⁵⁰¹ REV. STAT. 1841, c. 91, § 1; c. 145, § 6.

⁵⁰² GEN. LAWS 1891, c. 354.

⁵⁰³ REV. CD. 1857, p. 306; *Cassedy v. Jackson*, 45 Miss. 397 (1871).

⁵⁰⁴ GEN. LAWS 1896, c. 201, § 23.

⁵⁰⁵ LAWS OF 1899, c. 109, § 1.

⁵⁰⁶ LAWS OF 1884, No. 146.

⁵⁰⁷ CD. 1849, ch. 116, § 5; *Middleton v. Arnolds*, 13 Gratt. (Va.) 489 (1856).

⁵⁰⁸ LAWS OF 1874-1875, c. 256. See *Johnson v. Prairie*, 94 N. C. 773 (1886).

⁵⁰⁹ Section 681 of the DAKOTA CIVIL CODE (see *supra*, n. 493), was dropped from c. 38, Civil Code, North Dakota, and although adopted as § 6137 of the Statutes of Oklahoma of 1893, was dropped in 1897, LAWS 1897, p. 102.

⁵¹⁰ See *supra*, n. 493.

⁵¹¹ *Galbraith v. Payne*, 12 N. D. 164, 174; 96 N. W. 258 (1903); *Huston v. Scott*, 20 Okla. 142, 94 Pac. 512 (1908).

⁵¹² A statute of 1805 made such lands transferable. See *Whitesides v. Martin*, 7 Yerg. (Tenn.) 384, 395 (1835).

⁵¹³ *Young v. Pate*, 3 Dana (Ky.), 306, 309 (1835); but see the authorities collected in the note to *Huston v. Scott*, 35 L. R. A. 760.

⁵¹⁴ L. (1821), ch. 66, § 1.

⁵¹⁵ Session Acts, p. 443.

⁵¹⁶ KY. STAT., CARROLL, §§ 210-216 (1915); TENN. CODE, SHANNON, §§ 3172-3175 (1917).

⁵¹⁷ GEN. STAT. 1918, § 5098.

⁵¹⁸ *Doe ex. dem. Magruder v. Roe*, 13 Fla. 602 (1870); *Nelson v. Brush*, 22 Fla. 374 (1886); *Reyes v. Middleton*, 36 Fla. 99 (1895).

⁵¹⁹ R. P. Law, § 260. See also Penal Law, §§ 2032, 2033, and C. C. P., § 1501.

therefore, can the rule as to non-transferability be said to be a rule of property apart from the law of champerty and maintenance.

Even where the rule of the non-transferability of land in the adverse possession of another has been a rule of property the accustomed explanation of it has been the avoidance of maintenance and champerty,⁵²⁰ and in a recent and able note it has been denominated the champerty rule.⁵²¹ As such it has been singularly ineffective. That its tendency is to increase rather than to decrease litigation would appear from the long line of cases involving the rule in the Decennial Digest from Oklahoma alone.⁵²² Nor does it seem to keep down the proscribed transfers. This may be due in part to the absence of the severe penalties of Stat. 32 Hen. VIII, c. 9.⁵²³ It is also due to the fact that from an early time⁵²⁴ it has been the almost universal⁵²⁵ rule in the United States that although the grant be void as to the adverse possessor, it is good as between the parties.⁵²⁶ This enables the grantee to recover in the grantor's name and makes of the rule little more than a trap in the proving of title. In the states where it still survives it is to be hoped that the so-called champerty rule may soon pass into oblivion.

To sum up, if seisin were made a stock of descent in Maryland, dower and curtesy allowed in reversions and remainders in the considerable number of states where they are not so allowed at the present time, and land in the adverse possession of another made transferable in Connecticut, Florida, Kentucky, New York, North Dakota, Oklahoma, and Tennessee, seisin, as an element in the transfer and devolution of land, would be practically obsolete in the United States. This has come about in part through legislative action, but most of this legislative action was at such an early period that it may fairly be said that seisin, as an essential for the

⁵²⁰ The earliest reported cases in the United States give the avoidance of maintenance as the reason of the rule. *Whitaker v. Cone*, 2 John. Cases (N. Y.) 58 (1800); *Jackson v. Brinkerhoff*, 3 John. Cases (N. Y.) 101 (1802), Kent, J.; *Tabb v. Baird*, 3 Call, 475 (1803); *Den dem. Gibson v. Shearer*, 5 N. C. (1 Murphey) 114 (1806).

⁵²¹ 35 L. R. A. (N. S.) 729, 731.

⁵²² 4 SECOND DEC. DIG. 1857.

⁵²³ For some of the penal provisions of the earlier statutes see note to *Whitaker v. Cone*, 2 John. Cases (N. Y.), 58 (1800).

⁵²⁴ *Williams v. Jackson*, 5 Johns. (N. Y.) 489 (1809); *Jackson v. Demont*, 9 Johns. (N. Y.) 55 (1812), Kent, C. J.; *Brinley v. Whiting*, 5 Pick. (Mass.) 347 (1827).

⁵²⁵ Kentucky is an exception. See 35 L. R. A. (N. S.) 761.

⁵²⁶ *Id.*, 737.

transmission of rights in land, was never generally adopted as a part of the American law.

In one respect, however, seisin, or rather the consequences of seisin, were adopted as part of our law, and that was in respect to contingent remainders. Except in Pennsylvania,⁵²⁷ South Carolina,⁵²⁸ and perhaps New Jersey,⁵²⁹ contingent remainders seem never to have been subject to destruction by tortious feoffment, fine, or recovery, nor are there many jurisdictions in which their destruction by merger has been recognized,⁵³⁰ but in the great majority of states they will fail to take effect if the contingency on which they are to vest does not happen until after the natural determination of the particular estate. Only in Alabama, Arizona, Georgia, Kentucky, Massachusetts, Michigan, Minnesota, Montana, New York, North Dakota, South Dakota, Virginia, West Virginia, and Wisconsin, do there appear to be complete contingent remainder acts.⁵³¹

The tendency which Sweet noticed in England to use seisin in the sense of ownership⁵³² has been much more marked in the United States than in England. It is believed that if it were not for that tendency seisin would be practically unknown to our present legal vocabulary except in New England, where the continued existence of statutory writs phrased after the old real actions tends to preserve the terminology of the old seisin as against that of the more modern possession.⁵³³ The unfortunate doctrine of the 1700's that under the common law, land was held but not owned,⁵³⁴ has made lawyers grasp at a substitute for owner-

⁵²⁷ See *supra*, n. 422.

⁵²⁸ Tortious feoffments were abolished in 1883. See *supra*, n. 421.

⁵²⁹ *Den v. Crawford*, 3 Halst. L. (N. J.), 90, 107 (1825). Common Recoveries were abolished in 1799. See *supra*, n. 422.

⁵³⁰ Since the decision in *Bond v. Moore*, 236 Ill. 576, 86 N. E. 116 (1908), the destruction of contingent remainders by merger has flourished in Illinois. See *Kales*, 28 YALE L. J. 656, 670, n. 48. But outside of Illinois the only cases of destruction by merger in the United States given by Mr. Kales are *Craig v. Warner*, 16 D. of C. 460 (1887), *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. 195 (1904), and *Bennett v. Morris*, 5 Rawle (Pa.), 8 (1835).

⁵³¹ To the list given by Mr. Kales, 28 YALE L. J. 656, 672, n. 53, should be added Arizona and South Dakota, and from the list, it would seem, Indiana should be subtracted.

⁵³² 12 L. QUART. REV. 239, 247.

⁵³³ See *supra*, p. 726.

⁵³⁴ 2 POLLOCK AND MAITLAND, 2 ed., 4; MAITLAND, CONSTITUTIONAL HISTORY, 142 *et seq.*; Hogg, 25 L. QUART. REV. 178.

ship, and that substitute has been seisin. And so where statutes have used the term 'seised' it has been held to have been used in the sense of 'owning,' so as to make title the real stock of descent notwithstanding the language of the statute,⁵³⁵ and so curtesy has been given in land held adversely during coverture⁵³⁶ and dower in an equitable fee.⁵³⁷ Probably the most common use of seisin at the present time is in connection with the covenant of seisin in a warranty deed, and there its general use is to indicate indefeasible title.⁵³⁸ This confusion in terminology will continue until it is definitely recognized that land is owned as well as chattels, just as it was recognized to be by Coke and Bracton.⁵³⁹

If the old seisin has thus fared badly at the hands of American courts, it has even been worse with disseisin, or the notion of an estate turned to a right. Right of entry has had a certain vogue because of its association with the action of ejectment, but in general the right of entry for condition broken has been much more conspicuous than right of entry because of a disseisin. The latter never really became acclimated. Instead we have had land in the adverse possession of another.⁵⁴⁰ From the artificialities of Preston, who would have made an ouster mean a loss of ownership,⁵⁴¹ we had almost entirely escaped until we came to Professor Ames, while even the common-law incidents of disseisin such as tortious feoffment,⁵⁴² discontinuance,⁵⁴³ tolling of an entry by a descent cast,⁵⁴⁴

⁵³⁵ See *supra*, p. 731.

⁵³⁶ See *supra*, p. 733.

⁵³⁷ *Ibid.*

⁵³⁸ RAWLE, COVENANTS FOR TITLE, 4 ed., 76.

⁵³⁹ See Maitland, 3 SELECT ESSAYS, 591, 592.

⁵⁴⁰ Perhaps the most conspicuous instance of this has been the marked absence from most of the statute books of any reference to the transferability or non-transferability of rights of entry. On the other hand, references to the transferability of land in the adverse possession of another abound.

⁵⁴¹ See 34 HARV. L. REV. 624.

⁵⁴² See *supra*.

⁵⁴³ A conveyance in fee by a husband of land held in right of his wife seems never to have worked a discontinuance in this country. The Stat. 32 HEN. VIII, c. 28, has been accepted as part of the common law. See 2 KENT, COM., 14 ed., 133, n. (d.) and 1 WASHBURN, REAL PROPERTY, 6 ed., 181, n. 673. Where fee tails have been recognized, it has been possible from a very early time to dock them by a simple deed so that the effect of such a deed is not a discontinuance but a destruction of the estate.

⁵⁴⁴ See 2 GREENLEAF'S CRUISE, REAL PROPERTY, 129, n. 1; 1 REEVE, REAL PROPERTY, 382, n. 3; 2 *ib.*, 1146; 3 WASHBURN, REAL PROPERTY, 6 ed., 124. In *Smith v.*

continual claim,⁵⁴⁵ have been almost unknown to us. The rule that a wrongdoer cannot qualify his own wrong has been accepted not as a rule of disseisin but as a rule of disseisin at election.⁵⁴⁶ If it had not been said, in an early English case,⁵⁴⁷ that the statute of limitations would not run unless there had been a disseisin, the interest for us of the latter would be almost, if not quite, antiquarian. Disseisin is frequently referred to in connection with the statute of limitations, but how completely those who would read disseisin into the statute of limitations fail to grasp the real significance of adverse possession will be taken up elsewhere.

That any one could have seen disseisin in the law of chattels in the United States is due to the unfortunate classification of chattels into choses in action and choses in possession which Blackstone did so much to popularize.⁵⁴⁸ Blackstone himself could not have consistently defined a chattel in the hostile possession of another as a chose in action, for he described choses in action as arising out of contracts;⁵⁴⁹ but one American judge⁵⁵⁰ whom Ames quotes⁵⁵¹ went so far as to describe the right of the owner in such a case as a mere right of action. If such a chattel were a chose in action, then of course it would have come within the rule that choses in action were not assignable, and if belonging to a woman, would not have passed to her husband on marriage. To-day the chattels of a woman do not pass to her husband on marriage, whether in possession or action,⁵⁵² and the right to bring an action for the taking of a chattel is generally assignable,⁵⁵³ so that the occasion for using Blackstone's classification is likely to be slight. It is to be hoped that the day is not distant when the classification of personal property into corporeal and incorporeal will have definitely taken its

Burtis, 6 John. (N. Y.) 197 (1810), *Aigler's Cases*, 7, the court denied that entry had been tolled by descent cast, though it would seem to have been a clear case for the application of the doctrine on common-law principles.

⁵⁴⁵ *Id.*

⁵⁴⁶ *Ricard v. Williams*, 7 Wheat. (U. S.) 59 (1822); *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275 (1900). It was otherwise with Coke. See *Co. Lit.* 271a, and *Major v. Johnson*, 3 Lev. 35 (1376).

⁵⁴⁷ *Reading v. Rawsterne*, 2 Ld. Raym. 829.

⁵⁴⁸ See *supra*, p. 722.

⁵⁴⁹ 2 COMM. 396; *Elphinstone*, 9 L. QUART. REV. 311, 312; *T. Cyprian Williams*, 10 L. QUART. REV. 143, 146.

⁵⁵⁰ *Caton, J.*, in *McGoon v. Ankeny*, 11 Ill. 558 (1850). ⁵⁵¹ 3 SELECT ESSAYS, 556.

⁵⁵² *STIMSON, AMERICAN STATUTE LAW*, § 6420B.

⁵⁵³ See 1 GRAY, *CASES ON PROPERTY*, 2 ed., 147 n.

place.⁵⁵⁴ However this may be, the ease with which American law has taken to the notion that even rights of action in tort are assignable shows how utterly foreign to it was Ames' fundamental thesis that a thing could be transferred but that a right could not.

CONCLUSION

One of the great desideratums of the law at the present time is the obliteration of the artificial differences between the law of realty and that of personalty. Maitland hoped to help in this by showing that the gulf between the two is not so deep as is sometimes supposed in that seisin was once common to both. Ames also hoped to help in this, but by showing the old law of disseisin still in existence and applicable to chattels. Had his views met with acceptance, he would have wiped out some of the differences in the law applicable to land and chattels but would have added greatly to its artificiality, for he took the old law of disseisin in its most repellant form⁵⁵⁵ and applied it regardless of consequences. In doing this he was more than reactionary. He was doing more than attempting to call ghosts back to life; he was attempting to give reality to the "very tedious fairyland"⁵⁵⁶ which Preston's brain had invented. In doing so he was running counter to the modern tendency, which has been greatly to extend the transferability of rights and to substitute notions of property and possession from the law of chattels for the discarded notions of seisin and disseisin.⁵⁵⁷ It is in the complete realization of this tendency that the hopes of a uniform and inartificial law would seem to lie. The first step in any real advance in the law of real property would seem to be the elimination by legislation of the last vestiges of the 'sophistications' of the old seisin and disseisin.

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⁵⁵⁴ This classification is used by Gray, *ib.*, 145 n. It is advocated by SCHOULER, *PERSONAL PROPERTY*, 5 ed., § 15.

⁵⁵⁵ See *supra*, p. 624.

⁵⁵⁶ This phrase is used by Gray of Preston's work in general. (*RULE AGAINST PERPETUITIES*, 3 ed., p. 582). It is a peculiarly apt description of Preston's treatment of disseisin.

⁵⁵⁷ Perhaps the most striking instance of this tendency is the bill now before Parliament to make all estates in land leases for years. See Hudson, "Current Land Law Reform in England," 34 *HARV. L. REV.* 341.

THE PROGRESS OF THE LAW, 1919-1920

SALES

THE UNIFORM SALES ACT

THE Uniform Sales Act has now been enacted in Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Wisconsin, Wyoming, Alaska. There is reason to expect that the number will be increased during the present legislative season. The statute is already in force in nearly the whole of a broad strip of territory extending from Massachusetts on the east as far as Montana on the west, as well as in some states not within these limits.

THE STATUTE OF FRAUDS

There have been very few changes made by the legislatures of the several states which have enacted the Sales Act from the form recommended for enactment by the commissioners who prepared the statute. The limit of value (\$500) fixed in Section 4 of the statute as making necessary a written memorandum, or partial payment or acceptance and actual receipt, has, however, been varied in several states which have passed the Act. The amount is reduced to \$50 in Minnesota, New York, Oregon, Wisconsin, and Wyoming. It is reduced to \$100 in Michigan; and in Iowa the statute is made applicable to all sales irrespective of the value of the goods.

A few recent decisions in regard to what are goods, wares, and merchandise within the terms of this section may be mentioned. In *Eagle Paper Box Co. v. Gatti-McQuade Co.*,¹ the court held, disapproving an earlier decision,² that a contract to sell goods to be manufactured by a third person was within the terms of the section even though the nature of the article was such that it could not

¹ 99 Misc. 508, 164 N. Y. Supp. 201 (1917).

² *Morse v. Canasawacta Knitting Co.*, 154 App. Div. 351, 139 N. Y. Supp. 634 (1912).

readily be resold. This decision seems required by the words of the section which follow the wording of the rule originally laid down by Chief Justice Shaw,³ and later applied in Massachusetts before the enactment of the Sales Act in a case involving, like the New York decision, a contract to sell goods manufactured by a third person.⁴

Whether an agreement to sell money as a commodity is within the Statute of Frauds has been suggested by a recent New York decision.⁵ Prior to the enactment of the Sales Act, a sale of gold coin, made at a time when that form of money was at a premium, was held within the Statute of Frauds.⁶ The Sales Act, following in this respect the English Sale of Goods Act, excludes money from the definition of goods.⁷ The New York court, however, in the case referred to above, held a contract to sell Russian bank notes was within section 4 of the Act; and though the decision was rested mainly on the conclusion that these notes were not money, since there was no responsible government behind them, the court intimated that even domestic money if dealt with as a commodity would be within the statute; and the same inference seems warranted by a later decision in the same state,⁸ where an agreement to deliver a cabled transfer for twenty thousand pounds within four months, buyer's option, to be paid for in dollars on the exercise of the option, was held either the sale of a commodity or a chose in action; and in either case within the Statute of Frauds. The conclusion seems sound; and it may fairly be held that in order to come within the exception of the statute, the article bargained for must be money, as such.

The rather regrettable doctrine that the seller may under any circumstances be the agent of the buyer to "actually receive" the goods and thereby satisfy the statute has recently been again expressed judicially.⁹ The decisions which hold, as not a few do,

³ *Mixer v. Howarth*, 21 Pick. (Mass.) 205 (1838).

⁴ *Smalley v. Hamblin*, 170 Mass. 380, 49 N. E. 626 (1898).

⁵ *Reisfeld v. Jacobs*, 107 Misc. 1, 176 N. Y. Supp. 223 (1919).

⁶ *Peabody v. Speyers*, 56 N. Y. 230, 234 (1874); *Fowler v. N. Y. Gold Exchange Bank*, 67 N. Y. 138, 146 (1876).

⁷ Section 76.

⁸ *Equitable Trust Co. v. Keene*, 111 Misc. 544, 183 N. Y. Supp. 699 (1920).

⁹ *Bicknell v. Owyhee Sheep and Land Co.*, 31 Idaho, 696, 176 Pac. 782 (1918). Though Idaho has enacted the Sales Act, it was not in force when the facts of this case

that the seller cannot be such an agent, as confessedly he cannot be agent to accept the goods so as to satisfy the statute, seem based on better reason.¹⁰

The troublesome question whether a check given for goods amounts to part payment for them within the meaning of the statute was raised in a South Dakota decision.¹¹ The court held that the check, being given as merely conditional payment, did not of itself satisfy the statute, and that the buyer on destroying the check and repudiating the contract was free from liability, though the check would have been paid on presentment. The correctness of such a decision depends on the meaning of conditional payment. If it means, as seems the better view, that the condition is not precedent but subsequent,¹² the statute is satisfied, where the buyer fails to present the check, provided, at least that payment would have been made on presentment; and this view not only commends itself as matter of theory, but as a practical matter, since a check accepted even in conditional payment affords more permanent and incontrovertible evidence of the sale than a payment in cash.¹³ It must be admitted, however, that conditional payment is often defined in such a way as to indicate a court's understanding that the condition is precedent, and a majority of the few decisions on the subject hold, like the South Dakota decision, which is here the subject of comment, that unless a check is accepted, in absolute payment, it does not satisfy the statute until it is cashed, and that, prior to its payment, the buyer may repudiate the transaction. The question of absolute or conditional payment is one of fact, however, to be left to

arose. There seems no reason to suppose, however, that the uniform law will have any effect on this particular matter. In *Stem v. Crawford*, 133 Md. 579, 105 Atl. 780, 783 (1919) — a case decided under the Sales Act — the court took the same view as the Idaho court.

¹⁰ See WILLISTON, CONTRACTS, § 558.

¹¹ *Gay v. Sundquist*, 175 N. W. (S. D.) 190 (1919).

¹² Such a conclusion is supported by decisions holding that if a check thus given is presented and paid the statute is satisfied, *Hunter v. Wetsell*, 84 N. Y. 549 (1881); *Case v. Kramer*, 34 Mont. 142, 85 Pac. 878 (1906), though by its terms in the jurisdictions where the question arose part payment was required to be contemporaneous with the bargain, in order to satisfy the statute. The courts must, therefore, have held that the part payment took place when the check was given, not when it was paid.

¹³ This view seems supported by *Parker v. Crisp*, [1919] 1 K. B. 481, and *McLure v. Sherman*, 70 Fed. 190 (1895). See also *Logan v. Carroll*, 72 Mo. App. 613 (1897).

the jury, and it may be guessed that in a case of this sort the jury will generally find in favor of the seller.¹⁴

SUBJECT MATTER OF CONTRACT

The possibility of selling something which does not exist has involved more discussion than would seem likely from the obvious character of the answer to the question. If sale means a transfer of title, it necessarily involves the existence of some specific thing at the time when the sale is supposed to have been made.

Sale in the Roman law, however, did not bear this definition, nor does the word in the modern civil law mean this, but merely a contract to make the buyer owner in the future. A decision in Louisiana, therefore, where the code provisions are based on the civil law, should not be allowed to confuse the law of other states. It was there held ¹⁵ that a contract to sell all the Blackstrap molasses which should be made at a certain plantation in the ensuing year was a "perfect sale," vesting ownership in the buyer presumably when the molasses came into existence, for obviously title to nothing could pass at an earlier day.¹⁶

The metaphysical doctrine of potential possession in the common law has contributed to confusion of thought in the matter. The statement of that doctrine ordinarily involves the assumption that a sale may be made of a crop or of the young of animals, though neither the crop nor the young of the animals in question are in existence, provided that the seller owns the land or the animals from which the subject matter of the sale is to be produced.¹⁷

In the early days of the doctrine it was understood to involve not simply the ownership by the buyer of the goods as soon as they came into existence, but also the freedom of the buyer's title from

¹⁴ See *Summers v. Wood*, 131 Ark. 345, 198 S. W. 692 (1917); *Rohrbach v. Hammill*, 162 Ia. 131, 143 N. W. 872 (1913); *Groomer v. McMillan*, 143 Mo. App. 612, 128 S. W. 285 (1910); *Bates v. Dwinell*, 101 Neb. 712, 164 N. W. 722 (1917); *Hessberg v. Welsh*, 163 App. Div. 945, 147 N. Y. Supp. 44 (1914).

¹⁵ *Penick v. Waguespack*, 86 So. (La.) 605 (1920).

¹⁶ Illustrations of the meaning of sale in the civil law may be found in code provisions in civil law countries that a sale of something not belonging to the seller, as well as something not in existence, may be valid. See 67 *UNIV. OF PA. L. REV.* 76.

¹⁷ This mode of statement, for instance, may be found in *Hogue-Kellogg Co. v. Baker*, 34 Cal. App. 56, 190 Pac. 493 (1920), though the case may be rested wholly on the settled rule that a transaction which purports to be a sale, and which cannot take effect as such, will be given effect as an executory contract.

any defects arising after the agreement though prior to the existence of the goods;¹⁸ but modern decisions while professing to adopt the doctrine of potential possession are not likely to carry it further than to hold that on the coming into existence of the goods bargained for the buyer acquires a title good against the seller, but not necessarily against third persons.¹⁹

The English Sale of Goods Act and the American Uniform Law both abolish by implication the doctrine of potential possession, leaving the question of contracts to sell future crops, and the future young of animals, on the same footing as contract to sell other unspecified or future goods.

In a Colorado decision,²⁰ a seller contracted to sell "all hay, grade No. 2, or better, grown or growing upon the above described land for season 1916." The court held that no title passed to the hay prior to its grading and acceptance by the purchaser. Such would be the natural presumption, and if, as may be supposed, grading involved a matter of judgment and opinion, the necessary conclusion; for until the hay was graded the subject matter of the sale would not be identified. The court also held that a mortgage subsequently executed on the whole crop of hay was valid as against the buyer though the mortgagee knew of the prior contract. This also seems sound. Though an executory contract, performance of which was known by the plaintiff to involve breach by the defendant of a prior contract with a third person, may be unenforceable,²¹ an actual conveyance, whether by way of sale or mortgage, must be effectual.

THE PRICE

A problem which, in view of the common use of divisible contracts, occurs often was presented in an Indiana decision;²² namely,

¹⁸ Thus in the leading case of *Grantham v. Hawley*, Hobart, 132, the buyer's title prevailed over the rights of an innocent purchaser of the land on which the crop in question was grown, though the purchase of the land was made prior to the existence of the crop.

¹⁹ Thus in *Hamilton v. Klinke*, 29 Cal. App. 409, 183 Pac. 675 (1919), the buyer of a crop not yet grown was subordinated to a mortgagee who in good faith lent money on the crop after it was grown. See further, WILLISTON, SALES, §§ 133 *et seq.*

²⁰ *Gordon v. Denver Alfalfa, etc. Co.*, 188 Pac. (Col.) 733 (1920).

²¹ See WILLISTON, CONTRACTS, § 1738.

²² *Kokomo Steel & Wire Co. v. Macomber, etc. Co.*, 128 N. E. (Ind. App.) 362 (1920).

whether a seller of goods under such a contract is entitled to the price for an installment of goods which he has furnished, although he has been guilty of a subsequent breach of the contract. There seems no doubt on principle of the seller's right; that is the essence of a divisible contract.²³ The Indiana decision referred to recognizes this and allows recovery, as do most decisions involving the same point.²⁴

The right of the buyer, however, to retain a payment thus due because of a breach, or threatened breach, by the seller of the remainder of the contract, has caused more difference of opinion. If the buyer has no such right, his refusal to pay will justify the seller's further non-performance, and the buyer will have no right of action because of such non-performance. If mutual debts do not cancel one another in the common law, as has been generally held,²⁵ this conclusion seems unavoidable, since the buyer is guilty of an unexcused material breach. So it has been held in sundry cases;²⁶ but a number of decisions, looking at the matter from the standpoint of business justice, have allowed the buyer thus to protect himself without losing his right to the further performance of the contract.²⁷ As an original question this would perhaps not be seriously objectionable, but it is evidently inconsistent with the principle that mutual debts or liabilities do not cancel one another at the option of one party, and whether that principle can be eradicated from the common law without legislation is doubtful.²⁸

On a contract for the purchase of goods the buyer tendered a draft. The seller refused this and demanded payment of the price in cash. No specific provision was made in the contract for the

²³ WILLISTON, CONTRACTS, § 861.

²⁴ *Ibid.*

²⁵ *Id.*, § 859.

²⁶ *Ibid.* See also *Auer v. Roberston*, 111 Atl. (Vt.) 570 (1920).

²⁷ WILLISTON, CONTRACTS, p. 1644, n. 30; and to the same effect see *Wellington Piano Case Co. v. Garfield & Proctor Coal Co.*, 236 Mass. 544, 129 N. E. 285 (1920); *Goodyear Tire & R. Co. v. Vulcanized P. Co.*, 228 N. Y. 118, 126 N. E. 711 (1920); *Bernhardt Lumber Co. v. Metzloff*, 184 N. Y. Supp. 289 (1920).

²⁸ The problem was presented in another form in *Hunter v. Payne*, 184 N. Y. Supp. 433 (1920). The transaction was interpreted by the court as a "cash sale" justifying the seller in replevying the goods if the condition of payment was not complied with, but it was held that as the buyer was a creditor of the seller in a larger amount than the price, in the absence of a special definite agreement expressly forbidding the buyer to apply the debt to payment of the price, he was entitled to treat the debt as equivalent to a cash payment by him.

method of payment, but the buyer, in an action brought by him for breach of the contract, offered evidence of a custom in the trade that payments should be made by draft. The seller was held not liable.²⁹ There is no doubt that if the parties so agree the price may be paid in any way. By the Uniform Sales Act in force in Minnesota, the price may be paid in any form of personalty. As an implied agreement is as effective as an express one, and as usage is relevant to explain the meaning of a bargain,³⁰ it may be urged that the Minnesota court was wrong. It should be observed, however, that a draft is not a form of money, and the contract in question expressly provided for a price in terms of money. From one standpoint, therefore, the usage may be said to have been directly contradictory to the terms of the contract. On careful analysis it seems probable, however, that what the usage amounted to was the habitual waiver by sellers in the trade in question of their right to money payment. Such a waiver, even if given expressly, being without consideration, may be withdrawn at any time so long as no irrevocable change of position has been induced thereby. This was substantially the view the Minnesota court took. The buyer should doubtless have been allowed a reasonable time to substitute cash instead of the draft, had he so desired, but more than that he could hardly ask, and as he refused to give anything but the draft, the decision seems sound.

Where there are concurrent conditions of payment of the price on one side and delivery of goods on the other, delay beyond a reasonable time on both sides totally extinguishes the contract, and notice of an intent to forfeit the obligation if the adverse party does not proceed promptly is unnecessary.³¹ The contrary rule requiring notice has been enforced in some cases and may be defended as applied to contracts for the sale of land. The equitable property right acquired by the purchaser in such a case by mere force of the contract, justifies this conclusion; but the same principle is not applicable to the sale of merchandise by description.

A number of decisions have been made in the last few months involving the effect of war legislation or regulations on the per-

²⁹ *Stein v. Shapiro*, 176 N. W. (Minn.) 54 (1920).

³⁰ Sales Act, sec. 71. The Sales Act was in force in Minnesota.

³¹ *Pearl Mill Co., Ltd. v. Ivy Tannery Co.*, [1919] 1 K. B. 78; *Hurst v. Hill*, 96 Ore. 311, 188 Pac. 973 (1920). WILLISTON, CONTRACTS, § 1970.

formance of contracts. These cases involve rather a general problem of the law of contracts than any special principle of sales. They should be decided in the same way, whether the contract in question relates to the sale of goods or to anything else. A somewhat special problem of construction was presented, however, in *Ross Lumber Co. v. Hughes Lumber Co.*³² The contract there in question provided for the sale in installments of large quantities of lumber at prices which it was agreed should be fixed, from time to time, with reference to the then market price. While the contract was still executory, the government fixed a maximum price. It was held, correctly as it seems, that the price so fixed by the government was not a market price within the meaning of the contract.

TRANSFER OF PROPERTY BETWEEN BUYER AND SELLER

It is a recognized principle that where a contract is made to sell goods by description, the seller with the assent of the buyer may appropriate specific goods to the buyer and thereby transfer the ownership to him.³³ The assent of the buyer to the appropriation may be given either before or after the appropriation is made. In a recent English case³⁴ the seller, without previous authority so to do, appropriated certain goods to the buyer, which were of the kind and quality that contract between them required, and notified the buyer of the fact. No reply to this notification was made by the latter. The court held, and it seems rightly, that unless the buyer under such circumstances sends a prompt notice objecting to the appropriation, he must be deemed to assent thereto. The case is interesting not simply for the specific point decided in the law of sales, but with reference to the general question of when silence may be regarded as assent.³⁵

A curious question of transfer of ownership by mistake was presented in *Jones v. Chicago, B. & Q. R. Co.*³⁶ A consignor in that case, erroneously supposing that he was bound to do so, shipped goods to the plaintiff, drawing a draft on him for the price and

³² 264 Fed. (C. C. A., 5th) 757 (1920).

³³ Sales Act, sec. 19, Rule 4. WILLISTON, SALES, § 274 *et seq.*

³⁴ *Pignataro v. Gilroy*, [1919] 1 K. B. 459.

³⁵ See WILLISTON, CONTRACTS, § 91.

³⁶ 102 Neb. 853, 170 N. W. 170 (1918).

sending it forward with a bill of exchange. The consignor had in fact agreed to sell goods of the sort to a third person and acted under the impression that the contract was with the plaintiff. The plaintiff in good faith supposed the goods were meant for him, and on this assumption paid the draft and obtained the bill of lading; but before the goods were delivered the consignor discovered his mistake, and by his direction the railroad refused delivery. The plaintiff sued the railroad company but was denied recovery. The case seems wrong. The seller's apparent intent might justly be relied on by the plaintiff if he acted in good faith. There was, therefore, a clear offer of the goods which the plaintiff accepted by paying the draft. The acquisition of the bill of lading gave him constructive possession of the goods, and the refusal of the railroad to honor its bill of lading made it guilty of a conversion of the goods to which the bill related.

In two recent decisions³⁷ courts have repeated what has been said many times before,³⁸ though it is impossible to accept it as accurate, that where a check is given for property and the check is not paid on presentation, the title to the property never passes to the buyer. The argument in support of this conclusion is that the sale was intended to be a cash sale, and that title therefore does not pass until cash has been received. The argument is fallacious, however; the seller in fact intends to exchange the ownership of the goods for the check which he receives. He is induced to do so by the belief that the check is good. If the buyer has no funds he is committing a fraud, but this will result only in title being voidable, not in an entire failure of title to pass. If it were true, as is often stated, that no title passes until the check is paid, the buyer is a tortfeasor if he uses the goods until the check is paid, even though there are ample funds in the bank to make the payment. If it were true, as it is also often stated, that the fact that the check is given merely in conditional payment proves that no title passes until the condition is satisfied, the same consequence would follow

³⁷ *South San Francisco Packing Co. v. Jacobsen*, 59 Cal. Dec. 634, 190 Pac. 628 (1920); *Thomas v. Farmers' Nat. Bank*, 217 S. W. (Mo. App.) 860 (1920).

³⁸ WILLISTON, SALES, § 346, n. 28; and to the cases there cited may be added, *Sims v. Bolton*, 138 Ga. 73, 74 S. E. 770 (1912); *Dosbaugh Nat. Bank v. Jelf*, 86 Kan. 41, 119 Pac. 538 (1911); *Peoples' State Bank v. Brown*, 80 Kan. 520, 103 Pac. 102 (1909); *Johnson v. Iankovetz*, 57 Ore. 24, 110 Pac. 398 (1910).

if a time draft were given instead of a check. Such a result would obviously be absurd.³⁹ The decision in most of the cases here criticised for asserting that title did not pass to the buyer was indeed correct, because the controversy was either between the original parties or at least did not involve an innocent purchaser, and the buyer's conduct justified the conclusion that he was fraudulent;⁴⁰ but the reasoning of the courts would warrant the inference that the seller might reclaim the goods from an innocent purchaser; for one who fraudulently acquires merely possession, without even a voidable title, cannot transfer any right even to an innocent purchaser.

The point not accepted by the modern law of England until enacted by statute in 1889, that a second buyer obtaining delivery of the goods without notice of an earlier sale by the seller to another can retain the goods against the prior purchaser though as between the latter and the seller the title had passed, has been again decided.⁴¹

TRANSFER OF TITLE AND RISK OF LOSS UNDER BILLS OF LADING

The lack of any complete understanding of mercantile usage regarding the use of bills of lading, or perhaps it should rather be said the inability to translate an understanding of the facts into proper legal terms, still persists, and in England it is likely to persist, for there no corrective legislation exists. In the United States the provisions of the Sales Act regarding documents of title, the provisions of the Uniform State Law governing bills of lading and of the similar federal statute (the Pomerene Act) governing interstate bills, and also of the Uniform Warehouse Receipts Act, are likely ultimately to put the matter on a proper basis.

³⁹ In *White v. Garden*, 10 C. B. 919 (1851), and *Whitehorn v. Davison*, [1911] 1 K. B. 463, time bills were given under circumstances making it evident that there was no expectation on the part of the buyer that the drafts would be paid. His conduct was therefore fraudulent; yet he was held to acquire a title enabling him to give an indefeasible right to a bona-fide purchaser.

⁴⁰ This has not always been true, however, and in the two recent cases cited *supra*, n. 37, the evidence of the buyer's fraud was by no means clear. In both cases if the check had been presented more promptly, apparently it would have been paid.

⁴¹ *Williams v. Lancaster*, 111 Atl. (Me.) 754 (1920). See further Sales Act, sec. 25, and WILLISTON, SALES, § 349 *et seq.*

The root of the difficulty is the failure to grasp the idea that more than one person can have a property right in the same goods.

When a seller ships goods on the order of a buyer, or with a view to perform a prior contract with a buyer, and takes the bill of lading to his own order, his purpose in so doing is merely to secure payment of the price. The situation is in legal effect the same as if he had absolutely transferred title to the buyer and the buyer had mortgaged back that title to the seller to secure payment of the price. It has seemed hard for the courts to understand that both seller and buyer have incidents of ownership. It is too often apparently taken for granted that one party or the other must have title, and that the other can have only a contract right; yet the illustrations in the law of divided incidents of ownership are so numerous that there seems little excuse for misunderstanding. Equity has built up a whole system of jurisprudence based on the idea of one party having the legal title and the other the beneficial incidents of ownership; and it should not be supposed that the essential features of such a relation are peculiar to equity. A mortgage or a security title is not different in its nature when it relates to personal property and when it relates to land. Nor should it make any difference in the essential rights of the parties in what form the security title is held, whether by way of a purchase money mortgage, or a conditional sale, or a bill of lading running to the seller's order. It may indeed make a difference where statutes affect the situation. A recording act in terms applicable to mortgages does not apply to conditional sales, and recording acts applicable to either or both of such transactions will not usually be broad enough in terms to include a security title given or retained by means of a bill of lading, but sometimes they may be.⁴² To some degree the theory here expressed has been carried out in the decisions of the courts dealing with bills of lading, but very partially and not always consistently in different kinds of cases. A full recognition of the principles involved carries with it two important consequences:

1. The seller has the legal title so that he can convey the property even in violation of his duty to the buyer. This has generally

⁴² See *infra*, p. 759.

been recognized, the seller's power being given the vague name of *jus disponendi*.⁴³

2. The buyer bears the risk and has the beneficial incidents of property; and as against any one but an innocent purchaser for value of the bill of lading from the seller, may maintain trover, or analogous action based on ownership, on making tender of the price.⁴⁴

The problem has been presented recently in three classes of cases, which may be considered separately, namely:

A. The uncomplicated case supposed above of shipment from seller to buyer where there is no prior c. i. f. contract.

The goods are shipped to the prospective buyer and the seller takes a bill of lading for them in his own name, and nothing appears on the bill of lading to indicate the buyer's name, unless it be a request to the carrier to notify a certain person, who in fact is the buyer. The Sales Act provides that in such a case the property in the goods is retained by the seller; but that if, except for the form of the bill of lading, the property would have passed to the buyer on shipment, the seller's ownership shall be deemed to be merely for the purpose of securing performance of the buyer's obligations;⁴⁵ and the risk of loss in transit in such a case is thrown upon the buyer.⁴⁶ But where the Sales Act is not in force, courts too often do not look beyond the mere fact that the seller has retained title and hold that the risk of loss during transit is upon him.⁴⁷ On the other hand, a court sometimes recognizes that the substantial benefit of the transaction has already passed to the buyer, and is thus led to assert that the buyer already has the legal title, and that the seller's interest is merely a lien.⁴⁸

⁴³ WILLISTON, SALES, § 283. *Collin County Nat. Bank v. Harris*, 90 Ark. 439, 119 S. W. 662 (1909).

⁴⁴ WILLISTON, SALES, § 284. *J. L. Price Brokerage Co. v. Chicago, etc. R. Co.*, 199 S. W. (Mo. App.) 732 (1917). See also *W. T. Wilson Grain Co. v. Central Bank*, 139 S. W. (Tex. Civ. App.) 996, 999 (1911).

⁴⁵ Sales Act, sec. 20 (2).

⁴⁶ Section 22 *a*. In *Alderman Bros. Co. v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 Atl. 267 (1918), and *Kinney v. Horwitz*, 93 Conn. 211, 105 Atl. 438 (1919), the court accordingly held the buyer liable for the price of goods destroyed in transit, though the bills of lading ran to the seller's order.

⁴⁷ *Henderson v. Lauer*, 28 Cal. App. 909, 181 Pac. 811 (1919); *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 39 Pac. 738 (1895); *Penniman v. Winder*, 103 S. E. (N. C.) 908 (1920); *St. Louis & San Francisco Ry. v. Allen*, 31 Okla. 248, 120 Pac. 1090 (1912); *Graham v. Laird Co.*, 20 Ont. L. Rep. 11 (1909).

⁴⁸ *Robinson v. Houston, etc. Ry. Co.*, 105 Tex. 185, 146 S. W. 537 (1912).

B. The mercantile doctrine in regard to bills of lading has been most fully recognized in what are called *c. i. f.* contracts; that is, contracts where a total price is fixed covering the cost of the goods, their freight to the port of destination, and the cost of insuring them while in transit. Contracts of this sort are understood to involve as a primary feature an obligation on the part of the buyer to pay the price on presentation of documents, — that is, ordinarily the invoice of the goods, the bill of lading representing them, a receipt for the freight and an insurance policy.⁴⁹ Sometimes a warehouse receipt at the port of destination is substituted for the bill of lading. The insurance policy, as originally taken out, ordinarily either runs to the seller or is in such broad terms as to cover the interest of any one who may be owner of the goods while they are in transit.

In this class of cases it is well established that the buyer may have a property interest in the goods from the time of shipment. A mysterious force is indeed often given to the letters *c. i. f.* which seems hardly warranted. It is possible to import into contracts which provide for payment in a lump sum of cost, insurance and freight, terms which differ very widely, but the assumption has generally been made that under a *c. i. f.* contract a property interest in the goods necessarily passes to the buyer on shipment, and that the title retained by means of the shipping documents is retained merely for security.

"The familiar *c. i. f.* contract . . . has 'its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight.'" ⁵⁰

⁴⁹ *Ireland v. Livingston*, L. R. 5 H. L. 395, 406 (1871), per Lord Blackburn, and see cases of *c. i. f.* contracts cited in the following notes.

⁵⁰ *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, 26 (1915), quoting from *Ströms Bruks Aktie Bolag v. Hutchison*, [1905] A. C. 515, 528.

In *Biddell v. E. Clemens Horst Co.*, [1911] 1 K. B. 934, 955, 956, Kennedy, J. (whose opinion was strongly approved on appeal to the House of Lords, *E. Clemens Horst Co. v. Biddell*, [1912] A. C. 18), said: "At the port of shipment — in this case San Francisco — the vendor ships the goods intended for the purchaser under the contract. Under the Sale of Goods Act, 1893, s. 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, and by virtue of s. 32 the delivery of the goods to the carrier — whether named by the purchaser or not — for the purpose of transmission to the purchaser is *prima facie* to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The

It is accordingly said: "No one doubts that the seller's breach of a c. i. f. contract arises on failure to ship, but no one suggests that the buyer's duty to pay arises on such shipment."⁵¹ It follows also that the risk of loss is on the buyer, and a tender of proper documents must be accepted, though the goods have previously been lost or have deteriorated.⁵²

This has been held true where the Sales Act is in force, though that Act implies in rule 5 of section 19 that payment of the freight by the seller affords a presumption that the property in the goods was not intended to pass until they reached their destination.⁵³ The presumptions named in section 19 are by the terms of that section applicable only "unless a different intention appears;" and the well understood character of a c. i. f. contract is held to indicate a different intention.

On principle it may be thought that any universal assumption that a c. i. f. contract must involve all the consequences just stated is unsound. Frequently such contracts expressly provide that payment shall be based on "net landing weights," or that "sound packages" only shall be accepted. Such provisions are inconsistent with the idea that the risk of loss is on the buyer.

On the whole question of transfer of a property interest on

goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c. i. f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative: see the judgments of Bramwell, L. J. and Cotton, L. J. in *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164. It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative, as consignee."

⁵¹ *Parker v. Schuller*, 17 T. L. R. 299 (1901); *Crozier, Stephens & Co. v. Auerbach*, [1908] 2 K. B. 161; *Farwell, J.*, in *Biddell v. E. Clemens Horst Co.*, [1911] 1 K. B. 934, 951.

⁵² *Manbre Saccharine Co. v. Corn Products Co.*, [1910] 1 K. B. 198; *Biddell Bros. v. E. Clemens Horst Co.*, [1911] 1 K. B. 934, 959, per Kennedy, L. J., whose opinion was approved by the House of Lords on appeal, [1912] A. C. 18; *Mee v. McNider*, 109 N. Y. 500, 17 N. E. 424 (1888); *Smith v. Moscahlades*, 193 App. Div. 126, 183 N. Y. Supp. 500 (1920); *Martin v. Scalfani*, 159 N. Y. Supp. 41 (1916); *Smith Co. v. Marano*, 267 Pa. 107, 110 Atl. 94 (1920); *Bowden v. Little*, 4 Comm. (Australia) 1364 (1907); *Delaurier v. Wyllie*, 17 Ct. Sess. Cas. (4th Series) 167 (1889).

⁵³ *Smith v. Moscahlades*, 193 App. Div. 126, 183 N. Y. Supp. 500 (1920); *Smith Co. v. Marano*, 267 Pa. 107, 110 Atl. 94 (1920).

shipment of the goods, the decisions on c. i. f. contracts afford an interesting comparison with cases previously cited where by contract or custom the price of goods is payable against bills of lading, but no c. i. f. clause is inserted. As has been seen, apart from statute, the weight of American authority in those cases seems to hold that title and risk are in the seller until the buyer acquires the bill of lading. Yet every reason for holding that risk passes to the buyer on shipment under a c. i. f. contract is equally applicable to contracts which have no such clause. The provision that the seller pay the freight, indeed, permits a possible argument that no property interest passes in the c. i. f. cases which does not exist in the other cases, namely, that the seller being under a duty to pay for transportation may be supposed to be under a duty to deliver the goods at destination and to retain the ownership until that duty is fulfilled. As has been said, though the Sales Act following the common law raises a presumption that payment of the freight involves retention of ownership, the presumption has been held inapplicable to c. i. f. contracts. This seems sound, but surely the provision requiring the seller to pay the freight in the first instance cannot be a stronger indication of intent to pass the title than the contrasted case where the seller does not pay the freight, but where the buyer is compelled to pay it in order to get possession of the goods.

The provision for insurance in a c. i. f. contract might afford definite indication of an intent to give the buyer a property interest as soon as the goods were shipped if the insurance policy were ordinarily taken out in the first place in the name of the buyer, but in fact the policy is not ordinarily so taken out. Therefore no inference seems permissible from that feature of the contract.

C. The unfortunate failure of the courts to translate the mercantile customs in regard to bills of lading into rules of law, which has been confirmed in England probably beyond hope of change by the grounds of decision stated by the House of Lords in *Sewell v. Burdick*,⁵⁴ finds illustration in recent prize cases. In the case just cited the court held that the indorsee of a bill of lading for security was not the person "to whom the property in the goods passes," within the meaning of a statute rendering such a person liable for

⁵⁴ 10 App. Cas. 74 (1884).

freight. The court held that the indorsee of the bill of lading was a pledgee with a special property. Doubtless it would have been unfortunate to hold an indorsee of the bill of lading for security liable for freight. He is not the kind of owner whom the statute sought to reach. The result could have been attained by holding, as Lord Blackburn suggested, that the security holder was a mortgagee, but that transfer by way of mortgage was not a transfer of "the" property within the meaning of the statute.

Accepting the reasoning of this decision as conclusive, the English courts in several cases involving questions of prize law have held the holder of a bill of lading for security not an owner.

In *The Miramichi*,⁵⁵ it was held that a cargo shipped under a c. i. f. contract by a neutral to a German buyer, on a British vessel, before the imminence of war, was not subject to seizure — the property in the goods, it was said, had not passed to the enemy; the documents not having been taken up by him, and money having been advanced on them by a neutral banker. Sir Samuel Evans said that under previous decisions it was settled

"that, in the circumstances of the present case, the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid."

But in *The Odessa*,⁵⁶ where a cargo was shipped prior to the imminence of war, and the appellants who were neutrals had accepted bills of exchange, and as security received a bill of lading which made the cargo deliverable directly to them or assigns, the court held that the general property was in a German buyer, and that the appellants were merely pledgees thereof; and that the prize court did not recognize the claim of the pledgee but that the matter was governed by legal ownership. Lord Mersey rather naïvely said,⁵⁷ "All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned." The cases are indistinguishable. In both of them the legal title to the

⁵⁵ [1915] Probate, 71, 78.

⁵⁶ [1916] 1 A. C. 145.

⁵⁷ *Ibid.*, 154.

goods — a title held merely for security, however, — was in neutral hands, and the interest of the German buyers, though a property right like an equity of redemption, was burdened with an obligation amounting to the full price of the goods. The most recent decision of the Privy Council,⁵⁸ however, most fully exemplifies the lack of proper analysis of the relations of the parties in bill of lading transactions. A Texas seller had contracted to sell a Hamburg firm a quantity of wheat, "payment in Hamburg by net cash in exchange for shipping documents." There was no anticipation of war at the time. The wheat was shipped on the British steamship *Orteric*, under bills of lading making the wheat deliverable to shipper's order. The shipper indorsed the bills of lading in blank and drew a draft on the Hamburg buyer for the contract price. Attaching the bills of lading to the draft, he sold it through brokers to the National City Bank of New York, indorsing it specially to that bank. The brokers' contract described the transaction as a sale. The National City Bank indorsed the draft to a Hamburg bank for collection, the documents attached to it to be delivered to the drawees against payment. The bill of exchange was not accepted or paid, doubtless because the drawees expected that the war which had then broken out would prevent the cargo from reaching Germany — as indeed proved the case. The mercantile analysis of the situation thus presented is simple. The wheat was shipped under a contract with the German buyer and was at his risk from the time of shipment. The seller's retention of title by taking the bill of lading to his own order, was merely for the purpose of securing the payment of the price. He was in exactly the legal situation of a conditional seller who on delivering goods to the buyer retains the title as security.

When the Texas shipper sold the bill of exchange in New York, with the bill of lading as security, he assigned his claim for the price of the goods to the New York bank and with this he assigned his security title to the goods. He himself then dropped out of the transaction. In his own words, as he testified: "In the usual course of events when you part with those documents, you have said 'good bye' to the transaction." On these facts the Privy Council, after disallowing the claim of the National City Bank,

⁵⁸ The *Orteric*, [1920] A. C. 724.

held that the property in the goods at the time of their seizure while in transit was in the Texas seller. The one person of the three parties interested who had dropped out of the transaction was thus held to be the owner. It is true that as drawer of the bill of exchange he would ultimately have to reimburse the City Bank, and would then receive back the cargo if not held by the British government; but so far as the cargo was concerned, this would be merely a rescission of a previous transfer, and had the Texas shipper drawn his bill of exchange without recourse, such a rescission would not have taken place. The City Bank would probably not have cared to buy the bill of exchange, had it been drawn without recourse, but that method of drawing the draft could hardly have affected the ownership of the goods.

The subject of trust receipts given by the ultimate buyers of goods to bankers holding a bill of lading as security, has been considered in a few cases. It should make no difference in the substantial rights of the parties whether the transaction takes the form of a direct shipment from the seller to the banker at the buyer's home, with whom the buyer has arranged the credit, or whether after shipment to the seller's order an indorsed bill of lading is sent forward with a draft on the buyer's banker, who by paying the draft acquires the security of the bill of lading. In either form of transaction the banker has title, and in either form the title is merely for security. Whether the banker may properly entrust the bill of lading to the ultimate buyer, giving the latter a right to get the goods from the carrier and to deal with them as the exigencies of his business may require, while the banker still retains his security title, is a question of policy to which the same considerations are applicable as where a conditional seller entrusts the buyer with possession and a right to use goods as his own, or where a chattel mortgagee similarly entrusts the mortgagor. The case may be technically distinguished from an entrusting by a lien holder or by a pledgee to the general owner, since their legal right to security is theoretically dependent on possession rather than title. Where the security holder has title there is involved merely the question of the propriety of allowing him to assert that title against creditors of or buyers from one to whom he has entrusted the property and to whom he has given the privilege of dealing with it in ways ordinarily appropriate only for an owner.

In the case of chattel mortgages, and to a less degree in that of conditional sales, it has been found desirable to require record by the holder of the security title as a pre-requisite to the assertion of his title against innocent third persons. The statutes making this requisite have not generally been held broad enough in their terms to affect the right of bankers who accept trust receipts for bills of lading held by them as security. In a recent bankruptcy case, however,⁵⁹ the Ohio statute requiring record of conditional sales and similar bargains was held broad enough in its terms to deprive the banker of a right to reclaim from the buyer's trustee in bankruptcy goods which the latter held under a trust receipt at the time of the bankruptcy.

In a Massachusetts case, on the other hand, the banker was protected against the representatives of an insolvent buyer's estate.⁶⁰ In that case, presumably in order to show that the local chattel mortgage act was inapplicable, the court said:

"The plaintiff purchased the hides in its own name and interest for the ultimate use of the firm, directly from the foreign seller, and paid for them. It therefore had the legal title to the hides and rightly dealt with them as owner in its relations with the firm, and was not a mortgagee or pledgee."

The language may be justifiable to indicate that the case was not within the statute, but there is danger of its being misunderstood to imply:

1. That the transaction in its substantial nature is distinguishable from a transfer by way of security of a bill of lading originally running to the order of the seller or of the buyer.
2. That there is not just as much propriety from the standpoint of both logic and public policy in requiring record where the bill of lading is in one form or the other.

In substance the transaction is a mortgage,⁶¹ and the only excuse

⁵⁹ *In re Bettman-Johnson Co.*, 250 Fed. 657 (1918).

⁶⁰ *Peoples Nat. Bank v. Mulholland*, 228 Mass. 152, 155, 117 N. E. 46 (1917).

⁶¹ In *Moors v. Kidder*, 106 N. Y. 32, 44, 12 N. E. 818 (1887), where the bill of lading ran directly to the banker, the court said rightly: "Very likely, as is suggested for the defendant, the transfer was rather in the nature of a mortgage in which the title passes than in than of a pledge in which the pledgor is general owner." And *In re Richheimer*, 221 Fed. 16, 22 (1915), the court said of a similar transaction: "This 'security title' of the bankers cannot have the force of an unqualified ownership of the

for not requiring record can be that, on a balance of conveniences, it is more important to have a form of business necessary for commerce proceed unhampered than it is to protect such persons as may be deceived by the apparent ownership of those to whom bankers have entrusted goods upon which they hold security. This excuse is no better and no worse when the bill of lading runs directly to the banker's order than when it is merely endorsed to him.

WARRANTIES

A number of cases have arisen in the law of warranty but most of them have no special interest. A few, however, may be mentioned.

On a sale of glue the buyer saw the barrels containing the glue and every facility was offered him for further inspection, but being pressed for time he did not open any of the barrels. It was held that "he had examined the goods" within section 14 (subsection 2) of the Sale of Goods Act.⁶² As the American Sales Act follows the wording of the English Statute, the case has greater interest.⁶³ The decision follows the common law, for an opportunity for inspection undoubtedly has the same effect as actual inspection;⁶⁴ but the failure of the statutory codification so to provide in express terms gives some importance to the decision.

Where the buyer specifies exactly what he desires, there is no warranty implied of fitness for a particular purchase. Thus, where the buyer specified the ingredients of brass to be manufactured, no warranty of the degree of hardness could be implied.⁶⁵ Similarly when fertilizer was sold under a guaranteed analysis there was no implied warranty that it was suitable for a particular crop though the seller knew the buyer intended it to fertilize land

goods, with complete right of disposition irrespective of the importer's interest. The exporters having 'relinquished the whole of their interest' on transmission of the bills of lading to the bankers, the title acquired by the bankers for security must leave a 'residue of ownership' of some character in the importer under the contract of purchase and consignment of the goods."

⁶² *Thornett v. Beers*, [1919] 1 K. B. 486.

⁶³ See Sales Act, sec. 15 (3).

⁶⁴ *Williston, Sales*, § 234. See also *Neal v. West Winfree Tobacco Co.*, 219 S. W. (Ark.) 326 (1920).

⁶⁵ *Century Electric Co. v. Detroit Copper, etc. Co.*, 264 Fed. 49 (1920).

for such a crop.⁶⁶ A contract to sell goods like a sample means goods such as the sample appears to be. One aspect of this principle was brought out in the leading case of *Heilbutt v. Hickson*,⁶⁷ where a sample shoe contained, unknown to the buyer, paper in the sole. The seller was there held bound to furnish shoes which had no paper in the sole. A converse situation is brought out in a recent California case.⁶⁸ The buyer ordered bottles, and a sample bottle was sent by the buyer which was said to show the exact finish wanted. Bottles were furnished by the seller which corresponded in shape and finish with the sample bottle, but a method of sterilization used by the buyer, and said to be indispensable in its business of selling certified milk, spotted the bottles which the seller furnished, though it did not injure the sample bottle. It was held that the seller having no knowledge of this method of sterilization was not liable for breach of contract or warranty.

In accordance with the generally prevailing rule in the United States, where the Sales Act has not been enacted, a dealer is not liable for defects of which he has no knowledge. Therefore, an automobile dealer was held not liable for latent defects in a machine which he sold.⁶⁹

It is to be observed that under the Sales Act, following the English Statute, which in turn copied the English common law, a dealer is subjected to a larger liability.⁷⁰

Many cases have arisen recently in regard to the liability of a manufacturer of food products to an ultimate purchaser from a retail dealer due to the improper character of the food. The general rule in regard to all warranties is that they do not run in favor of any but an immediate purchaser,⁷¹ and this principle has been held applicable generally to sales of food to a subpurchaser.⁷² Several recent cases, however, have imposed the absolute liability

⁶⁶ *Bowker Fertilizer Co. v. Wallingford*, 111 Atl. (Me.) 329 (1920).

⁶⁷ L. R. 7 C. P. 438 (1872).

⁶⁸ *Travis Glass Co. v. Robbins*, 31 Cal. App. 551, 189 Pac. 112 (1920).

⁶⁹ *Hoyt v. Hainsworth Motor Co.*, 192 Pac. (Wash.) 918 (1920).

⁷⁰ See Sales Act, sec. 15.

⁷¹ WILLISTON, SALES, § 244.

⁷² *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288 (1905); *Drury v. Armour*, 140 Ark. 371, 216 S. W. 40 (1919); *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918 (1901); *Roberts v. Anheuser Busch Assn.*, 211 Mass. 449, 98 N. E. 95 (1912); *Tomlinson v. Armour Packing Co.*, 75 N. J. L. 748, 70 Atl. 314 (1907); *Crigger v. Coca-Cola Bottling Works*, 132 Tenn. 545 (1915).

of a warrantor on such a manufacturer in favor of the ultimate purchaser.⁷³

There of course is no doubt that the manufacturer is liable to the ultimate purchaser for the consequences of negligence if negligence can be established,⁷⁴ but to go further seems somewhat severe. There is difficulty in distinguishing subsales of food from subsales of such other articles of merchandise at least as are likely to produce physical injury if improperly manufactured. The difficulty in theory, however, which most courts seem to feel, that the liability of a warrantor is contractual, and, therefore, can only run directly between a purchaser and his immediate seller, does not seem impressive. A warranty is in many cases imposed by law not in accordance with the intention of the parties; and in its origin is enforced in an action sounding in tort, and based on the plaintiff's reliance on deceitful appearances or representations rather than on a promise.

PERFORMANCE OF A CONTRACT TO SELL

The Sales Act provides, —

"Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault." ⁷⁵

It has rightly been held that this provision has reference only to a temporary fault, while the contract between the parties is still subsisting.⁷⁶ It cannot be supposed that the seller may continue permanently to hold the goods at the risk of the buyer when the latter is in default. Two recent cases, one of which arose under the

⁷³ *Dothan Chero-Cola Bottling Co. v. Weeks*, 16 Ala. App. 639, 80 So. 734 (1918); *Davis v. Van Camp Packing Co.*, 176 N. W. (Ia.) 382 (1920); *Parks v. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202 (1914); *Chysky v. Drake Bros. Co.*, 192 App. Div. 186, 182 N. Y. Supp. 459 (1920); *Ward v. Morehead City Seafood Co.*, 171 N. C. 33, 87 S. E. 958 (1916); *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 52 (1915); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913); *Flessner v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14 (1916). See also dissenting opinion in *Drury v. Armour & Co.*, 140 Ark. 371, 216 S. W. 40 (1919). It is sometimes not easy to be sure whether a court holds that the manufacturer is liable without negligence or that the defect proved to exist in the manufactured product is without more sufficient evidence of negligence.

⁷⁴ See cases collected in 18 MICH. L. REV. 436.

⁷⁵ Sales Act, sec. 22 (b).

⁷⁶ *Rylance v. The James Walker Co.*, 129 Md. 475, 99 Atl. 597 (1916).

Sales Act and the other at common law, presented a situation of such temporary fault where the buyer was held liable for loss.⁷⁷

No occasion should be lost to emphasize the distinction between the several uses of the word acceptance in the law of sales. It is variously used in three connections:

1. As indicating a method of satisfying the Statute of Frauds;
2. As indicating assent by the buyer to take title to the goods;
3. As indicating not only such assent, but an assent by the buyer to take the seller's performance as full satisfaction.

The requirements of acceptance under the Statute of Frauds will not here be discussed, but two recent cases illustrate the principle that a buyer who makes use of property offered to him under a contract to sell, thereby assents to transfer of ownership.⁷⁸ This is true, even though the buyer asserts while using the goods that he does not accept them.⁷⁹ The cases present an illustration of the principle that where a certain act is rightful only upon one assumption, the actor is not allowed to assert that he acted on any other assumption. In other words, he cannot set up that his act was wrongful.⁸⁰

The much vexed question whether acceptance by the buyer of goods which are inferior to the requirements of a contract between the parties frees the seller from liability is settled by the provisions of the Sales Act in the negative, though the buyer will lose his rights if he fails to give notice within a reasonable time after he "knows or ought to know" of the breach of any promise or war-

⁷⁷ In *Schenning v. Devere, etc. Lumber Co.*, 180 N. W. (Wis.) 136 (1920), lumber was sold for delivery f. o. b. at a certain siding, and the seller had written the buyer, urging immediate orders for shipment because of the danger from fire while the lumber remained piled in the yards near the railroad track. To this the buyer replied, promising to send shipping instructions in a day or two. The trial court found that a delay of ten days in sending the shipping instructions was unreasonable under the circumstances, and the buyer was held liable for the loss, though the title remained in the seller, under the Sales Act (St. 1919, § 1684t-22, subd. 2). In *Bishop v. Descalzi*, 31 Cal. App. 543, 189 Pac. 122 (1920), a buyer who wrongfully refused to receive the oranges he contracted to purchase was held liable for the price of oranges destroyed thereafter by frost before the owner could resell them, regardless of whether the title to the oranges had passed or not.

⁷⁸ *Vapor Vacuum Heating Co. v. Kaltenbach & Stephens, Inc.*, 111 Atl. (N. J.) 171 (1920).

⁷⁹ *Robertson & Wilson Co. v. Richman*, 180 N. W. (Mich.) 470 (1920).

⁸⁰ WILLISTON, *CONTRACTS*, §§ 21, n., 1795, 1856.

ranty.⁸¹ The buyer's right to damages after acceptance of the goods was enforced under this provision in a recent Connecticut decision.⁸² Several cases in New York have also construed the section of the act and recognized that the previous rule in New York, which with certain rather technical exceptions denied the buyer relief, has been abolished.⁸³

Whether the requirement of notice imposed by the Sales Act has been reasonably complied with involves a question of fact;⁸⁴ and the requirement is not confined to alleged breach of warranty or promise of quality, but is applicable to breach of any promise of the seller, for instance to deliver at a certain time.⁸⁵ It may be objected, what is the use of notifying a seller who has contracted to deliver goods on June 1 and who delivers them on June 2 that he has broken his contract by a late delivery? The seller must know that without being notified. But the words of the statute cover breach of "any promise or warranty"; and the purpose of the requirement is to inform the seller not merely that he has failed in the exact performance of his obligation, but also that the buyer does not accept the defective performance (as he might) in full satisfaction.

It has been decided in a number of cases that where one who is under several contracts to sell goods finds it impossible for some cause which operates as a legal excuse to fulfill all the contracts, he may apportion to the several buyers ratably the amount still possible for him to furnish, without liability for the deficiency.⁸⁶ A recent Missouri decision⁸⁷ turned on a term of a contract to sell coal, providing that the seller might make other contracts for the

⁸¹ See Sales Act, sec. 49.

⁸² *Williams v. Perrotta*, 111 Atl. (Conn.) 843 (1920). See also *Bishop v. Descalzi*, 31 Cal. App. 542, 189 Pac. 122 (1920); *Trimount Lumber Co. v. Murdough*, 229 Mass. 254, 118 N. E. 280 (1918).

⁸³ *Regina Co. v. Gately Furniture Co.*, 171 App. Div. 817, 157 N. Y. Supp. 746 (1916); *Mastin v. Boland*, 178 App. Div. 421, 165 N. Y. Supp. 468 (1917); *Kutsukian v. Limpert*, 167 N. Y. Supp. 1036 (1918); *Mechlowitz v. Krenik*, 170 N. Y. Supp. 923 (1918); *Majestic Cola Co. v. Bush*, 171 N. Y. Supp. 662 (1918).

⁸⁴ *M. & M. Co. v. Hood Rubber Co.*, 226 Mass. 181, 115 N. E. 234 (1917); *Stone v. Beim*, 176 N. Y. Supp. 25 (1919).

⁸⁵ *Trimount Lumber Co. v. Murdough*, 229 Mass. 254, 118 N. E. 280 (1918); *Mason v. Valentine Souvenir Co.*, 180 App. Div. 823, 168 N. Y. Supp. 159 (1917).

⁸⁶ WILLISTON, *CONTRACTS*, § 1962.

⁸⁷ *White Oak Coal Co. v. Squier Co.*, 219 S. W. (Mo. App.) 693 (1920).

sale of coal, and that if the total obligations thus created should exceed the seller's total shipments it might apportion the goods pro rata among the buyers, and that the buyers should accept the partial fulfilment of the orders without recourse. The contract was held to lack consideration so long as it remained executory, since the seller had it in its power to make further contracts or to diminish shipments and thereby create at will a situation which would free it from obligation.

The argument does not seem convincing, since the contingency of making other contracts beyond its power to fulfill, though wholly within the seller's power, could only be brought about by incurring detriment. Though by lowering the price sufficiently doubtless an excessive number of contracts could be obtained, this in itself would involve detriment to the seller, since it would be obliged to deliver coal under such contracts at unwarrantably low prices. Similarly, diminishing shipments would involve loss to the seller.

CONDITIONAL SALES

The troublesome question of the rights and remedies of the parties to a conditional sale bids fair to be settled by statute rather than by common law, the rules prevailing at common law being in great confusion, and in the majority of states being founded on no just principle.⁸⁸ The Uniform Conditional Sales Act has been passed in Alabama, Arizona, Delaware, New Jersey, South Dakota, Wisconsin, and will doubtless be enacted in other states this season. The statute provides a uniform method of filing contracts of conditional sales in order to validate them against subsequent purchasers and creditors of the buyer, and also makes provision for the protection of both the seller's and the buyer's interest, following the analogy of chattel mortgages. Aside from this statute, many states afford the buyer some protection against the possibility of being wholly deprived of the goods for breach of condition and also forfeiting all payments made.

In a recent Oregon decision,⁸⁹ without the aid of statute the court correctly held, contrary to the more commonly prevailing rule at common law — which compels a conditional seller to elect

⁸⁸ WILLISTON, SALES, § 579.

⁸⁹ *First National Bank v. Yocom*, 96 Ore. 438, 189 Pac. 220 (1920).

either to sue for the price or to reclaim the goods, but denies him the right to do both — that a deficiency judgment might be had after seizure of the goods by the seller and resale of them.⁹⁰

In another recent decision⁹¹ on a disputed point the Minnesota court reached the correct conclusion. The opinion reads:

"There is excellent authority for holding that when the vendor in a conditional sale contract wrongfully takes possession of the property the vendee may treat the contract as rescinded and recover the payments made."⁹²

"Cases adopting this doctrine seem to hold that the amount of the payments should be reduced by the value of the use, and in a proper case by a charge for depreciation.⁹³ In other jurisdictions the wrongful taking is treated as a conversion for which damages appropriate to an action of conversion may be recovered.⁹⁴

"The cases treating the vendee's wrong as a rescission are in some confusion, in part because of the different views obtaining as to the nature of a conditional sale contract, and the measure of damages which they adopt is sometimes difficult of application. Treating the vendor's taking as a wrong for which trover lies is in harmony with our holdings upon the right of a chattel mortgagor to recover in conversion from his mortgagee who has wrongfully retaken the mortgaged property.⁹⁵ It affords a definite and adequate remedy. We hold that the vendee, in

⁹⁰ *Id.*, 221. The court said: "The rule followed in this state is in effect that, where one of the remedies provided in a contract for the sale of property containing a reservation of the title in the seller until payment of the purchase price is the right on default of the buyer to seize and sell the property at public or private sale and apply the proceeds toward the payment of the purchase price, and the seller exercises this right, he is entitled to recover from the buyer any balance remaining after so crediting the proceeds of the resale. See also *Christie v. Scott*, 77 Kan. 257, 94 Pac. 214; *Van Den Bosch v. Bouwman*, 138 Mich. 624, 101 N. W. 832, 110 Am. St. Rep. 336; *Warner v. Zuechel*, 19 App. Div. 494, 46 N. Y. Supp. 569; *Ascue v. C. Aultman & Co.*, 2 Willson Civ. Cas. Ct. (Tex.) § 497; *McPherson v. Acme Lbr. Co.*, 70 Miss. 649, 12 South. 857; *Dederick v. Wolfe*, 68 Miss. 500, 9 South. 350, 24 Am. St. Rep. 283; and note, L. R. A. 1916A, 919."

⁹¹ *Reinke v. Findley Electric Co.*, 180 N. W. (Minn.) 236 (1920).

⁹² *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004 (1912); *Madison, etc. Co. v. Osler*, 39 Mont. 244, 102 Pac. 325 (1909); *Rhodes v. Jenkins*, 2 Ga. App. 475, 58 S. E. 897 (1907). To these cases may be added *Daskalopolis v. Mulvanity*, 111 Atl. (N. H.) 832 (1920).

⁹³ Citing *Rhodes v. Jenkins*, 2 Ga. App. 475, 58 S. E. 897 (1907); *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004 (1912).

⁹⁴ Citing *Smith v. Goff*, 29 R. I. 439, 72 Atl. 289 (1909); *Clark v. Clement*, 75 Vt. 417, 56 Atl. 94 (1903); *Goggan v. Garner*, 119 S. W. (Tex. Civ. App.) 341 (1909).

⁹⁵ Citing 1 DUNNELL, MINN. DIG., § 1474 and cases cited.

a situation such as is presented to us, cannot recover the payments made, but must recover, if he seeks damages alone, in conversion."

It may be added in support of this conclusion that a conditional sale is a sale from the time that the goods are delivered to the buyer. It is not a mere contract to sell;⁹⁶ and a buyer cannot rescind an executed purchase when the seller retakes the goods wrongfully.

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⁹⁶ WILLISTON, SALES, §§ 333 *et seq.*

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WHAT LAW GOVERNS THE REVOCATION OF A WILL. — A recent case presents a problem in conflicts of laws between two statutes of the same state. In *In re Cutler's Will*¹ the court admitted to probate a will executed² by the testatrix before her marriage. Her husband was domiciled in New York³ and, according to the New York law in force at the time,⁴ her marriage revoked her will. But at the time of her death, while she was still domiciled in New York, the law had been changed so that marriage for the purposes of this case was no longer a revocation.⁵ Which law should govern the alleged revocation of a will of personalty?

At the outset it must be conceded that the problem is primarily a question of statutory construction. No constitutional provision is involved. There are no vested rights to be divested since a will is ambu-

¹ 186 N. Y. Supp. 271 (1921). For the facts of the case see RECENT CASES, p. 785, *infra*.

² The will was executed while the testatrix was domiciled in New Jersey. But New Jersey law could not govern the alleged revocation. *In re White's Will*, 183 N. Y. Supp. 129 (1920). See 6 CORN. L. Q. 212. There is no reason for dating the revocation back to the time of execution; the only doubt is whether it should not be dated forward to the law of the testator's domicile at death.

³ This fact is not clear from the opinion, but it appears in the record that not only the husband but the wife also was domiciled in New York prior to the marriage.

⁴ See 1909 N. Y. LAWS, c. 18, § 36.

⁵ See 1919 N. Y. LAWS, c. 293, § 1. The new statute substitutes a rebuttable presumption of revocation in place of the absolute revocation, thus placing unmarried men and women on the same footing. See 1909 N. Y. LAWS, c. 18, § 35.

latory; the contract clause is obviously inapplicable;⁶ the *ex post facto*⁷ prohibition applies only to criminal law;⁸ and there is no other limitation upon retrospective legislation either in the United States Constitution or in the constitutions of a very large majority of the states.⁹ The legislature is free to dictate what law should control.¹⁰ Ordinarily the statute in question contains a proviso that it is to apply only to wills executed after a fixed date in the future.¹¹ But there is nothing to prevent a retroactive statute framed to cover all wills and all alleged revocations in the past,¹² as long as rights have not already vested under a will by the death of the testator.¹³ Frequently, however, the statute is entirely ambiguous. The courts must then fall back upon the principle that every presumption is against a retrospective construction.¹⁴

Granting that the statute in force at the testator's death is not retrospective, the situation is the same as if the testator had changed his domicile after the alleged revocation and the two conflicting laws had been enacted by different states.¹⁵ The problem is then reduced to the question under which law the alleged revocation took effect. The answer must depend ultimately upon the dual nature of the will itself. During the life of the testator the will leads an inchoate existence as an important legal instrument, but it is only at the testator's death that it takes effect upon his property. Which of these two natures prevails and hence which law applies depends upon the point in issue. The legal operation of a will upon the testator's property is governed by the law in force at his death.¹⁶ Where the validity of its execution is in issue,

⁶ See UNITED STATES CONSTITUTION, Art. I, Sec. 10 (1).

⁷ See UNITED STATES CONSTITUTION, Art. I, Sec. 9 (3), Sec. 10 (1).

⁸ *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798).

⁹ Only a very few states have such a constitutional provision. See, for example, MO. CONSTITUTION, Art. II, Sec. 15; N. H. CONSTITUTION, Pt. I, Art. 23; TENN. CONSTITUTION, Art. I, Sec. 20.

¹⁰ Several cases can be explained entirely upon principles of statutory construction. See *Baptist Missionary Union v. Peck*, 10 Mich. 341 (1862); *Sherry v. Lozier*, 1 Bradf. (N. Y.) 437 (1851). For the freedom of the legislature in this respect see 1 REDFIELD, WILLS, 3 ed., § 30 a (18).

¹¹ See, for example, 7 WM. IV & 1 VICT., c. 26, § 34. Where the conflict is between laws of different sovereigns, compare Lord Kingsdown's Act, 24 & 25 VICT., c. 114, § 3, "no will or other testamentary instrument shall be held to be revoked . . . by reason of any subsequent change of domicile. . . ." For a list of analogous American statutes see E. G. Lorenzen, "The Validity of Wills, Deeds, and Contracts as Regards Form in the Conflict of Laws," 20 YALE L. JOUR. 427, 435.

¹² Where the conflict is between laws of different sovereigns, a retroactive statute could not of course be given effect. But a statute might be framed to forbid probate of all wills executed before marriage.

¹³ *Wilderman v. Mayor and City Council of Baltimore*, 8 Md. 551 (1855); *Giddings v. Turgeon*, 58 Vt. 106, 4 Atl. 711 (1886). See SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 347.

¹⁴ See BLACK, CONSTITUTIONAL LAW, 3 ed., 754; SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 173.

¹⁵ This is on the assumption that there are no questions of conflicting public policy involved. Upon questions involving realty under the will the *lex rei sitae* must be substituted for the law of the testator's domicile. *Carpenter v. Bell*, 96 Tenn. 294 (1896).

¹⁶ *In re Kopmeier*, 113 Wis. 233, 89 N. W. 134 (1902); *Bishop v. Bishop*, 4 Hill (N. Y.), 138 (1843); *Price v. Taylor*, 28 Pa. St. 95 (1857); *Wilson v. Greer*, 151 Pac. 629 (Okla.) (1915).

the courts are divided, but probably the better view is that here too the law in force at his death controls.¹⁷ It might seem to follow that a revocation was governed by the same law. A revocation is simply a formal expression of intent that the will should not take effect at death. But this intent is accomplished by cutting the will off in its youth without waiting until it is full grown. A revocation takes immediate effect upon the inchoate existence of the will. This is brought out by the law on revival. If a revocation were purely ambulatory and took effect only upon death, its own revocation would surely be enough of itself to allow the original will to be probated as if nothing had happened. But in general the Wills Act¹⁸ in England and the American statutes in accord require a re-execution of the will,¹⁹ and the other line of legislation requires a clear intent to revive it by the terms of the revocation.²⁰ Doubtless this legislation is prompted by the same policy which favors a formal execution of the will in the first place. But the former type of statute shows that the revocation must have taken immediate effect upon the will and the latter type certainly points the same way. In fact the very term "revival" indicates that the will suffered before the testator's death. And authority is in accord. The distinct majority of cases hold that an alleged revocation is governed by the law in force at the time it was made.²¹

LIABILITY FOR ATTACK BY MAD DOG KNOWN TO BE VICIOUS. — It is well settled that at common law the owner of a domestic animal is not

¹⁷ For law at death: *Wakefield v. Phelps*, 37 N. H. 295 (1858); *Langley v. Langley*, 18 R. I. 618, 30 Atl. 465 (1894); *Sutton v. Chenault*, 18 Ga. 1 (1855); *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252 (1850). See 1 JARMAN, WILLS, 6 Am. ed., 332 n.; REDFIELD, WILLS, 3 ed., § 30 a (17) (18). Cf. *Moultrie v. Hunt*, 23 N. Y. 394 (1861). For law at date of execution: *Lane's Appeal*, 57 Conn. 182, 17 Atl. 926 (1889); *Packer v. Packer*, 179 Pa. St. 580, 36 Atl. 344 (1897); *Barker v. Hinton*, 62 W. Va. 639, 59 S. E. 614 (1907). See SCHOULER, WILLS, 3 ed., § 11.

Nothing turns on whether the law in force at death validates or invalidates the will.

¹⁸ See 7 WM. IV & 1 VICT., c. 26, § 22.

¹⁹ For a list of these statutes see WARREN, CASES ON WILLS, 315 n.

²⁰ For a list of these statutes see WARREN, CASES ON WILLS, 320 n.

²¹ *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557 (1887); *Swan v. Sayles*, 165 Mass. 177, 42 N. E. 570 (1896); *In re Tuller*, 79 Ill. 99 (1875). See *Smith v. Clemson*, 6 Houst. (Del.) 171 (1880).

The same rule applies where the conflict is between laws of different sovereigns. *In re Martin*, [1900] P. D. 211. See 14 HARV. L. REV. 379. See MINOR, CONFLICTS, § 149. *Contra*, *Coburn's Will*, 9 Misc. (N. Y.) 437, 30 N. Y. Supp. 383 (1894). The following two cases turn upon Lord Kingsdown's Act, note 11, *supra*: — *Goods of Reid*, L. R. 1 P. & D. 74 (1866); *In the Estate of Groos*, [1904] P. D. 269. But the language in the former case indicates that apart from the statute the law at death should govern, while the language in the latter favors the law at the date of the alleged revocation.

As far as the problem of conflicts goes it should make no difference whether the law in force at the time the revocation was made rendered it valid or not. If a revocation is a complete act, effective at once, it must stand or fall by the law in force at that time. And it is immaterial whether the revocation is by act, codicil, or operation of law. The distinction between a codicil and an actual tear for the purpose of conflicts of laws is only apparent. The reasoning above turns upon the effect rather than the superficial character of the revocation.

liable, in the absence of *scienter*, for injuries caused by it.¹ Even after he acquires knowledge of a propensity in the animal to cause harm, he is liable, by the weight of authority, not for all damage the animal may thereafter cause,² but only for those types of injuries which he knew it had a propensity to inflict.³ For instance, an owner knowing only that his dog has a ferocious disposition toward other animals, cannot be held for an attack upon a human being.⁴

The foregoing rule has often led to the general statement that the owner is liable only for the injuries resulting from some vicious or mischievous disposition of which he had notice.⁵ And since ordinarily injuries committed by an animal are due to its viciousness, it is usually immaterial whether it be said that the owner is liable because he knew from the nature of the animal that the type of *act* committed was to be expected, or because the act was in fact due to some *disposition* of which he had knowledge. It sometimes happens, however, that although the owner had notice of a vicious disposition which would naturally lead the animal to commit a certain injury, the animal commits that very injury not on account of its viciousness, but for some other reason of which the owner had no notice. These circumstances existed in a recent Missouri case.⁶ The owner of a dog knew that it was vicious. But unknown to the owner, the dog became afflicted with rabies and bit a child, causing her death by hydrophobia. The death being a proximate result of the bite,⁷ the owner clearly would be liable for it had the bite been due, even in part, to the dog's viciousness. Assuming, however, that the bite was not due to viciousness but solely to the rabies,⁸ should not the result be the same?⁹

¹ *Mason v. Keeling*, 12 Mod. 332 (1699); *O'Connell v. Jarvis*, 13 App. Div. 3, 43 N. Y. Supp. 129 (1897); *Domm v. Hollenbeck*, 259 Ill. 382, 102 N. E. 782 (1913).

² But see *Quilty v. Battie*, 155 N. Y. 201, 204, 32 N. E. 47, 49 (1892); *Speckmann v. Kreig*, 79 Mo. App. 376, 381 (1899).

³ *Cox v. Burbidge*, 13 C. B. (N. S.) 430 (1863); *Klenberg v. Russell*, 125 Ind. 531, 25 N. E. 596 (1890).

⁴ *Keightlinger v. Egan*, 65 Ill. 235 (1872); *Osborne v. Chocqueel*, [1896] 2 Q. B. 109.

⁵ See *Merritt v. Matchett*, 135 Mo. App. 176, 178, 115 S. W. 1066, 1068 (1909), *per Johnson, J.*

⁶ *Clinkenbeard v. Reinert*, 225 S. W. (Mo.) 667. For the facts of this case see RECENT CASES, p. 783, *infra*.

⁷ Cf. *Armstrong v. Montgomery St. Ry.* 123 Ala. 233, 26 So. 349 (1899); *Day v. Gr. East. Cas. Co.*, 104 Wash. 575, 177 Pac. 650 (1919). See J. H. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633, 645.

⁸ It may be that the ferocity of a mad dog is to some extent regulated by its natural disposition. See 14 ENCYCLOPAEDIA BRITANNICA, 11 ed., 168. If this is so it cannot be said that any bite of a mad dog, normally vicious, is not due, at least in part, to its viciousness.

⁹ The court held the defendant liable on the ground that on learning of the dog's viciousness, he kept it at his peril of answering for all injuries it might thereafter inflict. But see cases cited in note 3, *supra*. The decision of the court may, however, be justified by the fact that the injury would not have occurred but for the violation of a local ordinance forbidding the harboring of vicious dogs and apparently designed to prevent, among other things, attacks upon human beings. See *E. R. Thayer*, "Public Wrong and Private Action," 27 HARV. L. REV. 317, 328. But see *Marsh v. Koons*, 78 Oh. St. 86, 84 N. E. 599 (1908); *Heath's Garage (Ltd.) v. Hodges*, 32 T. L. R. 134 (1915); *Bowen v. Lightfoot*, 52 Dom. L. R. 305 (1920).

While the precise question seems never to have arisen before,¹⁰ it appears that on both reason and authority when the owner has notice that his dog has a propensity to bite mankind, he should thereafter be liable for any bite inflicted by it, whether proceeding from a ferocious disposition or not. All animals being to some extent a menace to the public, the general security demands restraint. The reasons for not imposing absolute liability in the case of ordinary domestic animals not known to be dangerous are not only that the menace is comparatively slight, but also that the owner should not be held for those injuries which, not being expected, he reasonably omits to provide against. But as soon as he has reason to anticipate a certain type of injury, having been put on his guard, he must prevent injuries of that type.¹¹ A change in the circumstances which may induce the animal to commit those injuries, whether known or not, can surely be no excuse for a failure to prevent them. Having reason to expect injuries of a certain type he must at his peril¹² restrain the animal from committing those injuries. This rule seems to be borne out by the early cases, where the stricter rules of pleadings were enforced, in which the material averment of *scienter* was that, well known to the defendant, the animal was accustomed to commit the very type of injury that occurred.¹³ And in cases where it is doubtful whether the injury was caused by a ferocious disposition of the animal or by mere playfulness, the courts have refused to inquire into the motive of the animal, but have held it sufficient for recovery that the type of injury inflicted was to be expected.¹⁴ *Scienter*, in other words, refers not to the disposition of the animal, but to the fact that it may be expected to commit a certain type of injury.¹⁵ Otherwise in order to recover for a dog's bite it would be necessary for the jury to determine in each case whether the bite was due to playfulness, or to viciousness, or to the rabies,¹⁶ and then find that the owner had knowledge of the particular condition that brought about the injury.

Having been put on his guard, it became the defendant's duty, in the case under discussion, to prevent any and all bites which might be inflicted by that dog on human beings. This duty continued as long as the dog had a propensity so to bite. Its subsequent affliction with

¹⁰ In *Hadwell v. Righton*, [1907] 2 K. B. 345, the defendant's fowl while straying on the highway was chased by a dog into the wheel of the plaintiff's bicycle. The court denied recovery but suggested that if the defendant had known of any habit in the fowl to fly at wheels, he would have been liable.

¹¹ *Gething v. Morgan*, [29 L. T. R. 106 (1857)]. See 2 COOLEY, TORTS, 3 ed., 697.

¹² This is true in all but a few jurisdictions where he is held only to due care in restraining the animal. *Worthen v. Love*, 60 Vt. 285, 14 Atl. 461 (1888); *Hayes v. Smith*, 62 Oh. St. 161, 56 N. E. 879 (1900); *De Gray v. Murray*, 69 N. J. L. 458, 55 Atl. 237 (1903).

¹³ *Worth v. Gilling*, L. R. 2 C. P. 1 (1866); *Read v. Edwards*, 17 C. B. (N. S.) 245 (1864); see *Osborne v. Chocqueel*, [1896] 2 Q. B. 109, 111. But see *Hartley v. Harriman*, 1 B. & Ald. 620 (1818).

¹⁴ *State v. McDermott*, 49 N. J. L. 163, 6 Atl. 653 (1886); *Oakes v. Spaulding*, 40 Vt. 347 (1867).

¹⁵ See *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. Supp. 337, 338 (1902).

¹⁶ If "the devil himself knoweth not the mind of man," we can scarcely expect the jury to determine with any degree of certainty what was going on in the mind of a dog.

rabies, though it imposed no further duty upon the owner, since he had no notice of it, did not alter the duty already imposed of restraining the dog from biting. Having failed in this, the defendant was rightly held liable for the death that resulted.

AMICI CURIAE.— In all trials, while the parties supply the knowledge of the facts particular to their quarrel, the court on its part supplies the necessary knowledge of law and of such fact, generally accepted, as will be judicially noticed.¹ In many cases a court has discretion to inform itself, in addition, of facts beyond the scope of judicial notice and to act upon them *sua sponte*, to prevent a miscarriage of justice.² To fulfill all these duties a court may frequently require more than that assistance which is usually rendered by the counsel of parties to the case. Accordingly, the custom was early adopted³ and has been uniformly adhered to of allowing counsel unconnected with a case to give advice, either on request of the court or by its permission,⁴ as *amici curiae*. Even a mere bystander may so appear.⁵ The advice so given is embodied in the form of a suggestion.⁶ It is often referred to as a motion,⁷ although denial of such a motion gives no right of appeal.⁸ Nor may either party object to the receipt of a suggestion of this sort unless it was clearly improper.⁹ An *amicus curiae* cannot perform any act on behalf of a party;¹⁰ his

¹ *Ryder v. Wombwell*, L. R. 4 Ex. 32 (1868); *Clough v. Goggins*, 40 Ia. 325 (1875). See 4 WIGMORE, EVIDENCE, §§ 2565-2582.

² *Coulson v. Disborough*, [1894] 2 Q. B. 316; *Serle v. St. Eloy*, 2 P. Wms. 386 (1726). And see other examples in notes 18, 19, 21-25, *infra*.

³ Collections of the cases appearing in the Year Books will be found in THELOALL'S ABRIDGMENT, 200, and in 2 VINER'S ABRIDGMENT, 475-476. One of the earliest cases in which the term appears is Y. B. 4 HEN. VI. 16 (1426). All pleaders (countors), as distinguished from attorneys, were in their beginnings curiously similar to *amici curiae*. See 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 211-217. In theory all argument of law before a court is directed rather to inform the court than to persuade it.

⁴ *Post v. Louis*, 172 N. Y. Supp. 561 (1918). In this case the appellate court refused to force upon the trial court the advice of an *amicus curiae* which the trial court had declined.

⁵ *Falmouth v. Strobe*, 11 Mod. 136, 88 Reprint 949 (1708); *Williams v. Blunt*, 2 Mass. 207 (1806). The statute of 5 HEN. IV, c. 8 (1403) (1 STAT. AT L. 458), provided with reference to feigned suits of debt: "(5) It is ordained and stablished, That the Justices in the King's Courts, and other Judges, before whom such Suits and Actions . . . shall be sued and taken, shall have Power to examine the Attorneys, and others whom please them, and thereupon to receive the Defendants to their Law, etc." It has been said that a statute of 4 HEN. IV (1403) extends the privilege of appearing as *amicus curiae*, previously confined to lawyers, to all bystanders. See "*Amicus Curiae*," 11 PITTS. LEG. JOUR. 321. If the reference is to the provision above, it somewhat misstates the effect of the words. It can hardly be said that every witness called by a judge is an *amicus curiae*, and the converse is certainly not true.

⁶ *The Maipo*, 252 Fed. 627 (1918).

⁷ *Haley v. Bank*, 21 Nev. 127, 26 Pac. 64 (1891).

⁸ *Birmingham Loan Co. v. National Bank*, 100 Ala. 249 (1893); *Douglas v. Trust Co. of Georgia*, 147 Ga. 724, 95 S. E. 219 (1918).

⁹ *The Claveresk*, 264 Fed. 276 (1920).

¹⁰ Thus he may not give notice of a motion for a rehearing. *Burns v. State*, 173 Pac. 785 (Wyo.) (1918).

suggestions are simply for the purpose of supplementing the information of the court. He represents no one and obviously no one is bound by what he does.¹¹

Upon any question of law an *amicus curiae* may inform the court in any manner open to a party. The court's knowledge of domestic law is less uncertain now than when the custom of *amici curiae* originated.¹² But greater certainty is more than counterbalanced by increased complexity. Briefs of *amici curiae* are often submitted where the court feels that the case is of exceptional moment and demands unusually careful consideration.¹³ In such a brief, cases are cited and points of law presented, as on an ordinary brief; and the brief is usually argued.¹⁴ It would even seem that if a statute is ambiguous an *amicus curiae* might introduce proper evidence of the intention of the legislators.¹⁵

Many of the orthodox definitions of the *amicus curiae* would draw the line here, for they confine the suggestions which he may make to "matters of law."¹⁶ Taken literally, this would exclude the majority of the cases. The practice is not so limited.

A suggestion of a fact of which judicial notice might properly be taken is, of course, seldom necessary, but in cases where such a fact is not obvious, an *amicus curiae* might well suggest it, if necessary to prevent the court from erring. And wherever the court might properly seek out information and act *sua sponte*¹⁷ it may permit *amici curiae* to suggest

¹¹ But see *The Prince's Case*, 8 Co. 1 (1606). In this case an *amicus curiae* was also a party and was bound, of course, as a party. A court may properly exercise its discretion to deny the application of a party to appear as *amicus curiae*, because of the dangers involved. *Todd v. Rhodes*, 193 Pac. 894 (Kan.) (1920). See *Browne v. Walker*, 2 Show. K. B. 406 (1684). A recent case expresses the opinion that one whose interests are represented by an *amicus curiae* is bound as if he were a party. See *Peterson v. Lewis*, 78 Ore. 641, 154 Pac. 101 (1916). This is difficult to support on principle.

¹² See *The Prince's Case*, *supra*, at 15, 29. This gives a vivid picture of the *amicus curiae* as an assistant in the research of the court. "Ut amici curiae and to inform the court of the truth, and of the state (estate) which the King that now is hath, etc., they repeated to the Court part of the act of 1 H. 7, concerning the said duchy of Cornwall" but the court resolved "that the act of 1 H. 7, which Hele Serjeant and the said Warwick have pleaded ut amici curiae to inform the court of the truth, avails them not, for . . . in truth the Serjeant and his son have not performed the office of a friend or of a good informer, for they have omitted one clause in the same act . . . and have thereby endeavored to deceive the court and suppress the truth."

¹³ See *The Second Employers' Liability Cases*, 223 U. S. 1, 16 (1912); *The Minnesota Rate Cases*, 230 U. S. 352, 363-364 (1913); *Colyer v. Skeffington*, 265 Fed. 17 (1920).

¹⁴ See *Ex parte Randolph*, 2 Brock. (U. S.) 447 (1833).

¹⁵ *Horton v. Ruesby*, Comb. 33, 90 Reprint 326 (1687). In this case it was argued that the Statute of Frauds and Perjuries was not intended to cover a certain situation, and "Sir G. Treby (ut *amicus curiae*), said he was present at the making of the said Statute, and that was the Intention of the Parliament. And a Supersedeas was deny'd." Such delightful informality would not be allowable to-day. See *United States v. St. Paul Ry.*, 247 U. S. 310, 318 (1918).

¹⁶ See ANDERSON, LAW DICT.; 1 BOUVIER, LAW DICT., 8 ed.; 1 TOMLIN, LAW DICT.

¹⁷ It is to be noted that a judge may not act upon his information as an individual. *Gibson v. Von Glahn Hotel Co.*, 185 N. Y. Supp. 154 (1920). See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 291. It follows that any information as to facts not judicially noticeable must be proved by proper evidence.

and prove relevant facts,¹⁸ and to move that the court take action.¹⁹ Beyond this, however, the practice must not go. An *amicus curiae* may not act for a party nor introduce proof of facts upon which the court might not in its discretion act without a motion.²⁰ A court acts in this way, if properly informed, for the purpose of preventing useless litigation or in order to protect the interests of a person for whom the court has a special regard. Thus an *amicus curiae* may properly intervene to protect the public against the misconduct of officials,²¹ or to have a guardian appointed for an infant,²² or to have an unworthy guardian removed,²³ or to secure the interests of a defendant in a criminal case.²⁴ And it does not seem to have been doubted that an *amicus curiae* may suggest facts which, if proved, would negative the jurisdiction of the court.²⁵

An exception is created by recent decisions of the United States Supreme Court, holding that it is improper to allow counsel for a foreign embassy to appear as *amici curiae* in order to suggest facts negating jurisdiction.²⁶ The opposite result had been reached in the lower federal courts.²⁷ The opinions suggest that the proper procedure is by diplomatic representations,²⁸ which result in a suggestion submitted by the proper United States official, or by the foreign nation's coming in as a party. While such diplomatic representations are always proper,²⁹ they had not heretofore been required in all such cases.³⁰ This adoption of a stiff procedure may be justified by the desirability of avoiding informalities in anything savoring of international relations. In theory it seems somewhat difficult to distinguish between counsel who act as *amici curiae* on behalf of a foreign sovereignty and those who so appear for any other reason. The essential purpose of the *amicus curiae*, as his name implies, is not to represent the interests of any person, but to

¹⁸ *Dove v. Martin*, 1 Show. K. B. 56, Comb. 169 (1689); *E. B. v. E. C. B.*, 28 Barb. (N. Y.) 299 (1858); *Matter of Arszman*, 40 Ind. App. 218, 81 N. E. 680 (1907). The last case shows that an *amicus curiae* may examine witnesses.

¹⁹ *Falmouth v. Strode*, *supra*; *Re Barr's Will*, 30 Wkly. L. Bul. 386 (Ohio Com. Pl.) (1891).

²⁰ *Moseby v. Burrow*, 52 Tex. 396 (1880); *Bass v. Fontleroy*, 11 Tex. 698 (1854); *Martin v. Tapley*, 119 Mass. 116 (1875).

²¹ *Matter of Mumma's Estate*, 2 Pa. Dist. Rep. 592 (1893).

²² *Beard v. Travers*, 1 Ves. Sr. 313 (1749).

²³ *Matter of Green's Estate*, 3 Brewst. (Pa.) 427 (1869).

²⁴ *State v. Hillstrom*, 46 Utah, 341, 150 Pac. 935 (1915). In this case a lawyer was appointed by the court to defend the prisoner. The prisoner discharged him. He was thereafter allowed to serve as *amicus curiae*.

²⁵ *Hassard v. United States of Mexico*, 29 Misc. (N. Y.) 511 (1899), affirmed without opinion, 173 N. Y. 645, 66 N. E. 1110 (1903); *The Maipo*, *supra*; *The Claveresk*, *supra*.

²⁶ *In re Muir*, Master of the *Gleneden*, U. S. Sup. Ct., October Term, 1920, No. 18, Original; *The Pesaro*, U. S. Sup. Ct., October Term, 1920, No. 317. For the facts of these cases see RECENT CASES, p. 782, *infra*.

²⁷ *The Maipo*, *supra*; *The Claveresk*, *supra*. And see *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349 (1908). In this case the situation was similar, except that the *amicus curiae* was not counsel for the foreign government involved.

²⁸ *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.), 116 (1812); *Hassard v. United States of Mexico*, *supra*.

²⁹ *The Schooner Exchange v. M'Faddon*, *supra*; *The Constitution*, L. R. 4 P. D. 39 (1879).

³⁰ *Mason v. Intercolonial Ry. of Canada*, *supra*. See *The Maipo*, *supra*, at 628.

assist the court. Whatever a court may know or do on its own initiative an *amicus curiae* may suggest, and it is usually immaterial who prompts him to appear.

STANDARDS IN INTERNATIONAL LAW. — As Dean Pound has clearly demonstrated, the desirability of rules, capable of strictly logical application, or standards, varying in application with changes in circumstances, depends upon the interests to be protected.¹ When the law is protecting interests of substance, upholding the social interest in the security of transactions and acquisitions, the utmost certainty is necessary. Fixed rules are required, upon which the business world can rely, and in that way avoid disputes and expensive litigation.² Such are the Rule in Shelley's Case in the Law of Property and the rules of negotiability in the Law of Negotiable Instruments. But when the law is protecting interests of personality, defining the limits of legal conduct, the rights of individuals outweigh the need for reliable rules. The infinitely varied combinations of facts call for the infusion of a discretionary element into the legal requirements of the situation. For this purpose the law employs standards,³ which in prescribing the limits of legal conduct allow a certain margin of attainment within the bounds of reason. Such are the standards of due care in the law of torts,⁴ of reasonable service and reasonable facilities in the law of public utilities,⁵ of fiduciary duty in equity.⁶ These standards "formulate the general expectation of society as to how individuals will act in the course of their undertakings . . . devised to guide the triers of fact in applying to each unique set of circumstances their common sense, resulting from their experience."⁷ Action which is due, reasonable, appropriate to the

¹ See Roscoe Pound, "Juristic Science and Law," 31 HARV. L. REV. 1047, 1060-1063; Roscoe Pound, "The Administrative Application of Legal Standards," 44 REP. AM. BAR ASSN., 445.

² See Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 454, 455; J. H. Beale, Jr., "What Law Governs the Validity of a Contract?" 23 HARV. L. REV. 260, 264.

³ See Roscoe Pound, "Juristic Science and Law," *supra*, 1061; Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 456, 457.

⁴ See *Yerkes v. N. P. R. Co.*, 112 Wis. 184, 193, 88 N. W. 33, 36 (1901).

⁵ See *Atlantic Coast Line Co. v. Wharton*, 207 U. S. 328, 335 (1907); *Loomis v. Lehigh Valley R. Co.*, 208 N. Y. 312, 322, 323, 101 N. E. 907, 911 (1913); *Chicago, R. I. & P. R. Co. v. Lawton Refining Co.*, 253 Fed. 705, 707 (1918). See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 797.

⁶ See *Robinson v. Roinstead*, 180 N. W. (S. D.) 67, 68 (1920) (administrator); *Magruder v. Drury*, 235 U. S. 106, 119, 120 (1914) (trustee); *Lurie v. Pinanski*, 215 Mass. 229, 231, 102 N. E. 629, 634 (1913) (partner); *Essex Trust Co. v. Enright*, 214 Mass. 507, 510, 511, 102 N. E. 441, 442 (1913) (employee); *Rolikatis v. Lovett*, 213 Mass. 545, 548, 100 N. E. 748, 749 (1913) (attorney); *Rogers v. Genung*, 76 N. J. E. 306, 312, 316, 74 Atl. 473, 475, 477 (1909) (broker).

Compare the duty of a trustee investing funds to use such care as would a reasonably prudent family man, investing with a view to protecting absolutely dependent people. See *Rae v. Meek*, 14 A. C. 558, 569, 570 (1880); *Hart's Estate* (No. 1), 203 Pa. 480, 485, 486, 53 Atl. 364, 366 (1902); *Winder v. Nock*, 104 Va. 759, 763, 52 S. E. 561, 563 (1906). See LORING, A TRUSTEE'S HANDBOOK, 1 ed., 69-82.

⁷ See Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 457.

circumstances, is called for and necessarily, therefore, a variation in circumstances requires a variation in application.⁸

In the field of international law the protection of national interests of substance on the one hand and of personality on the other calls for the application of the same guiding principles in their recognition and delimitation. Questions of the rights of nations over adjoining bodies of water, of what are territorial waters,⁹ of immunity of government owned property from judicial interference,¹⁰ of international regulations of commerce, open a large field for the logical application of fixed rules in the interests of certainty, while the conduct of a nation in the society of nations raises much the same problem as the conduct of an individual in society in general. It can best be regulated with a view to some degree of individualization and consideration of circumstances, by means of standards, as, for example, the standard of reasonable action of civilized nations in the circumstances.

A recent New York case¹¹ is significant in this connection in declaring that the question of the abrogation of treaties by war is to be determined by a standard rather than by rules. The respect accorded to a treaty involves an interest similar to an interest of personality. The expressed will of the sovereign will control in his own courts,¹² but in the absence of any revelation of his intent the courts may properly im-

⁸ But rules are constantly invading the proper sphere of standards and subjecting them to specification. See HOLMES, *THE COMMON LAW*, 110-119; Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 456. And certain specifications may prove efficacious, witness the rules of the road. But the danger lies in attempting to apply to a generality of situations with differing circumstances a rule which is an appropriate application of the standard only to the particular circumstances of special situations.

Thus in Pennsylvania a fixed rule developed that a failure to "stop, look, and listen" at a railroad crossing was negligence *per se*, irrespective of attending circumstances. See *Pa. R. Co. v. Beale*, 73 Pa. St. 504, 509, 510 (1873); *Davidson v. L. S. & M. C. R. Co.*, 171 Pa. St. 522, 524, 33 Atl. 86, 87 (1895); *Sullivan v. N. Y. R. Co.*, 175 Pa. St. 361, 365, 34 Atl. 798, 799 (1896). For criticisms of the Pennsylvania "Stop, Look, and Listen" doctrine: see *C. N. O. & T. P. R. Co. v. Ferra*, 66 Fed. 496, 501 (1895); *Chicago & N. W. R. Co. v. Hansen*, 166 Ill. 623, 627, 628, 46 N. E. 1071, 1072, 1073 (1897). See 6 ALBANY L. J. 313, 314; KEENER, *QUASI-CONTRACTS*, 103-108.

We also find in the books subdivisions of the standard of due care into slight, ordinary, and extraordinary care. See *Tracy v. Wood*, 3 Mason (U. S. C. C.), 132 (1822); *Astin v. Chicago, M., & St. P. R. Co.*, 143 Wis. 477, 483, 484, 128 N. W. 265, 268 (1910); *W. U. Tel. Co. v. Reeves*, 34 Okla. 468, 473, 126 Pac. 216, 218 (1912) (statutory); *Robinson v. Troy Laundry*, 180 N. W. (Neb.) 43, 45 (1920) (statutory). For criticism of the "Degrees of Negligence" doctrine, see *Gardner v. Boston R. Co.*, 204 Mass. 213, 216, 90 N. E. 534, 535 (1910); *Cates v. Hill*, 171 N. C. 360, 363, 88 S. E. 524, 525, 526 (1916).

⁹ See 1 WESTLAKE, *INTERNATIONAL LAW*, 2 ed., c. 9; HALL, *INTERNATIONAL LAW*, 5 ed., 152 *et seq.*; 1 HALLACK, *INTERNATIONAL LAW*, 3 ed., § 13; BYNKERSHOEK, *DE DOMINIO MARIS*.

¹⁰ For the American doctrine, see: *The Siren*, 7 Wall. (U. S.) 152 (1868); *The Davis*, 10 Wall. (U. S.) 15 (1869); *Stanley v. Schwalby*, 147 U. S. 508, 512, 515 (1893); *Johnson Lighterage Co.*, No. 24, 231 Fed. 365 (1916); *The Maipo*, 252 Fed. 627 (1918). Cf. *The Charkieh*, L. R. 4 Adm. & Ecc. 59, 99, 100 (1873); *The Parlement Belge*, L. R., 5 P. D. 197 (1878). *Mighell v. Sultan of Johore* [1894] 1 Q. B. 149.

¹¹ *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185 (1920). See RECENT CASES, p. 789, *infra*.

¹² Cases showing the refusal of the judiciary to review the determination of political questions by the legislative and executive departments of the government: *Foster v.*

pose an external standard in determining what action the nation will be presumed to have taken in the circumstances.¹³

The old writers upon international law declared that a declaration of war abrogated all pre-existing treaties, and then excepted treaties intended to regulate the conduct of hostilities.¹⁴ The exceptions in time became the rule and later writers were content to enumerate the individual kinds of treaties and state the effect of war upon each.¹⁵ Thus we find statements that political treaties, such as treaties of alliance, which are not intended to set up a permanent condition of things, are abrogated;¹⁶ while treaties intended to establish a permanent state of affairs, as cession, boundary, and recognition treaties, are unaffected by war.¹⁷

Judge Cardozo seeks the common element which pervades these precepts and sets up the standard that treaties are abrogated in the circumstance of war only in so far as and to the extent that "their execution is incompatible with war."¹⁸ The clause of the treaty in issue, between the United States and Austria, gave reciprocal rights of inheritance to the subjects of each country in the lands of the other.¹⁹ It was upheld as subsisting because to do so seemed "most in keeping with the traditions of the law, the policy of the statute, the dictates of fair dealing, and the honor of the nation." On principle, this standard, recognizing the duty of sovereign nations to live up to their contracts and excusing performance only where it is impossible, seems eminently sound and

Neilson, 2 Pet. (U. S.) 253 (1829); *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415 (1839); *Phillips v. Payne*, 92 U. S. 130, 132 (1875); *Jones v. United States*, 137 U. S. 202 (1890); *Pearcy v. Stranahan*, 205 U. S. 257 (1907).

See in this connection two discussions of the respective functions of the President and Congress in the termination of treaties. Jesse S. Reeves, "The Jones Act and the Denunciation of the Treaties," 15 AM. J. OF INTERNATIONAL LAW, 33; Howard T. Kingsbury, "The Refusal of the President to Give Notice of the Termination of Certain Treaty Provisions under the Jones Act," 15 AM. J. OF INTERNATIONAL LAW, 39.

¹³ Of course, it must be admitted that the court might have approached the problem as purely a matter of presuming the actual intent of the sovereign, in the absence of any expression thereof. See *Jones v. Walker*, 2 Paine (U. S. C. C.), 688, 696. If such were the line of approach, as might be inferred from parts of the opinion, it is arguable that it would not furnish an example of the application of a standard at all, but merely of a rule of construction. But it seems fair to say that the court is seeking to apply an external standard of the reasonable action of a civilized nation with respect to its treaty obligations in the circumstance of war. For the effectiveness of such standards, as well as of rules of international law in general, see Ronald F. Roxburgh, "The Sanction of International Law," 14 AM. J. OF INTERNATIONAL LAW, 26.

¹⁴ See 3 PHILLIMORE, INTERNATIONAL LAW, 3 ed. 794; VATTTEL, THE LAW OF NATIONS, Chitty's ed., 371.

¹⁵ See LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW, 4 ed., § 146; 2 OPPENHEIM, INTERNATIONAL LAW, 2 ed., § 99; 1 HALLECK, INTERNATIONAL LAW, 3 ed., 294; CRANDALL, TREATIES, 2 ed., § 181; HALL, OUTLINE OF INTERNATIONAL LAW, § 73; 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 33, 34; 1 KENT, COMMENTARIES, 12 ed., 176, 177.

¹⁶ See note 15, *supra*.

¹⁷ See note 15, *supra*. See also *Society v. Newhaven*, 8 Wheat. (U. S.) 464, 494, 495 (1823); *Sutton v. Sutton*, 1 R. & M. 663, 675 (1830).

¹⁸ See KENT, *supra*, 176; SCOTT, RESOLUTIONS OF INSTITUTE OF INTERNATIONAL LAW, 172; BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ, 5 ed., § 538.

¹⁹ See 9 STAT. AT L. 944.

should gain a large following in the courts the world over. The liberality of such opinions as that of Judge Cardozo, must open the way to the ultimate effectiveness of international law.

EFFECT OF THE STATUTE OF LIMITATIONS UPON A GRANTOR'S¹ EXPRESS LIEN FOR THE PURCHASE PRICE. — It is customary in some states for the grantor of land to reserve in the deed a lien for the unpaid purchase price. A recent decision refuses, at the suit of a purchaser from a grantee, to remove the cloud on title caused by such a lien, after the Statute of Limitations had run upon the purchase debt.² The problem is twofold: First, is the lien enforceable after extinguishment of the debt? Secondly, even if it is not, will equity clear the title of one who purchased with knowledge of the debt? The authorities are divided on the first of these questions.³ It is clear at the outset that no analogy can be drawn from doctrines of the "title" theory of mortgages.⁴ For a vital factor in the case under discussion is that the creditor does not have legal title. A more profitable analogy is furnished by the lien which in some jurisdictions, in the absence of express agreement, is given an unpaid vendor.⁵ It is true that this implied lien has often been attacked on the ground that it violates the Statute of Frauds and is opposed to the policy of the recording acts;⁶ but those objections are obviated in the case of the express lien which appears directly in the chain of title.⁷ It is overwhelmingly held that the former depends for its very life on the debt it was created to secure.⁸ The express lien, which

¹ Since the term "vendor's lien" has become current in cases where legal title is retained for security, it seems advisable to restrict its use to that situation.

² *Wilson v. Davis*, 86 So. 686 (Fla.) (1920). For the facts of this case see RECENT CASES, p. 793, *infra*.

³ In accord with the principal case: *Hull's Administrator v. Hull's Heirs*, 35 W. Va. 155, 13 S. E. 49 (1891). *Contra*, *Chase v. Cartright*, 53 Ark. 358, 14 S. W. 90 (1890). The federal courts follow the state law. *Dupree v. Mansur*, 214 U. S. 161 (1909).

⁴ It is well settled that the mortgagee can foreclose after the debt is barred, in the title-theory states. *Thayer v. Mann*, 19 Pick. (Mass.) 535 (1837); *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385 (1903); *Eyermann v. Piron*, 151 Mo. 107, 52 S. W. 229 (1899). *Contra*, *Harding v. Durand*, 138 Ill. 515, 28 N. E. 948 (1891). See 2 JONES, MORTGAGES, 7 ed., §§ 1204, 1207. The same is true in the similar situation where the vendor retains legal title for security. *Hardin v. Boyd*, 113 U. S. 756 (1885); *McGehee v. Blackwell*, 28 Ark. 27 (1872). Since express reservation of a lien is in Texas considered as preventing title from passing, the cases there are governed by this rule. *Ellis v. Hannay*, 64 S. W. 684 (Tex. Civ. App.) (1901); *Woodward v. Ross*, 153 S. W. 158 (Tex. Civ. App.) (1913).

⁵ *Mackreth v. Symmons*, 15 Ves. *329 (1808); *Crampton v. Prince*, 83 Ala. 246, 3 So. 519 (1888); see 1 PERRY, TRUSTS, 5 ed., § 232.

⁶ *Ahrend v. Odiorne*, 118 Mass. 261 (1875); *Philbrook v. Delano*, 29 Me. 410 (1849). See 2 WARVELLE, VENDORS, 2 ed., § 679.

⁷ All the statutes abolishing implied liens exempt express liens. See, for instance, 2 POLLARD, 1904 VIRGINIA CODE, § 2474; 1862 VERMONT GENERAL STATUTES, c. 65, § 33.

⁸ *Borst v. Corey*, 15 N. Y. 505 (1857); *Ilett v. Collins*, 103 Ill. 74 (1882); *Benedict v. Griffith*, 92 Ark. 195, 122 S. W. 479 (1909); *Shaylor v. Cloud*, 63 Fla. 608, 57 So. 666 (1912). *Contra*, *Baltimore & Ohio R. Co. v. Trimble*, 51 Md. 99 (1878). This is now true in England. See 19 HALSBURY, LAWS OF ENGLAND, 14.

serves an identical purpose, may well be governed by the same principles. Another very striking analogy is found in cases where acceptance of a devise of land charged with a sum of money involves the assumption of a personal debt. It is held that this equitable charge cannot be enforced after the Statute of Limitations has run upon the debt.⁹ These cases are particularly persuasive since in them the primary obligation was imposed directly upon the land. The prevailing view is, however, that the express reservation of a lien creates a situation akin to a mortgage in states where the title theory is not held.¹⁰ Even if this view is to be followed the lien, in a number of states,¹¹ would none the less be unenforceable after the debt is barred.

Assuming that for one of these reasons the lien is no longer enforceable, the question remains, will equity remove the cloud on the plaintiff's title? There is a conflict of authority whether the lien, like the debt, is merely dormant and able to be revived by an acknowledgment. In California, where the idea that a mortgage lien is in no respect anything but security has been most completely developed, an acknowledgment which is effective as to the debt leaves the mortgage unenforceable.¹² Other states have a different rule; an acknowledgment by a purchaser from the mortgagor revives the lien.¹³ But all agree that the *mortgagor* cannot, by restoring his own liability, resuscitate the lien as against one to whom he has conveyed.¹⁴ The same principles should apply to a purchase from a grantee-debtor. Since the purchaser unambiguously shows, by bringing the action, that he will never make the acknowledgment, relief cannot be denied on the ground that the defendant has an inchoate right of which he should not be deprived.

Apart from this ground of decision there is some authority in the books for the rather indefinite principle that it would be inequitable to clear title as long as the debt is unpaid. So far as these are cases of common-

⁹ *Loder v. Hatfield*, 71 N. Y. 92 (1877); *Yearly v. Long*, 40 Oh. St. 27 (1883); *Millington v. Hill, Fontaine & Co.*, 47 Ark. 301 (1886). *Contra*, *Stringer v. Gamble*, 155 Mich. 295, 118 N. W. 979 (1909).

¹⁰ See *Kyle v. Bellenger*, 79 Ala. 516, 521 (1885); *Talbot v. Roe*, 171 Mo. 421, 432, 71 S. W. 682, 684 (1903); *McKeown v. Collins*, 38 Fla. 276, 289, 21 So. 103, 106 (1896). See 3 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 1257.

¹¹ *Wells v. Harter*, 56 Cal. 342 (1880); *Allen v. Shepherd*, 162 Ky. 756, 173 S. W. 135 (1915). *Contra*, *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638 (1891); *Campbell v. Upton*, 56 Neb. 385, 76 N. W. 910 (1898).

It might be argued that the express lien constitutes a contract to hold the land as security, specific performance of which will be given unless the promisee has been guilty of laches, and that the Statute of Limitations furnishes only a *prima facie* period. But even if the transaction is not considered as rather executed than executory, the promise can be no more than to mortgage the land; and the promise can have no greater effect than its performance. See *Ray v. Ray*, 24 Misc. 155, 53 N. Y. Supp. 300 (1898). The argument is certainly not applicable to the principal case, which came up on demurrer to a bill alleging laches.

¹² *Wells v. Harter*, *supra*. This and the cases in the succeeding notes deal with mortgage liens. If the analogy to the implied grantor's lien is taken, the argument will apply with even greater force.

¹³ *McLane v. Allison*, 60 Kan. 441, 56 Pac. 747 (1899); *Neosho Valley Investment Co. v. Huston*, 61 Kan. 859, 59 Pac. 643 (1900); *Fitzgerald v. Flanagan*, 155 Ia. 217, 135 N. W. 738 (1912).

¹⁴ *Schmucker v. Sibert*, 18 Kan. 104 (1877); *Cook v. Prindle*, 97 Ia. 464, 66 N. W. 781 (1896), reversing 63 N. W. 187 (1895).

law mortgages,¹⁵ the result is undoubtedly correct. As has been seen the mortgage is still enforceable,¹⁶ and no difference in result should follow from the fact that the parties are reversed. It is true, though, that the same doctrine has been applied to mortgage liens,¹⁷ and even to the grantor's implied lien.¹⁸ The contrary authority must be regarded as the better view.¹⁹ Equity had never refused to clear a title acquired by adverse possession, even as against the former owner.²⁰ The situation is entirely different from that in the common-law mortgage cases; the plaintiff has a title which no one can dispute and is merely asking to have the *status quo* declared. Not to do so is of no benefit to the defendant, while it embarrasses the plaintiff and makes the land inalienable. With her rational conception of mortgages California takes this view. In two cases²¹ the court has cleared the title of a purchaser from the debtor, distinguishing a prior case,²² on the ground that there the conveyance was made before the statute had run. Since in none of the cases was the purchaser under a personal obligation, and in all knew that the land had been charged with the lien, the distinction shows a desire to avoid the former unfortunate decision. These cases should be followed and a similar result reached in a situation like that in the principal case.

TAXABILITY OF CAPITAL INCREMENT AS INCOME. — If property, held as an investment, is sold at a profit, may the profit constitutionally be taxed by the federal government as income? The answer, given by a unanimous court, is in the affirmative.¹ The legislative definition of income expressly included such profit; such definition was not unreason-

¹⁵ *De Walsh v. Braman*, 160 Ill. 415, 43 N. E. 597 (1896); *Jenkins v. Andover Theological Seminary*, 205 Mass. 376, 91 N. E. 552 (1910).

¹⁶ See note 4, *supra*.

¹⁷ *Sturdivant v. McCorley*, 83 Ark. 278, 103 S. W. 732 (1907); *Barney v. Chamberlain*, 85 Neb. 785, 124 N. W. 482 (1910); *Keller v. Souther*, 26 N. D. 358, 144 N. W. 671 (1913). See 1 POMEROY, *EQUITY JURISPRUDENCE*, 4 ed., §§ 386, 393.

¹⁸ *Cassell v. Lowry*, 164 Ind. 1, 72 N. E. 640 (1904).

¹⁹ *Kingman v. Sinclair*, 80 Mich. 427, 45 N. W. 187 (1890); *Cushing v. Spokane*, 45 Wash. 193, 87 Pac. 1121 (1906) (tax lien); *Boyd v. Buchanan*, 176 Mo. App. 56, 162 S. W. 1075 (1914) (*semble*).

In those states where a mortgage lien is enforceable after the debt is barred it will follow that equity will not clear the title just as it will not where the title theory of mortgages is held. Any objection to the refusal to clear the cloud on title in those states must then be based on objections to the doctrine that the mortgage is enforceable after the debt is barred.

²⁰ *Alexander v. Pendleton*, 3 Curt. (U. S.) 221 (1814); *Arrington v. Liscom*, 34 Cal. 365 (1868).

²¹ *Faxon v. All Persons*, 166 Cal. 707, 137 Pac. 919 (1913); *Muhs v. Hibernia Savings & Loan Society*, 166 Cal. 760, 138 Pac. 352 (1914).

²² *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196 (1906).

¹ *Merchants' Loan and Trust Co. v. Smietanka*, U. S. Sup. Ct., October Term, 1920, No. 608. In this case trustees held stock the value of which on March 1, 1913, was \$561,798 and which they sold in 1917 for \$1,280,996. The federal income tax was assessed on the difference between these two sums as income for the year 1917. The trustees claimed that this profit on sale was not "income" within the meaning of that term as used in the Sixteenth Amendment to the Constitution. The court held that the tax was properly assessed.

able or out of joint with popular conceptions, and therefore it should have been supported by the court. The court, however, did not reach its result by this reasoning. Its thought would seem to be that it was the province of the court to define the term "income" according to what it believed to be the popular conception of the term at the time of the adoption of the Sixteenth Amendment. In *Hays v. Gauley Mountain Coal Company*,² the court had, in dealing with the Corporation Excise Tax Act of 1909, construed the term "income" to include capital increment realized by a sale. In that case the only question presented was as to the legislative intent; in the principal case the question presented was as to legislative competence, but the court saw no reason for adopting a different construction of the term. It therefore declined to follow the *dicta* in *Gray v. Darlington*,³ and *Lynch v. Turrish*,⁴ and adopted the definition presented in a *dictum* in *Eisner v. Macomber*,⁵ to wit: "Income may be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." It is to be noted that this definition does not include any capital increment except such as is realized by a sale or conversion.

In *Goodrich v. Edwards*,⁶ decided at the same time, the court held that if property acquired before March 1, 1913, were sold for a price greater than the market value on March 1, 1913, but less than the cost, there was no taxable gain. It reached this conclusion by construction of the statute.

RECENT CASES

AMBASSADORS AND CONSULS — RIGHT OF FOREIGN EMBASSIES TO BE REPRESENTED IN OUR COURTS BY *AMICI CURIAE*. — The libellant brought a suit *in rem* against the *Gleneden*, a steamship leased as a British Admiralty transport. Counsel for the British Embassy intervened as *amici curiae* and raised objection to the jurisdiction of the court, claiming that the vessel was owned by the British government. The suggestion of the *amici curiae* was overruled on the ground that the vessel was privately owned. The master of the *Gleneden* applied for a writ of prohibition to prevent the court from proceeding with the suit. *Held*, that the petition be dismissed. *In re Muir, Master of the Gleneden*, U. S. Sup. Ct., October Term, 1920, No. 18, Original.

One ground of the decision was that the suggestion of the *amici curiae* was improperly received.

A suit *in rem* was brought against the *Pesaro*. The Italian Ambassador submitted a suggestion that the ship was owned by the Italian government and was not subject to the jurisdiction of the court. This suggestion was accompanied by a certificate of the Secretary of State that the Ambassador was the duly accredited diplomatic representative of Italy. The libellants objected.

² 247 U. S. 189 (1918).

³ 15 Wall. (U. S.) 63 (1872).

⁴ 247 U. S. 221 (1918).

⁵ 252 U. S. 189, 207 (1920).

⁶ U. S. Sup. Ct., October Term, 1920, No. 663.

The court decreed that the arrest of the ship be vacated, and the libelants appealed. *Held*, that the decree be reversed. *The Pesaro*, U. S. Sup. Ct., October Term, 1920, No. 317.

For a discussion of the principles involved in these cases see NOTES, page 773, *supra*.

ANIMALS — DAMAGE TO PERSONS AND CHATTELS BY ANIMALS — INJURY TO PERSON BY COW ON LAND ADJACENT TO HIGHWAY. — The defendant's cow, while being driven along the highway without negligence, escaped from his control, entered land adjoining the highway belonging to the plaintiff's brother, and knocked the plaintiff down. There was no *scienter*. *Held*, that the plaintiff cannot recover. *Street v. Craig*, 56 D. L. R. 105.

This case emphasizes the distinction between an injury caused by failure to restrain an animal and one caused by driving animals along the highway. Had the same injury occurred through the escape of the cow from an enclosure, the plaintiff would have recovered. *Troth v. Wills*, 8 Pa. Super. Ct. 1. See *Decker v. Gammon*, 44 Me. 322. The courts are not agreed on the basis of such a recovery, but the better view is that it is the violation of the duty of restraint of animals, imposed on the owner by law to secure the interest of persons on their own land in security from invasion and injury by wandering animals. See 32 HARV. L. REV. 420. If this duty is violated, it seems immaterial that the person injured did not happen to be owner of the land invaded. But there is no such extraordinary duty on an owner driving his animal along the street. Then the injury is caused by the affirmative conduct, not the failure to restrain, and to this affirmative conduct the law applies the usual standard of due care. *Tillett v. Ward*, 10 Q. B. D. 17; *Hartford v. Brady*, 114 Mass. 466. The interest of the landowner to be safe from invasion yields to the many interests in the use of public ways, and he takes the risk of any injury resulting from a proper and non-negligent use of the highway. *Brown v. Collins*, 53 N. H. 442.

ANIMALS — SCIENTER — LIABILITY FOR ATTACK BY MAD DOG KNOWN TO BE VICIOUS BUT NOT KNOWN TO BE MAD. — The defendant owned a dog which he knew to be vicious. Unknown to the defendant the dog became afflicted with rabies and bit the daughter of the plaintiffs, causing her death by hydrophobia. The plaintiffs sue for loss of services. *Held*, that the plaintiffs recover. *Clinkenbeard v. Reinert*, 225 S. W. 667 (Mo.).

For a discussion of the principles involved in this case, see NOTES, page 770, *supra*.

APPEAL AND ERROR — DETERMINATION AND DISPOSITION OF CAUSE — JOINT ASSIGNMENT OF ERROR NOT AFFECTING ALL THE APPELLANTS. — A directed verdict for the defendant was error as to one of the several plaintiffs. There was a joint assignment of error. *Held*, that the judgment be affirmed. *Dolbear v. Gulf Production Co.*, 268 Fed. 737 (Circ. Ct. App., 5th Circ.).

The common-law rule was that if a joint assignment of error was bad as to any party it was bad as to all. *Levy v. South Omaha Savings Bank*, 57 Neb. 312, 77 N. W. 769; *Helms v. Cook*, 62 Ind. App. 629, 111 N. E. 632; *Hancock v. Hullett*, 203 Ala. 272, 82 So. 522. The rule has sometimes been specifically changed by statute. *Manweiler v. Truman*, 125 N. E. 412 (Ind.). See 1917 IND. ACTS, c. 143, § 4. Similarly, a joint demurrer was overruled under common-law practice if the pleading was good as to any party. *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981. See *Boyd v. Mutual Fire Ass'n*, 116 Wis. 155, 175, 90 N. W. 1086, 1093. Also a single demurrer to several counts or pleas was overruled if one count or plea was good. *Chambers v. Lathrop*, Morris (Ia.), 102; *Farmers & Merchants Insurance Co. v. Menz*, 63 Ill. 116. But there was

some dissent from this rule. *Gearhart v. Olmstead*, 7 Dana (Ky.), 441; *Tittle v. Bonner*, 53 Miss. 578. The better view is that such demurrers should be taken distributively and ruled on as to each party or as to each count or plea. See *South Eastern Railway Co. v. Railway Commissioners*, 6 Q. B. D. 586, 605. A like rule as to joint assignments of error might well be adopted. Moreover the court was not called upon to decide this case as a matter of common law, for the amended Judicial Code provides that judgment in appellate courts shall be given "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." See 40 STAT. AT L. 1181. As long as judges accomplish actual injustice by clinging to the antiquated technicalities of common-law pleading in the face of remedial legislation, popular distrust of law and the courts will increase. See Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 REP. AM. BAR ASS'N, 395, 405.

BANKRUPTCY — ACTS OF BANKRUPTCY — APPOINTMENT OF RECEIVER — MEANING OF "INSOLVENCY." — Upon a petition in involuntary bankruptcy on the ground that a receiver had been placed in charge of the debtor's property, it appeared that the state court had appointed the receiver because the debtor was insolvent, in that it could not meet its obligations as they fell due. It also appeared that the debtor was insolvent in fact, in that all its liabilities exceeded all its assets. *Held*, that the debtor be adjudicated a bankrupt. *In re Sedalia Farmers Co-op. Packing & Produce Co.*, 268 Fed. 898 (Dist. Ct., W. D. Mo.).

Section 3 a (4) of the Bankruptcy Act provides that the debtor has committed an act of bankruptcy if "... being insolvent, ... because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state. . . ." Section 1 a (15) provides that a person shall be deemed insolvent if the aggregate of his property is insufficient to pay his debts. Previous cases have held that the Act requires that the state appointment of a receiver be made because of insolvency in the above sense. *In re Golden Malt Cream Co.*, 164 Fed. 326; *In re Edward Ellsworth Co.*, 173 Fed. 699. It was the unfortunate result of these cases that, by inducing a creditor to file a carefully worded bill in a state court, a hopelessly insolvent debtor could have his estate administered in that court and thus evade many of the wholesome provisions of the Federal Act. Such an evasion was even more simple under the original Act, for it was not until the Amendment of 1903 that the words quoted above were inserted in section 3 a. See 32 STAT. AT L., c. 487. It seems clear that it was the purpose of the Amendment to preclude such evasions, and that the principal case is correct in giving effect to that purpose. It may be noted in support of this view that where the word "insolvency" is used in reference to the action of state courts, it is more reasonable to give it the meaning adopted by those courts than to insist on the definition in the Act. See Putnam, J., dissenting, in *In re Butler & Co.*, 207 Fed. 705, 715.

CONFLICT OF LAWS — REMEDIES: PROCEDURE — LIMITATION OF ACTIONS. — As a defense to an action on a contract which provided that it should be governed by the laws of Spain, the defendant pleaded the Spanish Statute of Limitations. The action was not barred by the *lex fori*. The plaintiff demurred. *Held*, that the demurrer be sustained. *Dorff v. Taya*, 185 N. Y. Supp. 174.

It is almost axiomatic that in matters respecting the remedy, the law of the forum governs, and not the law of the place where the cause of action arose or the parties resided. See STORY, *CONFLICT OF LAWS*, 8 ed., 793. The limitation of actions being a matter of remedy, the statute of the forum governs. *Carrigan v. Semple*, 72 Tex. 306, 12 S. W. 178. In all common-law jurisdic-

tions except Alabama, parties can contract themselves into a different period of limitations; but the court in the principal case rightly refused to hold that they had done so, since they had not clearly expressed such an intent. As the *lex fori* governs substantive law, construing the contract to mean that it should be treated as if made in Spain required that the validity of the contract be determined by Spanish law, but left matters of remedy to the *lex fori*. The fact that the *lex loci* is held to govern where a statute creates a new right to exist only a limited time is a proper application of the above rules, and not an exception. *Lamberton v. Grant*, 94 Me. 508, 48 Atl. 127; *Boston & M. R. R. v. Hurd*, 108 Fed. 116; *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 582. So also it is proper that title obtained by adverse possession under the Statute of Limitations of one state should not be disturbed though the law of the jurisdiction where the action is brought requires a longer period of adverse possession. *Brown v. Brown*, 13 Ala. 208.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — LAW GOVERNING A REVOCATION. — The testatrix executed her will while domiciled in New Jersey. Subsequently she married a man domiciled in New York. According to the New York law in force at the time, her marriage revoked her will. But at the time of her death, while she was still domiciled in New York, the law had been changed so that marriage, for the purposes of this case, was no longer a revocation. Held, that the will be admitted to probate. *In re Cutler's Will*, 186 N. Y. Supp. 271.

For a discussion of the principles involved in this case, see NOTES, page 768, *supra*.

CRIMINAL LAW — DOUBLE JEOPARDY — CONVICTION UNDER STATE STATUTE AS BAR TO PROCEEDINGS UNDER THE VOLSTEAD ACT. — This is a prosecution under the National Prohibition Act. The defendant pleads in bar a conviction for the same conduct under a "bone-dry" state statute, enacted in 1915. Held, that the plea is good. *United States v. Peterson*, 268 Fed. 864 (Dist. Ct., W. D. Wash.).

The Constitution provides that no person shall be put twice in jeopardy for the same offense. U. S. CONST., Amendt. 5. But generally no plea of double jeopardy is available where the same act violates both national and state law, since the act offends two separate sovereignties. See *Cross v. North Carolina*, 132 U. S. 131; *Moore v. People of State of Illinois*, 14 How. (U. S.) 13. See 1 BISHOP, CRIMINAL LAW, 8 ed., §§ 178, 987-989. The Eighteenth Amendment grants Congress and the states concurrent power to enforce it by legislation. U. S. CONST., Amendt. 18, § 2. This means the states have ceded their previous power to regulate prohibition with a reservation of restricted power. See 34 HARV. L. REV. 317. It seems a state may still act as it sees fit, consistently with the Amendment and federal legislation. See *National Prohibition Cases*, 253 U. S. 350, 388-392. Thus, the Amendment does not invalidate a preëxisting state statute, more stringent than the federal. See 34 HARV. L. REV. 317. Such a statute, when first enacted, was an assertion of state sovereignty. It seems impossible that the Amendment can transmute this statute into legislation merely supportive of federal sovereignty. Unless it does so transmute it, the violation of this statute was an offense against a sovereign other than the one now prosecuting, and the prior conviction under it should be no bar. The refuge of one thus prosecuted a second time should be in judicial clemency rather than judicial perversion of law. See Taney, C. J., in a note in 14 Md. 149, 152. The court stresses the natural injustice of double punishment, yet inconsistently declares that a plea of prior conviction under a municipal ordinance is no bar to federal prosecution for the same conduct. The latter view is certainly correct. The ordinance is an expression of power delegated

from the state, and, as has been shown above, one act may offend both state and nation.

DOMICILE — HUSBAND AND WIFE: POSSIBILITY OF SEPARATE DOMICILE — Parties who were married in 1878 and resided in Scotland, parted by consent in 1893, the husband going to Australia and never returning to Scotland. The wife never went to Australia. In 1902, the husband went through the form of a bigamous marriage. In 1915, suit for divorce was brought by the wife in Scotland. While the suit was pending, she died. In order to determine the validity of the imposition of a tax, it was necessary to decide where the wife was domiciled. *Held*, that she was domiciled in Australia. *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146.

The proposition that the domicile of a married woman is that of her husband, though by no means universally approved, has hitherto been generally conceded to be a correct statement of the law. See Joseph H. Beale, "The Domicile of a Married Woman," 2 SOUTH. L. QUART. 93, 95. But recently in America, and even aside from the controversial question of domicile for purposes of divorce proceedings, courts have not been averse to qualifying, if not abandoning, the doctrine. There is some little authority to the effect that, once having acquired grounds for divorce, and the obligation to live with the husband having ended, the wife may acquire a separate domicile for any purpose. *Williamson v. Osenton*, 232 U. S. 619; *Shule v. Sargent*, 67 N. H. 305, 36 Atl. 282. And there are sporadic decisions to the effect that a voluntary separation for an extended period enables the wife to acquire a separate domicile. *Matter of Florance*, 54 Hun, 328, 7 N. Y. Supp. 578, appeal dismissed 119 N. Y. 661, 23 N. E. 1151. See *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88. See also 28 HARV. L. REV. 106. When it is considered that in the principal case we have (1) an agreement to separate, (2) a separation for twenty-two years, and (3) undoubted cause for divorce, this House of Lords decision must be deemed a decisive and unequivocal adherence to the general rule as to the domicile of a wife, and indicates a disinclination to depart from that rule under any circumstances.

EQUITABLE SERVITUDES — INJUNCTIONS — VIOLATION OF MUTUAL BUILDING RESTRICTIONS OR ACQUIESCENCE THEREIN AS A BAR TO ENFORCEMENT. — The deeds of all lots in a tract contained restrictions against building within thirty feet of the street. Many of the owners, including the plaintiffs, built open porches which encroached upon the restricted area, but no objection was ever raised. The defendant commenced to reconstruct his house so that the main part would extend eight feet beyond the building line. The plaintiffs, including the owners of the property adjoining the defendant's lot, seek an injunction. *Held*, that the injunction be granted. *Scott v. Stoner*, 69 Pitts. Leg. Jour. 88 (Pa.).

When a tract of land is divided into lots subject to mutual building restrictions, violations by a considerable number of the grantees may make the purpose no longer attainable, and therefore the restrictions will be unenforceable, whether or not the complainant has participated in the violations. *Scharer v. Panlter*, 127 Mo. App. 433, 105 S. W. 668; *Ewertsen v. Gerstenberg*, 186 Ill. 344, 57 N. E. 1051. But even if the purpose is still attainable, a complainant may be barred by his laches in not objecting seasonably to the defendants' violations. *Roper v. Williams*, Turn. & R. 18. Cf. *Bowier v. Segardi*, 112 Misc. 689, 183 N. Y. Supp. 814. Or his participation in the violations may bar any right to injunctive relief. *Loud v. Pendergast*, 206 Mass. 122, 92 N. E. 40. See BERRY, RESTRICTIONS ON USE OF REAL PROPERTY, § 397. Mere acquiescence in violations by others is not ground for denying a complainant relief against a subsequent violation. *Brigham v. Mulock Co.*, 74 N. J. Eq.

287, 70 Atl. 185; *Zipp v. Barker*, 40 App. Div. 1, 57 N. Y. Supp. 569. And participation in violations which are so trivial that the purpose of the restrictions is not materially impaired will not bar a complainant's rights to an injunction against a serious violation. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936; *McGuire v. Caskey*, 62 Oh. St. 419, 57 N. E. 53; *Adams v. Howell*, 58 Misc. 435, 108 N. Y. Supp. 945. The principal case is illustrative of such a situation. It might even be said that upon a proper interpretation of the restrictions, looking at the substance, no violation whatsoever was committed by the construction of the porches; and that therefore the complainant, not having participated in any violation, is clearly entitled to relief.

EQUITY — JURISDICTION — DISCRETION OF COURT IN GRANTING RELIEF. — A bill was brought by the stockholders of a corporation praying for the cancellation of a sale of corporation property made by the directors, for inadequacy of consideration. The District Court found the consideration inadequate, but ordered that the property be placed at public auction and, if no higher price than the consideration paid be offered, the sale stand confirmed. The sale was held and, no higher bid being received, the original transaction was confirmed. The stockholders appealed. *Held*, that the sale be vacated as prayed. *Geddes et al. v. Anaconda Mining Co. et al.*, U. S. Sup. Ct., Oct. Term, 1920, No. 25.

The decree of the lower court is an example of the occasional attempts made by equity judges to improvise that relief which appeals to them as most equitable. See *Haswell v. Standing*, 152 Ia. 291, 132 N. W. 417. See 25 HARV. L. REV. 290. Circumstances may indeed be conceived where a decree like the one in the principal case would be proper. See *Roth v. Burnham*, 126 Ill. App. 222. But in substance the condition sought to be imposed by the District Court not only selects an unreliable standard of value but also denies to the plaintiff rights to which he is already declared entitled. While a court of equity should respect and safeguard the rights of the defendant, it should not go so far as to create new rights for him. See *Manternach v. Stuetz*, 240 Ill. 464, 88 N. E. 1000. In further criticism of the decree of the lower court, it may be pointed out that the decree should be responsive to the prayer of the bill, at least if the relief asked for can be given. *Stanwood v. Des Moines Savings Bank*, 178 Fed. 670 (Cir. Ct. App., 8th Circ.).

EVIDENCE — ADMISSIBILITY OF CRIMES BARRED BY STATUTE OF LIMITATIONS TO PROVE INTENT. — The defendant was indicted under a statute for willfully omitting to examine the books of the auditor of accounts for a period ending in 1916. To prove the defendant's intent, the prosecution introduced evidence of similar omissions between 1910 and 1914. The defendant objected to this evidence on the ground that punishment for these offenses was barred by the Statute of Limitations. *Held*, that the evidence was properly admitted. *State v. Williams*, 111 Atl. 701 (Vt.).

Courts will not receive evidence of offenses similar to the one with which the accused is charged for the purpose of disparaging the character of the accused. *State v. Lapage*, 57 N. H. 245; *Ware v. State*, 91 Ark. 555, 121 S. W. 927. But whenever the intent of an accused is an essential ingredient of the crime with which he is charged, the intent may be proved by evidence of the mere commission of such prior offenses, because such evidence warrants the inference that the continued commissions were not unintentional. *Regina v. Francis*, L. R. 2 C. C. R. 128; *Commonwealth v. Russell*, 156 Mass. 196, 30 N. E. 763. Intent may be proved also by showing that the accused had that intent in those prior offenses, wherefrom it may be inferred that the intent still existed in the present instance. *Crum v. State*, 148 Ind. 401, 47 N. E. 833; *Schultz v. United States*, 200 Fed. 234 (Cir. Ct. App., 8th Circ.). It is clear that the

probative value of such evidence is not affected by the liability or non-liability of the accused to punishment for his former acts. Moreover, the accused cannot complain, since he is punished only for the crime with which he is presently charged. Nor can he justly plead unfair surprise, because he must be aware that his intent is an issue upon which evidence well inevitably be introduced. It follows that the court is right in the principal case in denying any effect to the argument that punishment for the prior offenses is barred by the Statute of Limitations. *King v. Shellaker*, [1914] 1 K. B. 414; *Adams v. State*, 78 Ark. 16, 92 S. W. 1123. The result is supported by decisions admitting evidence of similar crimes committed in other states. *People v. Zucker*, 20 App. Div. 363, 46 N. Y. Supp. 766, aff'd, 154 N. Y. 770, 49 N. E. 1102; *State v. Place*, 5 Wash. 773, 32 Pac. 736.

EVIDENCE — REAL EVIDENCE — COMPARISON OF HANDWRITINGS. — A depositor sued his bank for having charged his account with the payment of certain checks alleged to have been forged. The trial court admitted certain checks of the depositor, proved to be genuine, for purposes of comparison by the jury with the alleged forgeries. Held, that this admission was error. *Texas State Bank of Ft. Worth v. Scott*, 225 S. W. 571 (Tex.).

Certain historical objections, now obsolete, and an unwillingness to raise collateral issues led to various restrictions at common law upon the admission of genuine writings for comparison by the jury or by expert witnesses. See 3 WIGMORE, EVIDENCE, §§ 2000-2002. The English common law, and that of many American jurisdictions, allowed comparison only with genuine writings already in evidence for other purposes. See *Doe v. Suckermore*, 5 A. & E. 703; *Moore v. U. S.*, 91 U. S. 270; *Griffen v. Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605. More liberal courts let in any genuine writings appearing in the record. *Vinton v. Peck*, 14 Mich. 287; *Miss. Lumber Co. v. Kelly*, 19 S. D. 577, 104 N. W. 265. It is time to recognize the archaic nature of these restrictions and to discard them. The danger of raising collateral issues as to the genuineness of the standards introduced for comparison can be avoided by requiring the court to pass upon their genuineness before admission. Many jurisdictions, following the lead of England, by statute now allow comparison with any writings proved to the satisfaction of the judge to be genuine. See *Waggoner v. Clark*, 293 Ill. 256, 259, 127 N. E. 436, 437; *Plymouth Loan Assn. v. Kassing*, 125 N. E. 488, 490 (Ind. App.). And some jurisdictions, even in the absence of statutes, receive any admittedly genuine writings for purposes of comparison. *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145.

INSURANCE — DEFENSE OF INSURER — MURDER OF INSURED BY BENEFICIARY — RIGHTS OF NEXT OF KIN OF INSURED UNDER SURVIVORSHIP POLICY. — The deceased and her husband took out insurance with the defendant company payable to the survivor on the death of either. Deceased was murdered by her husband. Her administrator now sues for the insurance money. Held, that he cannot recover. *Spicer v. New York Life Insurance Co.*, 268 Fed. 500 (Circ. Ct. App., 5th Circ.).

It is well settled that a beneficiary who murders the insured cannot recover the insurance money. *New York Mutual Life Insurance Co. v. Armstrong*, 117 U. S. 591. See *Box v. Lanier*, 112 Tenn. 393, 79 S. W. 1042. It is regarded as being contrary to public policy to allow him to profit by his own criminal act. Cf. *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188. See GERMAN CIV. CODE, § 2339. But it does not follow that the company is no longer liable on the policy. In cases of mutual benefit insurance, it is agreed that the money must be paid to the person next entitled under the rules of the society. *Supreme Lodge v. Menkhause*, 209 Ill. 277, 70 N. E. 567; *Schmidt v. Northern Life*

Assn, 112 Ia. 41, 83 N. W. 800; *Sharpless v. Grand Lodge*, 135 Minn. 35, 159 N. W. 1086. Cf. *Cleaver v. Mutual Life Ass'n*, [1892] 1 Q. B. D. 147. And a similar result has been reached in two cases involving ordinary life policies. *Equitable Life Assurance Society v. Weightman*, 61 Okla. 106, 160 Pac. 629; *Robinson v. Metropolitan Life Insurance Co.*, 69 Pa. Super. Ct. 274. This seems the more desirable result. The public policy against allowing the beneficiary to take has reference only to his taking beneficially. If he is allowed to take in constructive trust for the persons who would have taken had he predeceased the insured, justice can easily be achieved. See Roscoe Pound, "The Progress of the Law — Equity," 33 HARV. L. REV. 420, 421. See also 30 HARV. L. REV. 622. This is in accord with the better view as applied in cases where a devisee murders his testator, or an heir his ancestor. See AMES, LECTURES ON LEGAL HISTORY, 310. Cf. *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540. In the principal case, if the murderer had predeceased his wife she would have taken under the policy. Accordingly, he should take in constructive trust for her next of kin.

INTERNATIONAL LAW — TREATIES — EFFECT OF WAR UPON PRE-EXISTING TREATIES. — The plaintiff was an Austrian subject resident in the United States. Just after the declaration of war by the United States against Austria, the plaintiff's father died intestate seised in fee simple of real estate in New York. The Convention of 1848 between Austria and the United States gave reciprocal rights of inheritance to the subjects of each in the lands of the other (9 STAT. AT L. 944). In a suit for partition against the other heirs, the plaintiff's capacity to acquire title by descent depended upon the continuance in force of this treaty provision. *Held*, that the plaintiff had the capacity. *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185.

For a discussion of the principles involved in this case see NOTES, page 776, *supra*.

NEGLECT — DUTY OF CARE — RESPECTIVE DUTIES OF CARRIER AND CONDUCTOR TO PASSENGER. — Action was brought by a passenger against the carrier and conductor for damages for injuries alleged to have been sustained through the negligence of the defendants. The trial court instructed the jury that both defendants owed the passenger the "highest practical care." *Held*, that this was error as to the conductor. *May v. C. B. & Q. R. Co.*, 225 S. W. 660 (Mo.).

In defining the duty of care owed its passengers by a carrier, the courts generally have made the fundamental error of confusing the fixed standard of due care with the ever-varying *quantum* of diligence called for by the changing circumstances of particular situations. To this confusion we owe frequent charges requiring the carrier to exercise the highest degree of care or a very high degree of care. *Pittman v. Hines*, 221 S. W. 474 (Ark.); *Sheppard v. Brooklyn R. Co.*, 146 App. Div. 806, 131 N. Y. Supp. 507. See *Groshong v. United Rys. Co.*, 142 Mo. App. 718, 121 S. W. 1084. Many courts, while using these emphatic phrases, show by their accompanying language an adherence to the correct rule. *Austin v. St. L. R. Co.*, 149 Mo. App. 397, 130 S. W. 385; *St. L. R. Co. v. Woodall*, 159 S. W. 1012 (Tex. App.). Still other courts lay down the true doctrine in unambiguous terms. *Raymond v. Portland R. Co.*, 100 Me. 529, 62 Atl. 602. The principal case presents an unusual opportunity to apply the standard correctly. The circumstances being the same, due care required of the conductor the same amount of diligence that the carrier owed. The instruction should have been reversed as to both defendants with directions to require, as to both, due care in the circumstances.

PAROL EVIDENCE RULE — NATURE AND SCOPE OF RULE — INAPPLICABILITY IN CRIMINAL PROSECUTIONS. — A New York statute provides that the lessor of a residential building must furnish heat unless there is an agreement to the contrary. In the absence of such an agreement the lessor shall be deemed to have contracted to furnish heat. (NEW YORK SANITARY CODE, § 225.) The defendant was prosecuted for violating the statute. The lease with his tenants contained no stipulation as to heating, but he offered to prove a parol contemporaneous agreement with the tenants absolving him from furnishing heat. *Held*, that the evidence was admissible. *People v. Glickman*, 185 N. Y. Supp. 567.

Where criminal intent is the issue, parol evidence bearing upon the state of mind of the defendant at the time he acted is competent even though it contradicts the terms of a written instrument under which he acted. *State v. Newman*, 74 N. H. 10, 64 Atl. 761; *Walker v. State*, 117 Ala. 42, 23 So. 149. See *People v. Barringer*, 76 Hun, 330, 336-337, 27 N. Y. Supp. 700, 704. In the principal case, however, the element of intent does not enter, the defendant's guilt depending entirely on the existence of an agreement which would excuse his failure to act. On principle it might be argued that since the prior parol agreement is here sought to be used for the very purpose for which the writing has superseded it, it should be excluded even in a suit involving others than parties to the writing. See 4 WIGMORE, EVIDENCE, § 2446. But there are numerous authorities for the general proposition that the parol evidence rule does not apply except in suits between parties to the instrument or their privies. *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994; *Northern Assurance Co. v. Chicago Mutual Bldg., etc. Assn.*, 198 Ill. 474, 64 N. E. 979; *Kellogg v. Thompson*, 142 Mass. 76, 6 N. E. 860. This rule has been applied in a criminal case where, as in the principal case, no question of intent was involved, on the ground that the state was not a party to the writing. *Roselle v. Commonwealth*, 110 Va. 235, 65 S. E. 526, aff'd, 223 U. S. 716.

PRESUMPTIONS — EXISTENCE AND EFFECT OF PRESUMPTIONS IN PARTICULAR CASES — PRESUMPTION OF VALIDITY OF SECOND MARRIAGE. — The defendant's first husband, when last heard from, had been injured in a railroad accident. Three years later she married the plaintiff. This suit for annulment is brought twenty years after the second marriage, alleging invalidity because of the prior marriage. *Held*, that annulment be denied. *Smith v. Smith*, 185 N. Y. Supp. 558.

Once a marriage ceremony is performed, there is said to be a presumption in favor of its validity which is "one of the strongest known" to the law. *Piers v. Piers*, 2 H. L. Cas. 331. See *Bruns v. Cope*, 182 Ind. 289, 105 N. E. 471. This presumption is then said to give rise to another presumption, that of the termination of a prior marriage by death or divorce. *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81. "Conflicting" with this presumption is that of the continuance of life of the former spouse. *Gilleland v. Martin*, 3 McLean (U. S.) 490; *Chicago & Alton R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088. The former presumption, however, is usually held to be "stronger" than the latter and to overthrow it. *The King v. Twynning*, 2 B. & Ald. 386; *Vreeland v. Vreeland*, 78 N. J. Eq. 256, 79 Atl. 336. But see *Goset v. Goset*, 112 Ark. 47, 164 S. W. 759. But this method of reasoning is entirely too mechanical. The so-called "presumption of validity" is but an outgrowth of the common-law presumption of innocence, which is of no evidential value. See 4 WIGMORE, EVIDENCE, §§ 2506, 2511. The presumption of the continuance of life is merely an inference of fact, of more or less value in varying circumstances. *The Queen v. Willshire*, 6 Q. B. D. 366; *Com. v. McGrath*, 140 Mass. 296, 6 N. E. 515. But even granting that these presumptions should be recognized they could not properly be said to be "conflicting."

They would nullify each other as rules of law, and leave the question one purely of fact, to be decided upon the balance of probability. *Turner v. Williams*, 202 Mass. 500, 89 N. E. 110. See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 343-351. A more satisfactory method is simply to assert a strong public policy in favor of the marriage, and require an equally strong balance of probability to overthrow it.

QUASI-CONTRACTS — MONEY PAID UNDER DURESS OR COMPULSION OF LAW — THREAT TO PROSECUTE A RELATIVE AS DURESS. — In an action on certain promissory notes, the defendant counterclaimed for the amount already paid on the notes, alleging that they had been extorted from him by the plaintiff's threats to prosecute the defendant's brother-in-law for a felony. There was no allegation as to whether a felony had or had not been committed, nor had any prosecution been begun. To this counter claim the plaintiff demurred. *Held*, that the demurrer was erroneously overruled. *Union Exchange National Bank v. Joseph*, 185 N. Y. Supp. 403.

In general, money paid because of threats and for no other reason, can be recovered. *Robertson v. Frank Brothers*, 132 U. S. 17; *Horner v. State*, 42 App. Div. 430, 59 N. Y. Supp. 96. And many courts permit such recovery even though the transaction was in the nature of compounding a felony. *Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069; *Nelson v. Leszczynski-Clark Co.*, 177 Mich. 517, 143 N. W. 606. See *Schoener v. Lessauer*, 107 N. Y. 111, 13 N. E. 741. But there is considerable authority to the contrary. *Jourdan v. Burslow*, 76 N. J. Eq. 55, 74 Atl. 124, aff'd, 78 N. J. Eq. 587, 81 Atl. 1133; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287. Even under the latter rule, however, recovery will be denied only if it appears that a felony was actually committed, or a prosecution instituted. It might be urged that it is equally against public policy to permit suppression of the investigation of merely alleged crimes. On this view alone can the principal case be supported, unless it be that threats to prosecute a brother-in-law cannot constitute such duress as will justify a recovery. On this point the authorities differ. In some states an obligation may be avoided if incurred solely to relieve a son-in-law from prosecution. *Nebraska Mut. Bond Ass'n v. Klee*, 70 Neb. 383, 87 N. W. 476; *Fountain v. Bigham*, 235 Pa. St. 35, 84 Atl. 131. And if the benefit of the rule is to be extended beyond cases involving close blood relations, there seems to be no reason why it should not be applied in the principal case. The doctrine might be carried even further, and held to cover all cases where the obligor's freedom of will is coerced by threats of harm to another. See *Davies v. London Ins. Co.*, L. R. 8 Ch. Div. 469.

STATUTE OF FRAUDS — PART PERFORMANCE — WHAT ACTS ARE SUFFICIENT. — A purchaser orally agreed to buy land of a vendor to give to the purchaser's niece. In reliance on the gift, the niece entered into possession. The purchaser died before the sale's completion. *Held*, that the vendor may specifically enforce the contract against the purchaser's estate, for the benefit of the niece. *Hohler v. Aston*, [1920] 2 Ch. 420.

It is settled law that part performance of an oral contract to purchase land takes the case out of the operation of the Statute of Frauds. See FRY, SPECIFIC PERFORMANCE, 5 ed., § 578. By the prevailing rule it is sufficient part performance if the purchaser is put in possession under the contract. *Butcher v. Stapely*, 1 Vern. 363; *Earl of Aylesford's Case*, 2 Strange, 783. See BROWNE, STATUTE OF FRAUDS, 5 ed., § 467. Many American jurisdictions require something more. *Bradley v. Owsley*, 74 Tex. 69. See 5 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 2243. The prevailing rule was adopted at a time when the manifest hostility of the English Chancellors toward statutes was coupled with an exalted sense of their ethical responsibilities. It originally contemplated

the taking of possession by the purchaser as in substance a common-law conveyance by livery of seisin. See Roscoe Pound, "The Progress of the Law — Equity," 33 HARV. L. REV. 929, 941-943. To-day such possession is regarded as sufficient because it is solely referable to a contract concerning this land. Clearly the possession of the purchaser's agent is the possession of the purchaser. See *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266. In the principal case, the possession of the contract beneficiary, taken at the instigation of the purchaser and with the assent of the vendor, must equally be regarded as the possession of the purchaser. However astray from "the right line of progress toward a satisfactory law upon this subject," which would require, beyond possession solely referable to the contract, irreparable injury to the purchaser if specific performance is denied, the decision clearly indicates the state of the prevailing authorities. See Roscoe Pound, "The Progress of the Law — Equity," *supra*, 944, 945; 15 HARV. L. REV. 659.

SURETYSHIP — SURETY'S RIGHT TO EXECUTION AT LAW UPON A JUDGMENT PROCURED BY THE CREDITOR AFTER PAYMENT BY THE SURETY. — A creditor obtained a judgment against the principal debtor and his surety. After payment by the surety, the judgment was assigned to him. Execution was levied upon this judgment against the property of the principal who now moves to quash the execution. *Held*, that the execution be quashed. *Grizzle v. Fletcher*, 105 S. E. 457 (Va.).

At law the payment of a joint obligation by one of the obligors extinguishes the obligation. *Booth v. Farmers & Mechanics' Nat. Bank*, 74 N. Y. 228. See 1 WILLISTON, CONTRACTS, § 332. And taking a narrow view, English courts of equity refused to allow a surety to be subrogated to the advantages of the creditor, such as bonds or judgments, which were legally destroyed by payment of the debt by the surety. *Copis v. Middleton*, 1 Turn. & R. 224; *Armitage v. Baldwin*, 5 Beav. 278. But this has been changed by statute in England. See MERCANTILE LAW AMEND. ACT, 19 & 20 VICT., c. 97, § 5. And to-day in most American jurisdictions equity keeps alive the original obligation so that a surety who has paid may be subrogated to a judgment rendered against himself, his principal, and his co-sureties. *Furnold v. Bank of the State of Missouri*, 44 Mo. 336. See 2 WILLISTON, CONTRACTS, § 1268. This often becomes important in establishing priority. *Hill v. King*, 48 Oh. St. 75, 26 N. E. 988. For a surety's right to reimbursement only arises upon his payment to the creditor. *Blanchard v. Blanchard*, 201 N. Y. 134, 94 N. E. 630. By statute many states allow execution at law upon such a judgment without requiring any decree of equity. *Kimmel v. Lowe*, 28 Minn. 265, 9 N. W. 764; *Garvin v. Garvin*, 27 S. C. 472, 4 S. E. 148; *Ezzard v. Bell*, 100 Ga. 150, 28 S. E. 28. And a few courts permit this without a statute if the suretyship relation was established in the former action and the judgment has been assigned to the surety. *Nelson v. Webster*, 72 Neb. 332, 100 N. W. 411; *Williams v. Riehl*, 127 Cal. 365, 59 Pac. 762. Since these factors were present in the principal case, the decision indicates a close adherence by the Virginia Court to the separation of legal and equitable relief.

TRUSTS — CESTUI QUE TRUST'S INTEREST IN RES — TRUST FOR EDUCATION AND MAINTENANCE. — The testator bequeathed his estate in trust to pay £13 a year to a named educational institution for the maintenance and education of his son, then aged four, and directed that if the son died before the estate was exhausted the balance should be applied in care of a certain grave. The expense of the son's education was borne by his mother, and at his majority the estate, which amounted to about £100, was still intact. *Held*, that the son is entitled to the money. *In the Will of O'Rourke*, [1920] V. L. R. 546.

Where the purpose of an express trust is fulfilled or fails and a surplus remains, there is normally a resulting trust to the donor or his heirs. *Easterbrooks v. Tillinghast*, 5 Gray (Mass.) 17; *Hopkins v. Grimshaw*, 165 U. S. 342. But this rule does not apply where there are circumstances indicating an intention that the trustee or *cestui que trust* should take beneficially. *Clarke v. Hilton*, L. R. 2 Eq. 810. English courts find such an intention when a gross sum or the total income of property is given in trust, and allow the beneficiary to take absolutely, construing any special purpose assigned as merely indicative of the donor's motive. *In re Andrew's Trust*, [1905] 2 Ch. 48; see *In re Sanderson's Trust*, 3 K. & J. 497, 503. Even where the donor has tried to limit the *cestui que trust's* right, as by the attempted creation of a spendthrift trust, in some jurisdictions the property is nevertheless his. Though the trustees are to apply the property to his support, if they cannot deprive him of his vested estate creditors may reach it as the *cestui que trust's* own. *Green v. Spicer*, 1 R. & My. 395; *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655. *A fortiori* where there is no question of contravening the donor's intent, the beneficiary should be absolutely entitled to the property in any jurisdiction, where the special purpose is not the *raison d'être* of the trust. It is a reasonable assumption in the principal case that the testator primarily intended that his son take the estate beneficially and that his mention of a particular institution was merely a direction as to the application thereof.

VENDOR AND PURCHASER — REMEDIES OF VENDOR — ENFORCEABILITY OF EXPRESS LIEN WHEN STATUTE OF LIMITATIONS BARS DEBT. — The defendant conveyed land to a third party, expressly reserving in the deed a lien for the unpaid purchase price. The third party conveyed to the plaintiff, who did not assume the debt. The plaintiff sues to quiet his title, the Statute of Limitations having run on the debt. The bill also alleged laches. *Held*, that the bill be dismissed. *Wilson v. Davis*, 86 So. 686 (Fla.).

For a discussion of the principles involved in this case see NOTES, page 779, *supra*.

WAREHOUSEMEN — WAREHOUSE RECEIPTS: PLEDGE OF A NEGOTIABLE RECEIPT TO THE ISSUING WAREHOUSEMAN. — The plaintiff sent goods to a factor for sale on commission. The factor stored the goods in the defendant's warehouse, taking a non-negotiable receipt. Subsequently he exchanged this receipt for a negotiable receipt, and immediately indorsed and delivered the latter to the defendant, as collateral security for a loan to himself. The defendant knew nothing of the agency, and acted throughout in good faith. The plaintiff brings replevin for the goods in the defendant's hands. A statute makes warehouse receipts negotiable "in the same manner as inland bills of exchange." The Uniform Sales Act is in force. *Held*, that the plaintiff can recover. *Decker & Sons v. Milwaukee Cold Storage Co.*, 180 N. W. 256 (Wis.).

It is an old and well-settled principle that a factor with authority to sell has no right to pledge the goods for his own debt, and that his pledgee acquires no rights against the principal. *Paterson v. Tash*, 2 Strange, 1178; *Allen v. St. Louis National Bank*, 120 U. S. 20. Nor can a factor make a valid pledge by taking, without authority, a negotiable warehouse receipt for the goods, and pledging it. *Commercial Bank v. Hurt*, 99 Ala. 130, 12 So. 568. But if he has express or implied authority to store the goods and take a negotiable receipt for them, a *bona fide* purchaser or pledgee of the receipt is protected against the prior owner. *Commercial Bank v. Canal-Louisiana Bank*, 239 U. S. 520. (This case was decided on the basis of §§ 40, 41, and 47 of the Uniform Warehouse Receipts Act; §§ 32, 33, and 38 of the Sales Act are to the same effect.) In the principal case, the court did not consider the extent of the factor's authority to warehouse. Nor did it consider whether, in any event, the maker of

the receipt may, upon pledge to him, be treated as a purchaser or holder. The latter point has not previously been decided; but on analogy to the later and better view regarding a similar situation in the law of bills and notes, the warehouseman might well have been treated as any other purchaser, and hence protected. See *Morley v. Culverwell*, 7 Mees. & W. 174; *National Bank v. Lindsay*, 2 Boyce (Del.), 83, 78 Atl. 407; *Horn v. Nicholas*, 138 Tenn. 453, 201 S. W. 756. The court, however, merely treated the whole transaction as, in total effect, a pledge of the goods. Such reasoning, while perhaps sufficient to reach correct results in some cases, is technically inaccurate and is likely to produce results seriously in conflict with commercial usage and understanding.

BOOK REVIEWS

- TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO. By Giovanni da Legnano. Edited by Thomas Erskine Holland. Washington: The Carnegie Institution. 1917. pp. xxxviii, 458.
- DE INDIS ET DE JURE BELLI RELECTIONES. By Franciscus de Victoria. Edited by Ernest Nys. Washington: The Carnegie Institution. 1917. pp. 475.
- DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III. By Balthazar Ayala. Edited by John Westlake. Washington: The Carnegie Institution. 1912. 2 vols. pp. xlv, 227; xii, 250.

These volumes belong to the series entitled "Classics of International Law." The general editor is Dr. James Brown Scott, Secretary of the Carnegie Endowment for International Peace. In each instance the reader is furnished with a facsimile of an early and trustworthy text, a translation into English, and an introduction by a special editor. The result is a firm foundation for scholarly investigation. The series is not yet complete, but it already contains so many volumes that comparison of one volume with another throws much light on the history of international doctrine.

The three authors named above antedate Grotius, and consequently are ancient from the point of view of international lawyers. It is true, to be sure that, as international law is simply a collection of the rules observed, or at least supposed to be observed, by states in their relations with each other, there was some sort of international law as soon as there were two states. It is true also that occasional statements regarding international practices are found in the Bible, in the Greek classics, and in the Latin classics. (1 OPPENHEIM'S INTERNATIONAL LAW, 3d ed., §§ 37-40.) Yet for thousands of years international law was not treated as a separate branch of knowledge. Its problems were commingled with those of government, ethics, and theology. In the middle ages there was abundant reason for such confusion; for the Church was the center of almost all learning, and, besides, the Church believed itself to have the right and the duty to control the State or at least to advise and reprimand the State's rulers. Thus the *Decretum* of Gratian, dating from between 1139 and 1150, and soon afterwards to be embodied in the *Corpus Juris Canonici*, gives in *Causa XXIII* of its second part a discussion of war, and more particularly of private war, the mediaeval link between the ancient blood feud and the vendettas still found in a few mountainous regions. So too the *Summa Totius Theologiae* of St. Thomas Aquinas, dating from between 1265 and 1274, has something to say on the same subject in the fortieth question discussed in the *Secunda Secundae*. The consequence is that the general editor of a series of classics of international law encounters difficulties. What is he to do with books devoted principally to subjects other than

international law? Is he to present extracts from the Bible and other sources such as those to which allusion has just now been made? As yet the general editor of this series has reprinted only works dealing with international law exclusively, or at least largely.

The nature of these volumes, as well as their relation to one another and to the development of international law, cannot be fully discovered without careful study; but a short statement regarding each author will serve to show that careful study will be well worth while.

In 1360 Giovanni da Legnano, then Professor of Civil Law in the University of Bologna, and later Professor of Canon Law, wrote the work entitled "*Tractatus De Bello, De Represaliis, et De Duello*." He was active in the public affairs of Bologna, and this work grew out of the local wars and was addressed to the leader of one of the factions.

Legnano begins with scriptural and astrological matter, but soon passes to topics more intelligible to-day. He deals largely with questions of military policy and discipline, e. g., "Of the legion and the cohort, and who and how many are required therein," "How soldiers should conduct themselves in war, whom they should obey, and from what they are commanded to abstain," "What belongs to the office of a general in war," "How soldiers are punished differently, according to their different offenses." The author also deals with questions of government and constitutional law, e. g., "Whether war made by the Emperor against the Church is lawful, and whether subjects are bound to obey him therein," "Whether vassals are bound to participate at their own expense, when a lawful war is begun by their lord," "Whether subjects are bound to help first a baron who begins a war against another baron, or the king who begins a war against another king, both commands being received at the same time," "Whether the non-liege vassal of two lords, summoned by both at the same time, is bound to help both, or one, and if so, which," "Whether a citizen of two states is bound to help one against the other," "Whether a vassal summoned by his lord is bound to follow him in parts beyond the sea to fight against barbarians." Perhaps no lesson taught by examining the book is more valuable than the knowledge that international law has been, and inevitably must be, interwoven with ethics, government, and military discipline. Among the topics which to-day might be dealt with in books on international law are these: "How universal corporeal war had its origin in the law of nations," "Who, first and chiefly, may declare universal war, and by what law, and against whom," "Whether quarter should be granted to the general of a war when captured," "Whether one who makes a capture in war becomes owner of the person or thing captured, and whether the doctrine of '*postliminium*' applies," "Whether persons captured in a war between two states become slaves," "Whether things captured in war become the property of the captors," "Whether trickery is allowed in wars," "Whether mercy should be shown to persons captured in a lawful war," "Whether those who attend in a war, but who cannot fight, enjoy the immunities of combatants." Those are nearly all the passages now interesting from the point of view of international law; but it is possible that some specialists in the history of the subject will care to follow in other passages the discussion of lawful and unlawful war, and of the distinction between universal and particular war, and of private reprisal; for just wars and private warfare played a large part in the early literature. Finally, the general history of law gains a valuable sidelight from the discussion of the duel as an incident of compurgation and of trial by combat (chapters clxx, clxxi, clxxv-cxciv).

The present edition leaves nothing to be desired. A nearly contemporaneous manuscript is presented in collotype. As the manuscript abounds in abbreviations and other difficulties, the original Latin is then presented in full. There is then a translation. There is also a facsimile of the edition of 1477.

The introduction by Sir T. E. Holland, formerly Professor of International Law in the University of Oxford, shows how the work originated and gives incidental insight into the varied life led by a law professor five hundred years ago. There is even a photograph of Legnano's tomb, one of those Bolognese tombs decorated with a representation of students and lecture room, perhaps in this instance the very lecture room bought by this professor from the estate of his predecessor (p. xiii).

Franciscus de Victoria was a Spaniard of the Dominican order, educated at the University of Paris, and from 1526 to 1546 Professor of Theology in the University of Salamanca. His dissertations *De Indis* and *De Jure Belli* were delivered in 1532. They were not printed until after his death. Their general subject is the justification for Spanish domination in America.

Some of the topics are "Whether the Indian aborigines before the arrival of the Spaniards were true owners in public and in private law," "Whether there were among them any true princes," "Whether heresy causes loss of ownership by human law," "Barbarians are not precluded by the sin of unbelief or by any other mortal sins from being true owners alike in public and in private law," "The Emperor is not the lord of the whole world," "Even if the Emperor were the lord of the world, that would not entitle him to seize the provinces of the Indian aborigines," "A refusal by these aborigines to recognize any dominion of the Pope is no reason for making war on them and for seizing their goods," "The Spaniards have a right to travel to the lands of the Indians and to sojourn there so long as they do no harm," "Any children born to Spanish parents domiciled in those parts who wish to become citizens thereof cannot be excluded from citizenship," "When and in what case the Spaniards can resort to severe measures against the Indians, treating them as faithless foes, and employ all the rights of war against them and take away their property and even reduce them to captivity," "Whether the Spaniards could have reduced the Indians into their power, if it were certainly clear that they were of defective intelligence," "Christians may serve in war and make war," "In whose hands lies the authority to make or declare war," "Anyone, even a private person, can accept and wage a defensive war," "What a State is, and who is properly styled a prince," "Petty rulers or princes, who are not at the head of a complete State, but are parts of another State, cannot undertake or make war," "And what about cities," "What can be a reason or cause of just war," "Proof that diversity of religion is not a just cause of war," "Extension of an empire is not a just cause of war," "The personal glory, or other advantage of a prince, is not a just cause of war," "Wrong done is the sole and only just cause for making war," "In just war it is lawful to make good, out of the goods of the enemy, all the cost of the war and all damages wrongfully caused by the enemy," "Whether it is lawful in war to kill the innocent," "Whether it is lawful to kill women and children in a war against the Turks, and what, among Christians, about farmers, civilians, foreigners, strangers, and clergy," "Whether it is lawful to kill captives and those who have been surrendered," "Whether things captured in a just war belong to the captor," "Whether it is lawful to leave a city to the soldiery by way of booty; and how this is not unlawful, but at times even necessary," "Soldiers may not loot or burn without authority," "Whether it is lawful to impose the payment of tribute on the conquered enemy," "Whether it is lawful to depose the princes of the enemy."

That is a long list of interesting topics; and to show the modernness of Victoria's spirit, it is worth while to quote the greater part of his summary of the rules of warfare: "First canon: Assuming that a prince has authority to make war, he should first of all not go seeking occasions and causes of war, but should, if possible, live in peace with all men. . . . Second canon: When war for a just cause has broken out, it must not be waged so as to ruin the

people against whom it is directed, but only so as to obtain one's rights and the defense of one's country and in order that from that war peace and security may in time result. Third canon: When victory is won and the war is over, the victory should be utilized with moderation and Christian humility, and the victor ought to deem that he is sitting as judge between two States, the one which has been wronged and the one which has done the wrong, so that it will be as judge and not as accuser that he will deliver the judgment whereby the injured State can obtain satisfaction, and this, so far as possible, should involve the offending State in the least degree of calamity and misfortune, the offending individuals being chastised within lawful limits; and an especial reason for this is that in general among Christians all the fault is to be laid at the door of their princes, for subjects when fighting for their princes act in good faith."

The introduction is by Ernest Nys, Professor of International Law in the University of Brussels. It gives, among other valuable matter, an account of the rise of the literature of international law in the middle ages; and this account is so thorough and so interesting that no one of scholarly tastes, whether acquainted with international law or not, can fail to be charmed with it.

Balthazar de Ayala was born at Antwerp in 1548. He was of Spanish descent. He became a licentiate in law at the University of Louvain. At the age of thirty-two he became military judge and judicial advisor in the Netherlands military service. In other words, he became judge advocate general. In 1581 he produced, apparently upon the basis of notes made before he entered into office, his treatise *De Jure et Officiis Bellicis et Disciplina Militari Libri III*. The first of the three books deals with topics distinctly related to international law, and among others the following: "Of the method of declaring war," "Of just war and just causes of war," "Of the duel or single combat," "Of hostage-seizing, commonly called reprisals," "Of capture in war and the law of postliminy," "Of keeping faith with an enemy," "Of treaties and truces," "Of trickeries and deceit in war," "Of the law of ambassadors." The second book is devoted chiefly to military policy, for example, to discussing whether it is better to await war at home or to carry it into the enemy's territory; and this second book contains at least two topics of interest to the student of international law, namely: "In time of victory the first and chief thought must be about peace," and "After enemies have been crushed, what is the best method for keeping them quiet in a lasting peace." The third book is devoted to military discipline, and contains nothing of interest regarding international law; but any one studying [the early history of military law will wish to examine the chapters dealing with military courts and the privileges and punishments of soldiers.

In the introduction, the late Professor Westlake, of the University of Cambridge, states the doctrines elaborated in the text and describes the author's position in the history of the subject.

Surely any one who has read the lists of topics selected from these sumptuous volumes has perceived opportunities to gain the keen mental pleasure of searching for origins and of tracing thoughts and words from the first source through the later writers. For example, does Ayala hark back to Victoria, to Legnano, to St. Thomas Aquinas, to Gratian, to the *Corpus Juris Civilis*, to the Latin classics, to the Greek classics, to the Bible? There are men who can spend a lifetime thus. In the case of international law a scholar need not feel that such a search is wholly useless; for there is practical value in demonstrating that a suggestion or international doctrine is new or old. There is a presumption against what has been suggested and tried and rejected. There is a presumption in favor of what has been long approved. Such at least is the view of statesmen. Hence just now, when the world needs readjusting, and theories on international law are to play a greater part than heretofore,

any classics of international law have interest and importance both for the scholar and for the practical man whose career lies neither in the study nor in the lecture room.

EUGENE WAMBAUGH.

THE PEACE NEGOTIATIONS. A PERSONAL NARRATIVE. By Robert Lansing. Boston and New York: Houghton Mifflin Company. 1921. pp. vi, 328.

This book is not what its title would seem to indicate, — a history of the Peace Conference at Paris. It is rather a record of the differences of opinion and the progressive estrangement which arose between President Wilson and his Secretary of State in connection with the peace negotiations and which led to Mr. Lansing's forced resignation a year later. The author writes with the moderation and dignity that were to be expected of him, paying not a few tributes to the high qualities of his former chief and offering adverse criticism of him with many hesitations and qualifications. Nevertheless, this is an *ex parte* statement, the proper evaluation of which is difficult until the case for the other side has also been heard.

In order to explain why he deemed it proper to publish such a book at such a time, Mr. Lansing cites the well-known correspondence between Mr. Wilson and himself of February, 1920, in which the President referred to the Secretary's obvious "reluctance" to accept his "guidance and direction," and declared that it would relieve him of embarrassment if Mr. Lansing would resign and afford him an opportunity to select some one "whose mind would more willingly go along with mine." In these words the author sees "the manifest imputation . . . that I had advised him wrongly and that, after he had decided to adopt a course contrary to my advice, I had continued to oppose his views and had with reluctance obeyed his instructions." It was in order to clear himself from this intolerable "imputation . . . of faithlessness and of a secret, if not open, avoidance of duty," that this book was published. Such reasons for writing do not seem very cogent. From an impartial reading of the letter in question, it is difficult to see that any such imputation was implied; and had it been, the present volume would not do much to refute it, for it throws little light upon how Mr. Lansing discharged his duties except in regard to the advice he tendered the President. The one thing it does prove is the reluctance of the former Secretary to accept the President's policies, that reluctance to which Mr. Wilson alluded and which Mr. Lansing himself does not in the least deny. "I followed his directions . . . with extreme reluctance, because I felt that President Wilson's policies were fundamentally wrong" — this is, indeed, the constant refrain of the book. It is in the exposition of these differences of opinion and of the reasons for them that the whole value of the volume lies.

Our two leading representatives at Paris differed continually, and on the most important questions. Mr. Lansing was opposed to the President's going to Paris, in the first place, to his personal participation in the Conference after he had got there, and to his whole method of conducting the negotiations. He regarded national self-determination — the principle on which most of the territorial work of the Peace Conference was based — as a "phrase . . . loaded with dynamite," and remarks, "What a calamity that the phrase was ever uttered!" He condemned the President's yielding in the Shantung affair. He deplored the alliance treaty with France, to which he affixed his signature. Above all, he opposed and long struggled against the plans, not indeed for an association of nations, but for the particular League of Nations on which, more than on any other object, the President's mind was bent. In every case his advice was disregarded, sometimes not quite courteously, he

affirms. While thus reduced to the rôle of Cassandra, he still held it to be his duty to remain at his post, believing that "the supreme need of the world" was an immediate peace (however bad, apparently), and that his own withdrawal from the American Commission would so much embarrass the President and encourage his enemies as seriously to retard the conclusion of the treaty or, at least, its ratification at Washington.

The copious extracts which Mr. Lansing has printed from his memoranda to the President and from his diary during the Peace Conference do credit to his prophetic instincts: in many cases, notably with regard to Article X of the Covenant, he foresaw very accurately the vehement opposition that Mr. Wilson's policies would arouse in this country, and the arguments that would be invoked against them. This volume shows that the President was repeatedly warned of the perils of the course upon which he was entering, though it also shows that even Mr. Lansing did not foresee the actual rejection of the Peace Treaties by the Senate.

The arguments against Mr. Wilson's policies with which this book is filled, will inevitably arouse very different reactions in different readers. In the opinion of the reviewer, there is much that will not add to Mr. Lansing's reputation. For instance, while an advocate of making peace as quickly as ever possible, he holds that "the President . . . should have insisted on everything being brought before the Plenary Conference," thus raising the interesting mathematical problem: if it took six months to harmonize the views of five powers, how many years would it have taken to harmonize the views of the thirty-two nations represented in the plenary gatherings? He deplors the fact that the negotiations at Paris were not conducted with complete publicity, quite ignoring the almost insuperable difficulties, not to say dangers to the peace of the world, involved in such a procedure. His arguments against the constitutionality of the Covenant seem to the reviewer rather surprising in a lawyer of Mr. Lansing's standing and experience. And as against his view that the President ought to have contented himself with directing the peace negotiations from Washington, leaving the Secretary of State to head our delegation at Paris, this book itself supplies the most conclusive evidence. It was difficult enough as it was for the President to make his principles prevail to any large extent in the peace settlement; but what chances would he have had of carrying any points at all if he had been obliged to entrust the burden of the contest to a man who disagreed with him on almost every fundamental issue?

Whatever the merits of Mr. Lansing's *apologia*, there remains the question of the propriety of publishing it at this time. It is probable that in such a controversy an adequate rejoinder could not be written without detriment to the public interest. Mr. Lansing has invited judgment on the question whether his conduct has been "in accord with the best traditions of the public service of the United States." It was scarcely necessary to write a book to establish the affirmative, as far as his loyal performance of duty while in office is concerned, for no one has ever cast doubts upon it. But it may be seriously doubted whether the publication of such a book at the present time was in accord with the best traditions of our public service — or with the American instinct for fair play.

R. H. LORD.

MODERN DEMOCRACIES. By James Bryce. New York: The Macmillan Company. 1921. 2 vols. pp. 508, 609.

As a writer on history and politics James Bryce has been known throughout the English-speaking world for fifty years. It is almost exactly a half-

century ago that his remarkable study of the Holy Roman Empire gave him a place in the front rank among historical scholars. Since that time he has been a member of parliament and cabinets, an ambassador from Great Britain to the United States, a lecturer at various universities, and a writer of books on many themes. Now, at an age when most men have ceased to remain immersed in literary work, he gives us this comprehensive survey of twentieth-century democracy in its principles and its actual results. It is an amazing achievement, even for a man of Lord Bryce's alert mentality.

This treatise on MODERN DEMOCRACIES is divided into three unequal parts. The first, extending over one hundred and sixty pages, sets forth the principles which underlie all types of democracy, and makes clear the true relation which exists between such things as democracy and education, democracy and religion, democracy and the press. It includes a striking chapter on "Traditions" and their influence upon the course of actual government, a chapter which shows Bryce at his very best. Then follows a comprehensive description of the way in which democratic government actually functions in France, Switzerland, the United States, and the British self-governing colonies. This exposition of democracy in its present-day workings forms the backbone of the whole work and occupies more than seven hundred pages. In view of the broad field which the author endeavors to survey, however, the description becomes rather sketchy in spots. This is particularly true of the chapters on the United States where the task of compressing so many things into relatively small compass gives the whole narrative the air of a text-book. Finally, there is a substantial and exceedingly interesting discussion of what democracy has really achieved and what its future is likely to be.

It is no disparagement of the other portions of Lord Bryce's book to say that these last chapters are by all odds the best. They are quite up to the standard set by the author in his AMERICAN COMMONWEALTH thirty-odd years ago; and when one says this he bestows no modest praise. There is the same deftness in winnowing the essentials from the details, the same trenchant exposure of shibboleths and shams, the same fertility in suggestion, and the same facility in the use of the English language. It is hard to imagine anything more timely, in these unsettled days, than Lord Bryce's vigorous argument that, with all its faults and imperfections, Democracy remains the one form of government which gives the better tendencies of human nature their fullest scope. At fourscore-and-three Lord Bryce has not abated, to the extent of a single iota, his faith in popular government. A peer of the realm, he remains an unconquered democrat. His book, by the way, is very appropriately dedicated to "his friend and fellow-worker," President Lowell.

WILLIAM BENNETT MUNRO.

OUTLINES OF LECTURES ON JURISPRUDENCE. By Roscoe Pound. Third edition. Cambridge: Published by the author. 1920. pp. iv, 136.

This is not yet the completed treatise on jurisprudence for which Dean Pound's lengthening list of fore-studies during the last two decades has led the whole world of legal scholarship eagerly to hope. But these OUTLINES, which Mr. Pound has prepared for the use of his classes in jurisprudence, are in this new edition, the third, so greatly enlarged as to constitute them practically a new book, and one which, even in its present form, will be of value to a far wider field than the classroom.

The OUTLINES begin with a fully documented treatment of the nature of jurisprudence and its historical development as a field of human thought. The end, the nature, the scope and subject-matter of law are successively considered; and then its sources, forms, and methods of growth. A particularly sug-

gestive section is devoted to the application and enforcement of law. The two closing divisions deal respectively with an analysis of fundamental legal conceptions and with the system of law. These divisions strike one as less fully developed than earlier ones. The material, unfortunately, does not lend itself to adequate representation by the outline form nor does the collection of material—largely definitions—for discussion do justice to the penetrating yet practical criticism which characterizes Mr. Pound's classroom development of these topics, one of which has been in recent times much in the arena of juristic logomachy in this country.

The author's object of furnishing material for class study and discussion accounts for the general schematic form of the book, and also for the diversity of methods used in developing its different sections. Some sections—for example, Section I, What is Jurisprudence?—consist of careful and detailed references to the literature of the topic, arranged under Mr. Pound's own illuminating classification of the material. In other sections the development is by carefully collated excerpts from representative authorities. An example is furnished by Section IV, Theories of Law. In still other sections an outline analysis directs the discussion, as well as provides material for it. The analysis is in some cases supported by references to the literature, including treatises, articles, and reports of judicial decisions. In others this equipment is lacking. An excellent example of the fullness, range, and varied character of the references is found in Section IX, Interests, and especially in those subsections dealing with such modern and growing subjects as the Conservation of Social Resources.

Accurately as the word *Outlines* denotes the form of the book, the unfortunate connotations of the term quite belie the impression an examination of the book will leave, at any rate upon a teacher. So suggestive is the arrangement of the material, so helpful the interspersed brief comment, so inviting the lists of titles of books, reported cases, and articles drawn not only from legal periodicals but from journals of philosophy, political, social, and economic science, from private pamphlets and government publications, that they can scarcely fail to stimulate in any student a desire to do the suggested work and construct his own theory of law in the light of the reflections the reading would evoke. Doubtless this is the aim Dean Pound had in mind in the course for which this book furnishes the syllabus.

"Sociological jurists," he says, and here he speaks with acknowledged authority, "insist that account must be taken of all the social sciences." The reluctance of students who have had the typical law school training to venture afield into this vast domain from the beaten paths of the reports, is in part due to the very vastness of the area, and in part to the recollection of an inevitably large proportion of fruitless expeditions made without a guide. Here, however, the winnowed results of years of reading, by a student of exceptional equipment both of learning and discernment, are made available. Few juristic thinkers are so widely read as Mr. Pound. Few even among these have the invaluable knowledge not only of the "law in books" but also of "the law in action," to use one of his own happy phrases, which serves as a check on that mere theorizing which has given jurisprudence its unhappy olfactory reputation.

It is clear that the book is one for students, and for students of some maturity of mind and of proper informational equipment. In discussing the materials for analytic jurisprudence Mr. Pound says (page 18), "It is assumed that the student has a dogmatic knowledge of Anglo-American law." This, or a similar knowledge of the civil law, is an indispensable pre-requisite for profitable study of jurisprudence, analytic or otherwise.

It seems safe to predict that no properly prepared student who does the reading and the thinking required by these *OUTLINES* will fail to recognize that

the point of view which the author maintains, however unobtrusively, throughout the book, the one he styles sociological is the one most likely to be fertile in practical results, in adapting existing legal rules and principles to the constantly changing social situation.

C. A. HUSTON.

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THE COMMON LAW OF ENGLAND. By W. Blake Odgers and Walter Blake Odgers. Second Edition. London: Sweet and Maxwell, Limited. (Toronto: The Carswell Co., Ltd.). 1920. 2 vols. pp. xcvi, 1584.

The title of this treatise is somewhat misleading; for it is an exposition of the present statute law of England fully as much as of the common law. But the title is derived from Broom's Commentaries on the Common Law, the tenth edition of which is the first edition of the present treatise. In the present treatise the reference to Broom's Commentaries is abandoned, as well it may be; for although the second edition differs little from the first edition, yet that was largely the original work of its authors. The authors show a preference for law in the statutory form; indeed the treatise ends with a plea for Codification as a sure means of making the law "clear and intelligible and readily accessible to all" (p. 1467). Those parts of the work which deal with statutes are indeed the best, particularly those relating to the adjective law and the law as to criminal offenses.

What we have, then, is a summary of the present law of England. From the practitioner's point of view, the book is necessarily too general to be of great value. From the point of view of students of the law, it does not sufficiently discuss the fundamental principles which must serve as an introduction to any real knowledge of the law. If a lawyer or student wishes to ascertain in a general way the English law on some point not too intricate or involved, he will often find the answer in this book. The fact that a second edition has been called for after an interval of ten years shows that the book has its uses. But certainly it is not as useful as Mr. Odgers' works on Pleading and on Slander and Libel.

A. W. S.

A TREATISE ON INTERNATIONAL LAW, WITH AN INTRODUCTORY ESSAY ON THE DEFINITION AND NATURE OF THE LAWS OF HUMAN CONDUCT. By Roland R. Foulke. Philadelphia: The John C. Winston Co. 1920. 2 vols. pp. lxxxviii, 482; lxxxviii, 518.

It was one of the wise observations of John Chipman Gray that "a loose vocabulary is the fruitful mother of evils." Mr. Foulke's notable work on the law of perpetuities and future interests seems to have led him to share Mr. Gray's dissatisfaction with a jurisprudence "encysted in phrases," and this treatise represents an attempt to clear away some misconceptions and confusions which such a jurisprudence has produced in international law. The field has long stood in need of such a fresh approach. The cumulation of expressions which baffle analysis and becloud understanding has proceeded in most fields of law with too little challenge, and in international law few attempts have been made to resist it. Constant clarification seems essential to keeping law serviceable to practical life in a world where human beings refuse to range their activities around legal categories and conceptions. Any serious attempt to revise the "old outfit of ideas, discriminations and phrases," as James Bradley Thayer termed it, is to be welcomed. The struggle between law and logomachy must be fought by each generation for itself.

Mr. Foulke has perceived that where the same furrows have been followed for many generations there is likely to be a "rich mine for analytical investigation." He purports only to have "scraped the surface" of the mine and exposed its riches. The profession will doubtless be grateful for some of his departures. A treatise on international law which states frankly that it proposes to "waste no time in chasing shadows" and therefore discards the word *sovereignty* "entirely"; which boldly asserts that the fiction of extra-territoriality "may now be freely discarded by clear thinkers"; which lightly suggests that the term *science*, as applied to international law, is "only another illustration of the fondness of writers for multiplying words" — such a treatise is certain to have been written without idle drifting with the current of classification and conception. Statements of this sort give Mr. Foulke's treatise an appearance of realism, and the reader finds much of his verbal daily bread in the author's scrap-heap.

Unfortunately the realism is largely a semblance in this case. So bold an effort demanded the richest scholarship and the broadest scientific equipment. Mere freedom from encysted thinking is not an end in itself. It may mean a failure to perceive the troublesome factors in complex affairs. It may spell a refusal to admit the existence of difficulties with which knowledge and method are unequipped to deal. The high road may be the only safe road to a traveler unprepared for the uncertainties of the by-paths. Where Mr. Foulke discards one abstraction, he seems to invent another to take its place.

The first chapter on the nature of law is devoted to analytical jurisprudence, but it shows little familiarity with notable recent contributions in that field. It may be too much to expect of American scholarship the mastery of recent continental progress in juristic thinking, though international law of all fields would seem to call for the broader treatment. But it seems quite proper to demand of an American scholar, who writes on jurisprudence, some knowledge of the work of American writers like Terry and Gray and Pound and Hohfeld. Yet Mr. Foulke analyzes fundamental terms like *right*, *power*, and *interest* without even a reference to the storm that is raging around Hohfeld's work. If we stood in need of a definition of law, we should want to know that it took account of what has been happening in other fields of social science like psychology. In framing his definition, Mr. Foulke has wisely sought to explain the factors determining human conduct; but in using such expressions as "the gregarious instinct," he has neglected the efforts of the psychologists to understand the realities behind such troublesome phrases. It is to be hoped that the day has passed when the American bar is willing to isolate law from other social sciences and to proceed as though no progress had been made in them since Blackstone. If a writer on jurisprudence would make a contribution to understanding at the present time, he must not be content to use such terms as *instinct* and leave them unexplained. One may agree with Mr. Foulke that "law is a mental conception," "a pure philosophical speculation" having "no motive, no activity, no purpose" of its own. It is at least a pleasant contrast with the conception of law as "a brooding omnipresence in the sky." But in a world of surging affairs it offers little help in solving the problems of workaday life.

In a second chapter on the "facts of international life," the treatise again presents a semblance of realism. This chapter seems to express a "practical" man's revolt from "theories," and his desire to get "back to facts." But throughout the chapter, one lacks a sense of the author's realization that questions of fact always involve questions of value, and that perception of facts is largely a process of assessing valuations. It is all too easily assumed that in the field of international relations, as in the physics laboratory, given phenomena will produce the same impression on every human eye, regardless of the intellectual spectacles which may be worn. Hence we find this chapter

on the facts of international life dealing with such subjects as the equality of states, the recognition of states, and the nature of jurisdiction. We find the author speaking of states as "living organisms," to which he assigns certain "inherent" qualities, such as dignity, honor, and reputation. It is not surprising, therefore, to find significance attached to the custom of referring to monarchies and kingdoms in the feminine gender and to republics in the neuter gender. An author who thinks that in municipal law "the animal man is the principal fact," easily abstracts states as the principal *facts* in international life, and his dealing with the law applicable to these abstract states has little reference to the political events of the last half century. A legal adviser of a foreign office would hardly turn to Mr. Foulke's discussion of states if he found it necessary to deal with questions arising in connection with the new governments erected on the territory of the former Russian Empire. Mr. Foulke's "facts" are extracted from a world of words, not from a world of political events. This process made it possible for him to reach the hopeful conclusion that "the probability is that modern civilization has now seen the final culmination of the struggle for popular liberty and that absolute governments will practically disappear from the world." The conclusion would probably occasion no dispute in "Main Street."

That part of the treatise which deals with substantive international law contains little that is new or striking. Its "logical arrangement" is undoubtedly some improvement on the classical chapter topics for a treatise on international law. It is generally free from over-reliance on analogies to private-law conceptions, but the statement that "fisheries in the maritime belt are universally admitted to be solely the property of the littoral state" (I, p. 401) is an unfortunate exception; so also the statement that "a federal constitution is the result of a treaty between several states, just as marriage is the result of a previous engagement to marry" (I, p. 476). In referring to the transfer of territory as "international conveyancing," the author lends aid to the modern writers who seem to think that sovereignty, like seisin, must not be in abeyance.

Since the treatise appears just at the end of the World War, perhaps future students will have some charity toward the treatment of problems acute while Mr. Foulke was writing. But they will hardly condone his reference to the German people as the "German tribes" (II, p. 230); nor are they likely to accept his unilateral title for the recent war, which he calls the "War of German Aggression." The discussion of questions on which the Allies had opposed the Central Powers is pitched in the tone of these references, and discloses a bias which will probably lead judicious persons to attach less weight to the author's views on important questions about which controversy is raging.

M. O. H.

INTERNATIONAL LAW. By L. Oppenheim. Vol. I—Peace. Third Edition, edited by Ronald F. Roxburgh. London and New York: Longmans, Green and Company. 1920. pp. xliii, 799.

For fifteen years this has been the English work on international law most highly esteemed for bibliographical material and also for wide scope. This new edition, prepared with the aid of notes left by the author, retains the qualities of its predecessors.

In examining a book so long esteemed, what one emphasizes is necessarily the new matter. Among the passages appearing for the first time in this edition are those dealing with the development of international law in the World War (§ 50a), the Peace Conference (§ 50b), the past and present positions of self-governing dominions (§§ 94a, 94b), the American punitive expedition into Mexico and the occupation of Juarez (§§ 133a, 133b), the German invasion of

Luxemburg and Belgium, (§ 133*c*), the League of Nations (§§ 167*a*-167*f*), aerial navigation (§§ 197*a*-197*c*), wireless telegraphy (§§ 287*a*, 287*b*), and the Channel Tunnel (§§ 287*c*, 287*d*). Those passages are adequate for the purposes of international law in peace; and war is reserved, as heretofore, for the second volume.

It is noticeable that the discussion of the merits and defects of the League of Nations gives no prominence to Article X or to the representation accorded to subordinate parts of the British Empire; but this volume was prepared for the press several months before those features of the League of Nations aroused discussion in the United States, and neither the author nor the editor should be blamed for having no more foresight than was possessed by the members of the Peace Conference.

E. W.

FEDERAL CRIMINAL LAW AND PROCEDURE. By Elijah N. Zoline. With an introduction by Hon. Henry Wade Rogers. Boston: Little, Brown and Company. 1921. 3 vols. pp. cxxxi, 505, 730, 783.

The end and aim of legal administration is not the perfection of law but the doing of justice. The actual achievement of justice may be infinitely assisted or infinitely impeded by rules of procedure. That there is ample room for reform in American procedure is a truism heard to-day from every side. "The procedure of our courts is antiquated and a hindrance, not an aid, in the just administration of the law," said President Wilson in an address delivered in New York in November, 1916. "We must simplify and reform it as other enlightened nations have done, and make courts of justice out of our courts of law." Perhaps this is more true of criminal law than of any other field of practice. "The administration of the criminal law in all the states of the Union (there may be one or two exceptions) is a disgrace to our civilization," remarked one of our ex-Presidents;¹ and Mr. Moorfield Storey, a former President of the American Bar Association, declared in an address before the Yale Law School: "There is no part of its work in which the law fails so absolutely and so ludicrously as in the conviction and punishment of criminals." Similarly, Mr. Henry W. Taft, delivering the President's address before the New York Bar Association in January, 1920, after quoting some very suggestive statistics, declared that "the figures show what is measurably near a scandalous condition in the administration of criminal justice."

One of the noteworthy features of the modern development of criminal law in this country is the increasing importance of criminal law and procedure in the federal courts. The first half-century which followed the adoption of the Constitution saw but comparatively an unimportant part played by federal criminal law, — a part which widened in its scope, however, with increasing Congressional action under the interstate commerce power, the power to regulate the mails, the power to regulate the national currency, etc. To-day federal criminal law has become of immense importance; one has only to think of the important Conspiracy prosecutions, the enforcement by criminal proceedings of the Anti-Trust Acts, the Pure Food and Drug Acts, the Mann Act, the Shipping Acts, the national Prohibition Acts, the Lever Act, the Espionage Acts, and a host of others. In 1919 the United States Department of Justice commenced no fewer than 47,443 prosecutions. It follows that the appearance of a book on federal criminal law and procedure is particularly timely and important, — especially so, as there has heretofore been no adequate work confined to a consideration of the criminal side of federal procedure.

Mr. Zoline's work is published in three volumes. The first deals with federal

¹ Mr. William H. Taft, in the *YALE LAW JOURNAL* for 1905.

criminal procedure, including the rules of evidence applicable in criminal cases. The second deals with the federal substantive law of crimes, and contains the federal criminal code with a brief commentary upon each section, together with the more important modern acts under which prosecutions are frequently brought and the interpretations of these as outlined in federal and state decisions. The third volume sets forth various typical forms for use in the federal courts. Mr. Zoline has produced rather a practitioner's handbook than a scholar's treatise. There is no careful analysis nor critical examination of the subject; instead the rules of law and leading principles are set forth as interpreted by the courts, and the pertinent statutes and legal interpretations of them are succinctly stated. Citations of the more important federal and state cases are collected in footnotes. One cannot help regretting that in innumerable places the treatment of the subject is not more comprehensive and full; but perhaps the scholar's loss is the practitioner's gain, who wants a succinct statement of the general law quickly accessible.

It is from the latter viewpoint after all that the work should be judged. From that standpoint the book is to be welcomed as a comprehensive, up-to-date, and very convenient, if somewhat general, practitioner's handbook on federal criminal law.

F. B. S.

THE FEDERAL INCOME TAX. Edited by R. M. Haig. Introduction by Edwin R. A. Seligman. New York: Columbia University Press. 1921. [pp. xii, 261.

These lectures were read at Columbia University in December, 1920, as a special course on income-tax problems offered under the auspices of the School of Business. They deal with the definition of income, the realization of income, inventories, and closed transactions; with the scope of legislative competence to determine what is income, and the effect of treasury regulation; with deductions (including an allowance for depletion) from gross income; with consolidated returns and certain questions of procedure.

Professor Haig believes that the conception of income by the economist is close to the popular conception. He suggests this definition: "the money value of the net accretion to one's economic power between two points of time." This would include gifts, devises and bequests, and it is submitted that the popular conception of income does not include these. But it would not be beyond the bounds of reason, or out of harmony with popular conceptions, to define income as including the money value of the net increase, between two points of time, of the taxpayer's economic power, (a) susceptible of measurement and (b) resulting from his property or labor.

Professor Powell believes that the checks on legislative competence in the matter are not substantial. The recent decision of the Supreme Court that capital increment, when realized by a sale, is taxable as income is the result predicted by him. But there remain questions as to the taxability of unrealized gains which we should think were of large importance.

Mr. Field's lecture on the legal force and effect of Treasury interpretation is a gem.

During 1919 many business units made great paper profits through an increase in the value of their inventories; they were required to pay taxes upon such profits; then in 1920 the value of the inventories collapsed, so that the result is that taxes have been paid upon unrealized profits. And yet the accountants for business units were very insistent that accountings should be made upon an accrual basis, and several provisions in the 1918 law were incorporated to meet their wishes. The lectures of Mr. Ballantine on inventories and by Professor Adams on the realization of income are very valuable.

Colonel Montgomery's lecture on reorganizations and the closed transaction lacks the quiet power which most of the other lectures show.

On the whole, the lectures are a valuable contribution to the intelligent consideration of the income-tax problems.

EDWARD H. WARREN.

THE CASE OF REQUISITION. By Leslie Scott and Alfred Hildesley. With an introduction by Sir John Simon. Oxford: Clarendon Press. 1920. pp. xxiv, 307.

This book examines the constitutional questions involved in the recent decision of the House of Lords in *The Attorney-General v. De Keyser's Royal Hotel, Ltd.*,¹ which affirmed a decision of the Court of Appeal.² The Crown had taken over a hotel for administrative purposes connected with the war. The owner's claim for compensation as a matter of right was resisted on grounds of prerogative, and also on the basis of the Defence of the Realm Acts. It was held that the petitioner was entitled to recover *ex lege* and not merely *ex gratia*.³

Prior to this case it seemed to be a generally accepted proposition that, in the absence of express constitutional limitations, such as exist in the Fifth and Fourteenth Amendments of the Constitution of the United States, the sovereign could take the property of a subject for purposes of national defence without compensation, and that the subject had no redress as a matter of right. The Court of Appeal had so held in 1915 in *In re a Petition of Right*.⁴ Properly considering himself bound by this decision, the judge before whom the petition came in the case of *Attorney-General v. De Keyser's Royal Hotel, Ltd.* decided against the suppliant. The Court of Appeal went more thoroughly into historical records and came to the conclusion that since the Crown had never taken the subject's land for the defence of the realm without compensation no such prerogative exists. Instead of overruling the prior decision, the court felt it necessary, in order to permit the petitioner to recover, to distinguish the case in three respects from that decided in 1915. The House of Lords in affirming the decision of the Court of Appeal recognized that the distinctions were untenable and in effect overruled *In re a Petition of Right*.

"... The official contention that the Crown could acquire compulsorily the use of a subject's land for the purposes of national defence without incurring any obligation to pay for it was shown to be without historical or legal foundation, and the House of Lords by a unanimous judgment laid it down that while public necessity may justify expropriation it cannot destroy the subject's right to be paid for the land so taken" (p. xviii). "... The judgment in the Case of Requisition ... teaches ... the lesson that the foundations of constitutional law lie deeply embedded in ground which is in the joint occupation of historians and lawyers, and that the protection of private citizens against unfounded claims by the Executive is one of the most valuable functions of the judiciary" (p. xxiv).

The above passages, quoted from the introduction, are perhaps somewhat extravagant in light of the *ratio decidendi* of the Lords. The right to recover was based on statutory provisions. The learned judges concurred substantially in the view that Acts of Parliament had curtailed the royal prerogative. "I should prefer to say that when such a statute expressing the will and in-

¹ [1920] A. C. 508.

² [1919] 2 Ch. 197.

³ For a discussion of the decision of the Court of Appeal see 33 HARV. L. REV.

713, 735.

⁴ [1915] 3 K. B. 649.

tention of the King and of the three Estates of the Realm is passed, it abridges the Royal Prerogative while it is in force to this extent, that the Crown can only do the particular thing under and in accordance with the statutory provisions, and its Prerogative power to do it is in abeyance."⁵ There was no doubt, however, in the minds of the judges that Parliament could authorize a taking of private property for national defence without any compensation. One may wonder whether a "prerogative" of Parliament may not become as irksome as a prerogative of the Crown, and whether the function of the judiciary should not also extend to a protection of private citizens against the legislature.

The book is a scholarly discussion of this aspect of the royal prerogative. It cites and examines most of the statutes and cases bearing upon the matter from the time of Magna Charta. It contains chapters on the Defence Acts, the prerogative of the Crown, the Defence of the Realm Consolidation Act, the effect of the statute upon the prerogative, petition of right; notes on the right to compensation in respect of requisitioned property other than land, the Indemnity Act, 1920; and appendices containing statutes, historical documents, and the judgment of the House of Lords in *Attorney-General v. De Keyser's Royal Hotel, Ltd.*

A PRACTICAL TREATISE ON ABSTRACTS AND EXAMINATIONS OF TITLE TO REAL PROPERTY. By George W. Warvelle. Fourth edition. Chicago: Callaghan and Company. 1921. pp. xxvii, 757.

The chief value of this book lies in the practical suggestions it makes for the abstractor of titles or conveyancer in the narrow, technical field of his craft. The book is composed in part of these suggestions and in part of the statement of the general rules of the law of property and wills. There are chapters on the acquisition of title, uses and trusts, dower and curtesy, on descent, on insolvency and bankruptcy, on wills, and on adverse title. Such chapters are not the main purpose of the work and are the least valuable part of it. The author has properly dealt briefly with these topics, but they could frequently be better expounded. In several instances positive misstatements are found. The language of § 402 that a perpetuity occurs "whenever there is a suspension of the power of alienation for a longer period than a life or lives in being at the creation of the estate" has not been changed since the first edition in 1883. Since that date it has been clearly demonstrated that the Rule against Perpetuities strikes at the creation of remote future interests even if alienable. The statement of the Rule in "Shelly's" (Shelley's) Case, § 386, perpetuates a common error.

But the other parts of the book have proved of decided value to the practitioner, and the work here is well done. There is no better place to find the description of our records and indices, the extent of the search which should be made, the method of compiling the abstract, the statement of errors and omissions frequently met, and the form and presentation of opinions. The appendix, as in the third edition, contains forms of New England abstracts and tables of land measures. All kinds of United States conveyancing are dealt with, New England and western methods of recording and indexing, state and United States patents, and tax titles.

Of the four editions the most radical changes occurred in the third. Not much new matter is added in the present edition.

J. W.

⁵ [1920] A. C. 508, 539, per Lord Atkinson.

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THE MAXIMS OF EQUITY — I

OF MAXIMS GENERALLY

I. PROVERBS AND MAXIMS ¹

MAXIMS in modern law are either inherited or borrowed from the Roman law or framed in the formative period of modern law "*juxta exemplum Romanorum*." But the maxims of Roman law had their model, in large part at least, in the proverbs and maxims which are to be found among all peoples in a certain stage of culture. A distinction is made between popular proverbial sayings and literary proverbs or gnomes. According to the accepted theory the former were originally uttered spontaneously; they were spontaneous utterances called forth by unusual and stirring incidents and experiences. They were not made deliberately but sprang up out of the soil of national character. This orthodox doctrine as to proverbs savors of the romantic explanation of all social phenomena which came into vogue in the fore part of the last century, of which Savigny's theory of law as a spontaneous product of the *Volksgeist* is another example. In the light of recent philosophy and folk-psychology we may suspect that proverbial sayings are rather traditional versions of the orally expressed reflections of individuals gifted with more than ordinary power of observation, homely wit, and a trenchant tongue. Aristotle suggested some-

¹ Reference may be made to TRENCH, PROVERBS AND THEIR LESSONS (1905); GERBER, DIE SPRACHE ALS KUNST (1885), II, 397-442; BOIS, LA POÉSIE GNOMIQUE (1886).

thing of this sort, saying that proverbs were remnants which because of their brevity and accuracy had been preserved out of the ruins of ancient philosophy.² Moreover, many of the earliest proverbs were responses of oracles. Our chief concern with these proverbial sayings is that they sometimes have to do with matters of law and are one of the forms of expression of customary law. As will be seen presently, legal proverbs attained some importance in Germanic law. For the rest, popular proverbial sayings furnished the model for the literary proverb or gnome and so ultimately for the legal maxim. By all accounts the literary proverb is a product of conscious reflection. Originally it may but cast a popular saying into literary or perhaps poetical form.³ Presently it may express the first stirrings of philosophical reflection upon life and conduct. The fusion of advice about practical life, rules of agriculture, moral precepts, and political advice to rulers which we find in Hesiod is the beginning of the reflection on life that was to lead to ethical and political philosophy. Down to Socrates we find nothing but isolated maxims.⁴ But Greek moral and political philosophy had its roots in the maxims and gnomes of Theognis and Phocylides and the gnomic poetry attributed to the Seven Sages. Thus maxims "stand on the threshold of philosophy"⁵ and "form the transition to philosophy proper."⁶ When conscious reflection begins, they bridge the gap between customary moral rules and ethical principles. The later throwing of ideals, not reflections on customary conduct, into the form of ethical maxims is quite another matter. Such maxims may eliminate all the limitations and obstacles that are encountered in practice and put practically unattainable standards in order to fire the imagination or excite moral enthusiasm.⁷ They are related to the maxims of the beginning of ethical philosophy only in that in form they follow the model of the proverb.

² Quoted by Synesius, Bekker, *ARISTOTELIS OPERA*, V, 1474.

³ "The sayings attributed to the mythical or semi-mythical Seven Sages are crystallizations of popular morality which cannot be treated as the beginnings of a science." WUNDT, *ETHICS* (transl. by Titchener and others), II, 3.

⁴ *Ibid.*

⁵ ZELLER, *PRESOCRATIC PHILOSOPHY* (transl. by Alleyne), 121.

⁶ ERDMANN, *HISTORY OF PHILOSOPHY* (transl. by Hough), I, § 18.

⁷ FOWLER AND WILSON, *PRINCIPLES OF MORALS* (1894), II, 293-294.

2. MAXIMS IN ROMAN LAW⁸

Dirksen⁹ and Sanio¹⁰ pointed out long ago that the maxims of which Roman juristic writing is full belong to the older legal science of the Republic and not to the classical period. Some of them are referred to the *auctoritas* of named jurists of the older period.¹¹ Others are expressly attributed to the *ueteres*.¹² Moreover the way in which these maxims are treated by the later jurists shows that they came from an earlier time and had traditional authority. They are cited as generally recognized truths or are even applied and interpreted as actual rules of law much as if they were statutory provisions.¹³ If, with Girard,¹⁴ we recognize three phases of legal development in republican Rome, namely, the esoteric phase in which the interpretation and application of the enacted and of the customary law were a monopoly of the pontifices, the phase of secularization and popularization, and the phase of systematization, Cato the Younger, with whom the practice of framing maxims is held to begin,¹⁵ belongs in the second stage. Thus we see that the jurisprudence of maxims comes in at the very threshold of Roman legal science.

In the older practice, the case in hand was decided by a simple method of distinctions and analogies.¹⁶ Also the older juristic

⁸ Reference may be made to JöRS, *RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK* (1888), 282-313; JHERING, *GEIST DES RÖMISCHEN RECHTS*, I, § 3, II, § 40; RABEL, *ORIGINE DE LA RÈGLE IMPOSSIBILUM NULLA OBLIGATIO* (1907); BRUNSENEL, *GESCHICHTE UND QUELLEN DES RÖMISCHEN RECHTS* (HOLTZENDORFF, *ENZYKLOPÄDIE DER RECHTSWISSENSCHAFT*, 7 ed., I, 1915), § 30. I have relied largely on JöRS and on the texts he has collected.

⁹ "Ueber den Zusammenhang der einzelnen Organe des positiven Rechts der Römer mit der gleichzeitigen juristischen Doctrin," 3 *RHEINISCHES MUSEUM FÜR JURISPRUDENZ*, 85, 106-109 (1829).

¹⁰ *DE ANTIQUIS REGULIS IURIS* (1833).

¹¹ E. g., many are attributed by name to Q. Mucius Scaevola. See references in JöRS, *RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK*, 291, n. 2.

¹² Dirksen cites GAIUS, III, § 180, as an example. The title of the *DIGEST*, *DE DIUERSIS REGULIS IURIS ANTIQUI* (50, 17), tells the same story.

¹³ E. g., compare the maxim attributed to Cassius — *non possit causam possessionis sibi ipsa mutare* (DIG. XLI, 6, 1, 2) — with the interpretation by Iulianus: *quod uolgo respondetur causam possessionis neminem sibi mutare posse, sic accipiendum est, ut possessio non solum ciuilis sed etiam naturalis intellegatur*. DIG. XLI, 5, 2, 1.

¹⁴ *MANUEL ÉLÉMENTAIRE DU DROIT ROMAIN*, 6 ed., 43-46.

¹⁵ JöRS, *RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK*, 289 ff.

¹⁶ JHERING, *GEIST DES RÖMISCHEN RECHTS*, III, § 49.

writing was no more than a heaping together of legal materials in collections of actions and of *responsa*. The *Tripertita* of Sex. Aelius Catus, a work of this type although it essayed to be something more, marks the end of this method. On the basis of these collections which handed down the results of juristic craftsmanship, jurists began to think of the substance of the law, as distinguished from laws and as distinguished from method of decision. Accordingly they sought to find common points of view in the mass of collected or traditional *responsa*, formulae of actions and forms for legal transactions and sought to express these points of view concisely in maxims. But, says Jörs, these maxims at first are not addressed to the judge but to the jurist.¹⁷ The *responsa* remained expert opinions as to the application of the law to particular cases. They did not seek to impart general legal information. Yet in view of the bulk and the diversity of the recorded *responsa* and the conflict of juristic opinion, it became important for the individual jurisconsult to state precisely and in terse language the point of view which he sought to express in a rule of law. The analogy of a statutory provision was obvious and naturally enough was made use of. "As the *lex* declared what should be law for the future, so the jurists, through their maxims, established what was rightful and legal for the present, and, as in the case of *leges*, their phrases were as sharp and concise as possible, sometimes in imperative form, sometimes in proverbial form."¹⁸ It is likely that the model of proverbial sayings was before the minds of the jurists quite as much as the model of the terse and oracular phrases of the old statutes.

Another factor in the development of legal maxims is to be found in the *disputationes fori*, or public disputations upon questions of law. The very name (*regula*) indicates a measure which the teacher gives to the pupil for the decision of legal controversies. Every teacher has had experience of the desire of students for a crisp phrase which they may put down in their notebooks. Evidently many of the maxims were first framed for the use of students.¹⁹

¹⁷ RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 293.

¹⁸ *Ibid.* Examples of the statutory form are: *a ueteris praeceptum est* (DIG. XLI, 2, 3, 19); *civilis constitutio est* (DIG. XLVII, 1, 1, pr.); *ueteres decreuerunt* (DIG. XXVIII, 5, 32, pr.). Of the proverbial form: *quod uolgo dicitur* (GAIUS, II, § 49); *solemus etiam dicere* (DIG. II, 14, 7, 5).

¹⁹ JÖRS, 294. As to the tendency of teachers to frame maxims or aphorisms, compare the maxim-like sayings of Zeno. BEVEN, STOICS AND SCEPTICS 18, 33.

It is noteworthy that in Roman law, as later in the common law, a great number of maxims have to do with principles of interpretation of statutes and of legal transactions. This is parallel development, not borrowing. But it is significant of the stage of development at which maxims arise. The strict law takes no account of will or intention as such. The words operate quite independent of the thought behind them.²⁰ At the end of a period of strict law, as lawyers begin to reflect and to teach something more than a tradition, as they begin to be influenced by philosophy to give over purely mechanical methods and to measure things by reason rather than by arbitrary will, a chief effect is to change the emphasis from form to substance, from the letter to the spirit and intent. When statutes and legal transactions were looked at in this way, maxims grew up announcing policies to be followed in interpretation in doubtful cases. Thus there were maxims to the effect that certain relations or certain situations were to be favored,²¹ that words were to be interpreted in favor of promissors and against those from whom the transaction proceeds,²² that the milder interpretation was to be preferred in certain cases,²³ and generally that as between different possible interpretations the more intrinsically meritorious was to be adopted.²⁴ The transition to the natural law of the classical jurists was easy. "From recognition that certain *regulae*, to be discovered and established by juristic research, lay at the foundation of application of law, it was a short

²⁰ JHERING, *GEIST DES RÖMISCHEN RECHTS*, III, § 49; DANZ, *GESCHICHTE DES RÖMISCHEN RECHTS*, I, § 142.

²¹ *E. g.*, — "Where the will of the manumitter is doubtful, freedom is to be favored" (DIG. L, 17, 179). — *Cf.* DIG. L, 17, 20, to like effect. "In case of doubt it is better to decide in favor of dower" (DIG. L, 17, 85). *Cf.* DIG. XXIII, 3, 70, to the same effect. "In testaments we interpret the will of the testators liberally" (DIG. L, 17, 12).

²² It should be remembered that in Roman law the promisee or creditor speaks, not the promisor or debtor, as in our law. These maxims appear in two forms, which suggest much as to the development of a jurisprudence of maxims into a jurisprudence of principles. In an older form we have special maxims as to particular transactions, *e. g.*, stipulations, DIG. XXXIV, 5, 26, XLV, 1, 99, pr., XLV, 1, 38, 18; sales, — "that is taken which is to the disadvantage of the seller" (DIG. XVII, 1, 33), "the agreement is to be interpreted against the seller" (DIG. L, 17, 172); letting and hiring, DIG. II, 14, 39. In a later form these are generalized. DIG. L, 17, 96.

²³ Here again the earlier form applies to penalties. "In penal causes the milder interpretation is to be made." DIG. L, 17, 155, 2. Later it is generalized. DIG. I, 3, 18, L, 17, 56, L, 17, 192, 1.

²⁴ DIG. I, 3, 19, XXXIV, 5, 24, L, 17, 67.

step to the wider thought that a *lex* also need not be regarded as a mere aggregate of precepts but that these precepts themselves are but forms or derivatives of ideas of right which should be formulated theoretically as *regulae*.”²⁵ This leads to the philosophical view of the *ratio iuris*²⁶ and of all legal rules, whether statutory or traditional or doctrinal, as but expressions of or attempts to formulate principles of natural law.

Application of maxims merely as solving phrases is a later abuse. The jurisprudence of maxims was a theoretical working over of the law for practical purposes. Roman legal science was never purely theoretical. Application to concrete causes was the end of theory and the end was kept constantly in view. But that end might be sought in two ways. One way was to begin with the cases which occurred in practice. The other way was to begin with the ideas which were taken to be behind the law and to treat the phenomena of practice as realizations of these ideas.²⁷ The older jurisprudence took the first course and the method of collecting *responsa* and *formulae* remained an important form of legal writing. Next came commentaries in which there is a transition from the method of beginning with cases to that of beginning with ideas, in that more and more the commentaries take account of general ideas of which the statutes are regarded as expressions and of spheres of interest and jural relations which the *formulae* are regarded as seeking to secure. The jurisprudence of maxims carries this still further and enters definitely on the method of beginning with ideas. It is “the first attempt at a theoretical formulation of law.”²⁸

Certain defects, characteristic of the period of legal history in which maxims arise, abide with the jurisprudence of maxims to the end. When the right line of evolution is followed, which leads through natural law to the maturity of law, the maxim develops into a fruitful legal principle and is merged therein.²⁹ But Roman

²⁵ JÖRS, RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 295.

²⁶ DIG. I, 3, 15.

²⁷ JÖRS, RÖMISCHE RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 300.

²⁸ *Ibid.*

²⁹ Jörs gives the following example: When the burden of proof was first considered theoretically, a *regula* was framed to the effect that the plaintiff had the burden of proving his assertion. DIG. XXII, 3, 21. This continued to be used and the question as to proof of exceptions (equitable defenses) was met by another *regula* that “in an exception the defendant is a plaintiff.” DIG. XLIV, 1, 1. But this did not suffice

maxims develop in two other ways. Some become fixed in form from the beginning, retain their form throughout the subsequent history of the law, and become encrusted with exceptions and limitations or are turned into arbitrary special rules.³⁰ In such cases there is a survival of the methods and modes of thought of the strict law in situations where the maxim was too narrowly conceived at too early a stage of the jurisprudence of maxims and acquired an authoritative stamp before it was critically examined and restated. Others are diverted from their original function of standards for the decision of controversies or from the outset are theoretical and become vague high-sounding generalities, of no practical import, and may even serve to darken counsel and to retard the working out of a sound principle.³¹ In these cases we have a phenomenon of the beginnings of legal philosophy in the period of natural law or of the decadence of legal philosophy at the end of that period — of the time when juristic philosophy was finding itself and had not learned to make a proper use of concrete legal materials or of the time when it had exhausted itself for the time being and was unfruitful. In short, we have a characteristic phenomenon respectively of the transition from the strict law to natural law and of the transition from natural law to the maturity of law.

Writers on jurisprudence commonly speak of law as an aggregate of rules. But a legal system of any degree of development is more complex than this formula would indicate. Rules, that is, definite detailed provisions for definite detailed states of fact, are the staple of the beginnings of law and continue to be employed in the maturity of law in situations where there is exceptional need for certainty to maintain the economic order.³² In a later stage

to meet cases where the defendant contended that he had paid or where the exception was met by a replication. After further *regulae* for these cases (DIG. XXII, 3, 25, 2), the jurists came ultimately to the general proposition that "the burden of proof lies on one who asserts not on one who denies." DIG. XXII, 3, 2.

³⁰ *E. g.*, DIG. XLI, 3, 33, 1, XLV, 1, 91, 3, L, 16, 231.

³¹ "One who remains silent certainly does not speak; but nevertheless it is true that he does not deny." DIG. L, 17, 142. "Ignorance of law will not help those seeking to acquire, but will not be prejudicial to those who are seeking their own." DIG. XXII, 6, 6. "No one is held to act wrongfully who makes use of his own right." DIG. L, 17, 55.

³² As to rules, principles, conceptions, and standards, see my papers, "Juristic Science and Law," 31 HARV. L. REV. 1047, 1060-1062, and "Administrative Application of Legal Standards," 44 REP. AMERICAN BAR ASSN., 445, 454-458.

legal principles become a second element. These are general premises for juristic reasoning, to which we turn to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards and to reconcile them when they conflict. This element comes into law with the advent of legal writing and juristic theory and its presence as a controlling factor is a mark of a developed legal order. A third element may be called legal conceptions. These are more or less exactly defined types to which we refer or by which we classify cases so that when a particular case is so classified we may attribute to it the legal consequences attaching to the type. This element is a product of juristic study in the attempt to set the materials of the law in order. In Roman law, maxims appear when the jurisconsults begin to reflect on law, when Greek influence, and so philosophical influence, are just beginning, when teaching of law compels the jurisconsult to begin to organize his materials through generalization. Bridging the transition from the strict law to the philosophical jurisprudence of the classical natural law, maxims are an intermediate step between rules and principles. This explains why so many maxims fall down between the two and acquire neither the detailed precision of rules nor the tested universality of legal principles. It explains also why it is that when principles come to be understood and to be worked out thoroughly, so many maxims become on the one hand mere traditional rules to be interpreted like *leges*, or on the other hand empty oracular phrases.

3. MAXIMS IN THE CANON LAW ³³

Primarily the canonists were academic teachers. They were influenced immediately by the Roman law, the great subject of study in the Italian universities after the twelfth century, and had before them the sententious texts of the Digest, handed down from the jurisprudence of maxims of the jurists of the Republic. Also they were under the immediate influence of scholastic philosophy and logic. The whole method of canonist and of civilian came to be shaped externally by the scholastic modes of disputation; and it is not without significance that in the formal academic disputa-

³³ SAVIGNY, *GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER*, III, 567-570; SCHULTE, *GESCHICHTE DER QUELLEN UND LITERATUR DES CANONISCHEN RECHTS*, I, 196, 213, II, 84.

tions of the time a crisp formula of general currency was of much service to the disputant, whether as a theme, as a premise, or as an argument. Indeed our common-law use of "maxim" in this connection comes from thirteenth-century logic.³⁴ Thus the natural demand upon teachers to sum up their reflections in trenchant formulae was reinforced. Moreover the stage of legal development in which jurists were constrained by authoritative texts of the *Decretum* or of the Digest, which might be interpreted and applied but not questioned, is analogous to that in which the jurists of republican Rome began to comment reflectively on the *ius civile*; and it gave rise to similar phenomena.

Down to the last decade of the twelfth century the *Decretum* of Gratian was the sole basis of instruction in the canon law. After that time all the collections of decretals became the subject of study. But the method remained the same. First the teacher simply read the text, giving students an opportunity to write it down in case they were unable to procure a copy. Next followed observations as to the correct reading (*corrigere* or *emendare literam*), and next in order an exposition of the text. In the lectures on the *Decretum* and later on the decretals the readings on particular sections were preceded by an introduction to their content (*summa*) in order to acquaint the hearers with the general features of the subject. The exposition of the text involved five points: (1) raising or noting actual or apparent contradictions of the particular text, (2) solution of the apparent contradictions between equally authoritative texts and of questions of law arising out of them, (3) putting of cases, real or hypothetical, involved in the text or suggested thereby, (4) framing of general rules or maxims for the purpose of solving doubts or reconciling apparent contradictions, and (5) citation of parallel passages from the authorities.³⁵ The

³⁴ It is first used in the sense of "a widely received general assertion or rule" by Albertus Magnus (1193-1280), *POST. ANAL.* lib. I, cap. 2, and PETRUS HISPANUS (1226-1277). The latter says: "A maxim is a proposition than which no other is prior or better known." *SUMMULAE*, v. The term was used in this sense following the *Summulae* by Thomas Blundeville (1594). In the Oxford Dictionary several examples are given of its use in the fifteenth and sixteenth centuries to mean an axiom in mathematics or dialectics. Thence through Bacon and Coke it came definitely into our legal usage in the seventeenth century. As to the authority of Petrus Hispanus, because of his afterwards becoming Pope, see PRANTL, *GESCHICHTE DER LOGIK*, II, 264.

³⁵ SCHULTE, *GESCHICHTE DER QUELLEN UND LITERATUR DES CANONISCHEN RECHTS*, I, 213.

general rules or maxims, called *brocarda* or *brocardi* or *brocardica*, are to be found frequently in the glosses, and were regarded as an essential part of the lectures.³⁶ They seem to have grown out of reflection on and attempts to solve real or apparent contradictions in texts which could only be interpreted. The practical occasion of the Roman *regulae* was the need of deciding cases on the basis of *leges* and *responsa*. The practical occasion of the brocards of the canon law was the need of settling the interpretation and application of authoritative texts. But the former were required for and developed by men who primarily were practitioners, while the latter were needed primarily for academic purposes and were developed by men who primarily were teachers.

Pilius, a teacher at Bologna in the latter part of the twelfth century, is named by Baldus as the first to use the term *brocarda* in his book of disputations (*Libellus disputorius*) near the end of that century.³⁷ But the important collection for the canon law is that of Damasus, who taught at Bologna in the second decade of the thirteenth century. His compilation is entitled *Brocarda siue regulae canonicae* and contains one hundred and twenty-five maxims. According to Schulte, he was the first to compile the maxims which up to that time were to be found only in the MSS. of the *Decretum* as part of the gloss.³⁸ Some time after 1234 Bartholomaeus Brixiensis revised the *Brocarda* of Damasus in his *Brocardica iuris canonici*.³⁹ The development of maxims in the canon law ends with the title *De regulis iuris* at the end of the Sext (1298) in which eighty-eight maxims are authoritatively laid down.⁴⁰ Some of them are taken from the title of the Digest, *De diuersis regulis iuris antiqui* (50, 17).⁴¹

³⁶ SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, III, 567.

³⁷ BALDUS ON USUS FEUDORUM, tit. *de feudo marchiae* (I, 14); SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, III, 569, note f.

³⁸ SCHULTE, I, 196.

³⁹ SCHULTE, II, 84.

⁴⁰ It should be noted that the Sext uses the Roman term *regula*. The French very generally keep the term *brocard*. BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 12 ed., 103; FABREGUETTES, LA LOGIQUE JUDICIAIRE ET L'ART DE JUGER, 199 ff. The canon law retains the Roman term *regula*, following the Sext. The Germans also say *Rechtsregel*. In the common law we say "maxim," following the writers on logic who influenced our classical texts in the seventeenth century. The Italians also say *massima giuridica*. The older Scotch writers speak of "brockards." STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND, I, 10, 34 (1681).

⁴¹ E. g., No. 6 is DIG. L, 17, 185; No. 33 is DIG. L, 17, 75; No. 44 is equivalent to

But a great part are the work of the glossators, and it is significant how many of them have to do with interpretation⁴² and procedure.⁴³ The influence of this authoritative collection of maxims has been only second in importance to that of the last title of the Digest. "When in any century," says Maitland, "from the thirteenth to the nineteenth an English lawyer indulges in a Latin maxim, he is generally, though of this he may be profoundly ignorant, quoting from the Sext."⁴⁴

Both the good and the bad features of a jurisprudence of maxims may be found in the maxims of the canon law. Here, as in the Roman law, they help to lead the jurists from a body of hard and fast rules, authoritatively imposed, above question and subject only to interpretation, to a conception of principles of reason, discoverable by juristic theory and philosophy, of which particular positive rules were but declaratory. Not only are they forerunners of the fruitful philosophical method of the following centuries, more immediately they are in the right line of descent of the systematic treatment of law as a whole which begins with the Humanists.⁴⁵ They are among the solvents of the strict law, as they were in republican Rome. On the other hand, even more than the Roman maxims they tend to become empty abstractions. Partly this is due to a certain moral or theological flavor. Partly it is due to their academic origin. Largely it is due to the circumstances of the stage of legal development to which they were appropriate and in which they arose. Attempts at generalization in that stage are necessarily crude. When they are not cautiously narrow they are uncritically broad and abstract and may easily acquire authority before they have been subjected to a thorough test. Maitland does not hesitate to describe the whole title of the Sext as a bouquet of "showy proverbs."⁴⁶

DIG. L, 17, 142; NO. 48 IS DIG. L, 17, 206; NO. 55 IS DIG. L, 17, 10. Schulte says they are "generally rules taken from the Roman law." I, 44.

As to the authorship of this title, see SCHULTE, I, 44; VIOLLET, HISTOIRE DU DROIT CIVIL FRANÇAIS, 3 ed., 76-77.

⁴² E. g., Nos. 15, 16, 17, 30, 34, 35, 37, 39, 40, 42, 43, 45, 49, 53, 57, 61, 74, 80, 81, 88.

⁴³ E. g., Nos. 8, 11, 12, 20, 24, 26, 47, 63, 71.

⁴⁴ I POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 196.

⁴⁵ SAVIGNY, SYSTEM DES RÖMISCHEN RECHTS IM MITTELALTER, III, 570.

⁴⁶ I POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 196. Cf. Savigny's estimate, III, 570.

4. MAXIMS IN THE CIVIL LAW⁴⁷

For a time maxims had a concurrent development in the canon law and in the civil law. The assumptions, methods, and surroundings of decretist and of legist were the same. Both were teachers. Both expounded and explained authoritative texts. Indeed down to the period of the commentators the canonist was the more practical of the two. In law, as in other fields, there was no criticism. It was an age of authority. Moreover, while the canon law was growing through new papal legislation, the civil law could not grow in form and could be developed only by interpretation. In academic theory the German (Holy Roman) emperors were the successors of Augustus and of Justinian, and hence the *Corpus Iuris Ciuilis* was binding statute law for the civilized world. Accordingly the glossators treated the legislation of Justinian much as French jurists of the nineteenth century treated the Code Napoléon.⁴⁸ "In these laws of another age they saw a law made for their epoch; in their eyes the praetor was a *podesta*, the Roman *eques* a knight of the Middle Ages, the feudal emperor another Justinian reigning despotically over the anarchical society of the twelfth century."⁴⁹ Their interpretation was purely textual; "they had too much respect for the text to disfigure it at all in order to satisfy the needs of practice."⁵⁰ Thinking of the Digest as a statute and so of every text as written at the same time, their chief concern was to reconcile or, as it seemed to them, to solve the insoluble antinomies which it presents to analytical and dogmatic study.⁵¹ As in the canon law and for like reasons, the necessity of solutions which would reconcile conflicting authoritative texts dictated the more important features of teaching and writing.

⁴⁷ SAVIGNY, *GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER*, III, §§ 204, 209; BRINZ, *PANDEKTEN*, 3 ed., I, § 12; MATTHAEUS, *IN TITULUM DE DIUERSIS REGULIS IURIS ANTIQUI COMMENTARIUS* (1615); POTHIER, *PANDECTAE*, Tit. *de diuersis regulis iuris antiqui*; FABREGUETTES, *LA LOGIQUE JUDICIAIRE ET L'ART DE JUGER*, 192-273; PHILLIMORE, *PRINCIPLES AND MAXIMS OF JURISPRUDENCE*.

⁴⁸ BRISSAUD, *HISTOIRE GÉNÉRALE DU DROIT FRANÇAIS*, I, 210.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ On the glossators see PERTILE, *STORIA DEL DIRITTO ITALIANO*, 2 ed., II², § 61; DEL VECCHIO, *DI IRNERIO E LA SUA SCUOLA* (1869); BESTA, *L'OPERA DI IRNERIO* (1896); LANDSBERG, *DIE GLOSSE DES ACCURSIVS* (1883); PESCATORE, *DIE GLOSSEN DES ACCURSIVS* (1888).

A contemporary account tells us how the teacher proceeded: "First, I shall give you summaries of each title before I come to the text. Second, I shall put cases of particular laws well and distinctly. . . . Third, I shall read the text for the purpose of correcting it. Fourth, I shall repeat the case in brief terms. Fifth, I shall solve contradictions, adding *generalia* (which are commonly called *brocardica*) and distinctions and subtle and useful questions with their solutions."⁵² As in the canon law, the *brocardica* are constructed to solve contradictions. Hence both the framing of the maxim and the discussion with its final solution in the form of a maxim go by the name "*brocardizare*."⁵³ As has been said,⁵⁴ Pillius was the first to use the term *brocardi*. But while his book seems to have gone by the name of *Brocarda*,⁵⁵ it is evident that it was entitled *Libellus disputorius*⁵⁶ and that it was a collection of disputations as to conflicts of the texts together with the solving formulae. The first compilation of maxims as such is the *Brocarda* of Azo (1150-1230). The purpose of this book seems to be to reconcile conflicts between the maxims. It consists of a number of short legal maxims, citing authorities from the texts under each. Often, but not always, the maxim is followed by another, likewise fortified by citations, which seems to contradict it. After some observations, Azo develops the maxims further and explains them and seeks to reconcile the conflict.⁵⁷ Soon after comes the *Brq-carda* of Damasus, already referred to,⁵⁸ "a book on the canon law very like the *Brocarda* of Azo on the Roman law."⁵⁹ This, as has been seen, was revised after 1234 by Bartholomaeus Brixiensis. Finally there is the *Distinctiones siue brocarda* of Petrus de Bellapertica († 1308) containing one hundred and twenty-five maxims.⁶⁰ It should be noted that this is the same number as the *Bro-*

⁵² Odofredus (Odefroy), quoted in SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, III, 553, note a; BRISSAUD, MANUEL D'HISTOIRE DU DROIT FRANÇAIS, 208.

⁵³ AZO ON COD. IV, 30, 13; SAVIGNY, III, 569. "*Brocardica materia dicitur que est contrariorum opinionum rationibus inuoluta.*" VOCABULARIUS UTRIUSQUE IURIS, s. v. *brocardica*.

⁵⁴ *Ante*, note 37.

⁵⁵ SAVIGNY, IV, 331.

⁵⁶ SAVIGNY, IV, 329, note c, 330, note d.

⁵⁷ On the *Brocarda* of Azo, see SAVIGNY, IV, § 14.

⁵⁸ *Ante*, note 36.

⁵⁹ SAVIGNY, V, 163.

⁶⁰ SAVIGNY, VI, 33.

carda of Damasus. The derivation of the word *brocardum* is in doubt.⁶¹

In the hands of the glossators the law admitted no possibility of independent reasoning as such. Moreover, although the texts were in theory absolute and final authority, the attempt to make Justinian's law as such the law of mediaeval Europe could but fail, and had the result of putting the gloss, which applied the text to the needs of practice, in the first place. Hence in the period of the commentators the citations are of opinions and treatises, still treated as authoritative because expositions of the authoritative text.⁶² This gave authority to the maxims of the prior period much as those of the canon law got authority through the last title of the Sext, and as the maxims of the republican law at Rome got authority from being embodied in the writings of the *ueteres*. One result was an "uncritical use of *brocarda*," now for practical purposes on a higher level than the texts, "in that these maxims often were given a wholly unwarranted extension."⁶³ The main reliance of the commentators was on dialectic and a rigid, mechanical, logical form in which ingenious objections were raised and refuted and conclusions were tried, not by the texts, but by hypothetical cases in which the acumen and logical power of the jurist were given ample scope. In the fully developed formal scheme of juristic treatment of a subject according to the *mos Italicus*, one of the steps was "the framing of general rules or maxims by abstraction."⁶⁴

⁶¹ It has been supposed to be derived from Burchard or Burkhard of Worms (†1026), author of a well-known collection of *decreta*. There are references to him as Brocardus and to his book as Burgodus which give this derivation a certain plausibility. SAVIGNY, III, 569, note h. Zoepfl says: "Burkhard already about the year 1000 must have made a collection of legal rules which through alteration of his name came to be called *Brocardica*, with which word subsequently the conception of maxims in general came to be connected." DEUTSCHE RECHTSGESCHICHTE, 4 ed., I, 125, note 16. It has often been pointed out that Burchard's collection of decretals does not answer this description. SAVIGNY, III, 569. A derivation from the Greek *βρόχος* has been suggested. PERTILE, STORIA DEL DIRITTO ITALIANO, II², 38.

⁶² On the method of the Commentators reference may be made to BRUGI, OSSERVAZIONI SUL PERIODO STORICO DEI POSTGLOSSATORI IN ITALIA; SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, VI, 1-25, 267 ff.; STINTZING, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT, I, 83, 106-133; ENGELMANN, SCHULDLEHRE DER POSTGLOSSATOREN, 1-16; BRISSAUD, HISTOIRE GÉNÉRALE DU DROIT FRANÇAIS, I, 213 ff.; Calisse in CONTINENTAL HISTORY SERIES, General Survey, 142-147.

⁶³ SAVIGNY, VI, 90. Cinus (1270-1336) attacked this tendency.

⁶⁴ STINTZING, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT, I, 108. These

The maxims of the civilians were shaped in this period and indeed some originated therein. But the life was already out of them. The purposes for which the method had been devised were achieved. For a season there was "a pernicious abuse of *brocarda*" which "on a superficial appearance and often a misunderstanding of the sources, were assumed to be generally valid."⁶⁵ The renewed and critical historical and systematic study of the texts which came in with the Humanists did not wholly put an end to this abuse since the *mos Italicus* long persisted for practical purposes after the *mos Gallicus* had captured the Universities.⁶⁶ But the effect of the new method was to recall men to the Roman *regulae* in their Roman form, and the supervening philosophical jurisprudence of the law-of-nature school, definitely superseding authority and logical manipulation of authority by reason and superseding a jurisprudence of rules by a jurisprudence of principles, and the historical jurisprudence of the nineteenth century, systematizing the whole law on a scientific basis of history and analysis, left the maxims no real function. To those who know the law they serve as convenient catch phrases to express certain ideas or describe certain doctrines. In modern law "they play the rôle of the needle with respect to the pole. They do nothing but point."⁶⁷ As in the case of the needle, there is much deviation and many things may serve to deflect.

It will be seen that the development and decay of a jurisprudence of maxims in the Roman law was closely paralleled in the method of *brocardica* in the modern Roman law. The latter had the advantage of starting with the final form of the refined product of the former, and the greater part of the current maxims of the civilian are Roman or at least are adapted from the Digest.⁶⁸ But the period of the glossators and of the commentators is one of strict law, and the idea of authoritatively imposed rules admitting only of interpretation brought about the same results and was shaken off in the same way in the legal development of modern Europe as in the legal development of ancient Rome. In each case a jurisprudence of maxims helps the law pass from rules to principles and

"bore the uncommon and unexplainable name of *brocardica* and later were called *regulae, loci communes* and *axiomata*." *Ibid.*

⁶⁵ SAVIGNY, VI, 9-10.

⁶⁶ STINTZING, I, 121 ff.

⁶⁷ FABREGUETTES, LOGIQUE JUDICIAIRE ET L'ART DE JUGER, 194.

⁶⁸ FABREGUETTES, 196.

leaves a legacy of showy or oracular proverbs⁶⁹ for the convenience or for the befuddlement of the future.⁷⁰

5. MAXIMS IN GERMANIC LAW.⁷¹

Putting rules of law in the form of verse or rhyme or proverb is as old as law.⁷² Everywhere customary law truly so called⁷³ tends to be put in terse, striking phrase, in verse or in rhyme.⁷⁴ "While law is still popular, it condenses in proverbs like popular speech."⁷⁵ Poissnel, quoted by Esmein, says: "In an unwritten law adages have a value which nowadays we do not suspect. A custom is fluctuating; later it is fixed; it becomes conscious of itself; now it is caught up and summed up in brief and forceful formula in order to recall it continually. Codes of written law have not the secret of the imperious language which the genius of a people creates in order to command its memory. These juridical proverbs were so well made that they were not forgotten."⁷⁶ Such proverbs are a transition from ordinary popular proverbial sayings to legal maxims. They are proverbial sayings which have grown up with more or less immediate relation to a practical purpose. Sometimes they

⁶⁹ "They are as so many oracles of jurisprudence." D'AGUESSEAU, ŒUVRES, I, 279.

⁷⁰ Cf. the difficulties made for French law, in the face of express provisions of the code, by the maxim *contra non valentem non currit praescriptio*. BAUDRY-LACANTINERIE, PRECIS DE DROIT CIVIL, I, §§ 1482-1496.

⁷¹ ESMEIN, COURS D'HISTOIRE DU DROIT FRANÇAIS, 13 ed., 813-814; BRISSAUD, MANUEL D'HISTOIRE DU DROIT FRANÇAIS, 1392; CHAISEMARTIN, PROVERBES DU DROIT GERMANIQUE (1891); AMIRA, GRUNDRISSE DES GERMANISCHEN RECHTS, 2 ed., 10; SIEGEL, DEUTSCHE RECHTSGESCHICHTE, 3 ed., p. 2.

⁷² BRUNNER, GRUNDZÜGE DER DEUTSCHEN RECHTSGESCHICHTE, 7 ed., § 5. See also MAINE, EARLY HISTORY OF INSTITUTIONS, 14-15; MAINE, EARLY LAW AND CUSTOM, 9-10.

⁷³ *I. e.*, as distinguished from received written non-enacted law, which got the name of customary law in the books on jurisprudence because of the theories of the historical school. See, *e. g.*, CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, chap. 5.

⁷⁴ "Verse is one of the expedients for lessening the burden which the memory has to bear when writing is unknown or very little used." MAINE, EARLY LAW AND CUSTOM, 9. See MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 3 ed., 95; HUEBNER, HISTORY OF GERMANIC PRIVATE LAW, transl. by Philbrick, 10.

⁷⁵ ESMEIN, COURS D'HISTOIRE DU DROIT FRANÇAIS, 13 ed., 813.

⁷⁶ RECHERCHES SUR LES SOCIÉTÉS UNIVERSELLES CHEZ LES ROMAINS, NOUVELLE REVUE HISTORIQUE DU DROIT, III, 431, 442.

are expressions of extralegal observation of the operation of the legal order, as in our popular saying, "possession is nine points of the law." Sometimes they represent attempts to state the settled custom in a few easily remembered words.⁷⁷ The juristic maxims of the transition from the strict law may contain echoes of these archaic legal proverbs, but they are quite a different thing, arising to meet different needs, and for the most part but imitate the sententious proverbial style.

In Germanic law we may see the two types and may mark the influence of the one upon the other as the customary law comes under the influence of the canon law and of the civil law. In the oldest form in which we know it, Germanic law is in the proverbial form which is characteristic of primitive law. Later it was largely put in legislative form or reduced to writing in law books. Still later it was worked over by jurists, and although, except in England, it was ultimately pushed into the background by the reception of Roman law, it persisted and has contributed important elements to the modern codes.

Maxims were very numerous in French customary law. For a long time they were preserved only in oral tradition. At the end of the sixteenth century and the beginning of the seventeenth century they began to be collected and published.⁷⁸ The important book is Loisel,⁷⁹ in which the essential rules of the *droit coutumier* are put in the form of proverbs. Maxims of very different periods

⁷⁷ E. g., "*Man ende wijf hebben geen verscheyden goet*," MATTHAEUS, PAROEMIAE BELGARUM JURISCONSULTIS USITATISSIMAE, 15. That is, "husband and wife have no separate goods," a proverbial statement of the matrimonial property régime known as community property. Compare, "*Aet tham neglum gehwylcum scilling*," that is, "for every nail a shilling." ETHELBERG'S DOOMS, 55; LIEBERMANN, GESETZE DER ANGEL-SACHSEN, I, 6. Ancient "codes," i. e., reductions to writing of primitive customary law, are full of this. E. g., in the XII Tables: "*Cum nexum faciet mancipiumque uti lingua nuncupassit, ita ius esto*," — "When he makes nexum or mancipium, as he speaks orally so be the law." Compare the fragments of traditional customary law called the *leges regiae*, e. g., the fragment attributed to Servius Tullus: "*Si parentem puer uerberit ast ille plorassit puer diuis parentum sacer esto*," — "If a boy beat his parent or abuse him, be the boy devoted to the gods of the parents."

⁷⁸ ESMEIN, COURS D'HISTOIRE DU DROIT FRANÇAIS, 13 ed., 814. For collections of these maxims, in addition to Loisel, see L'HOMMEAU, MAXIMES GÉNÉRALES DU DROIT FRANÇAIS (1614); POQUET DE LIVONNIÈRE, RÈGLES DU DROIT FRANÇAIS (1730); FERRIÈRE, NOUVEAU INSTITUTION COUTUMIÈRE (1730); PRÉVÔT DE LA JANES, PRINCIPES DE JURISPRUDENCE (1770).

⁷⁹ LOISEL, INSTITUTES COUTUMIÈRES (1608), ed. by Dupin and Laboulaye (1846).

of legal development are contained in these collections, and they are put side by side without any historical critique. Some of them belong to a very old stock of Germanic legal proverbs. Others are relatively modern and some are obvious phrasings of the law of the time in proverbial form. It is clear that several influences had been at work. One was the Roman and the canon law, with their collections of maxims. The customary law was still close to the primitive form and was full of traditional legal sayings which were applied according to the "equity" of the tribunal. But it had passed into a strict law, and jurists had begun to study it, to write upon it,⁸⁰ and even to teach it.⁸¹ The exigencies of commenting on a theoretically fixed custom which might be interpreted and expounded but not consciously altered led to a jurisprudence of maxims, as we have seen like circumstances do in so many other systems. There was a considerable development of this jurisprudence of maxims down to the Revolution⁸² and more than one of the maxims in use in modern French law are of customary and so ultimately of Germanic origin.⁸³

In Germany the maxims of the Germanic law were often called *paroemiae*.⁸⁴ They had a similar development to that of the maxims of French customary law and for like reasons.⁸⁵ Recently in the enthusiasm of revived study of Germanic law and of the Germanic element in modern law attempts have been made to utilize them

⁸⁰ VIOLLET, PRÉCIS DE L'HISTOIRE DU DROIT FRANÇAIS, 3 ed., 227-229.

⁸¹ VIOLLET, PRÉCIS DE L'HISTOIRE DU DROIT FRANÇAIS, 3 ed., 236.

⁸² See the books cited in note 78, *supra*.

⁸³ E. g., "*Donner et retenir ne vaut*." This is a maxim of the Germanic law growing out of the idea of seisin of movables. COLIN ET CAPITANT, DROIT CIVIL FRANÇAIS, II, 774-776; Desjardins, "Recherche sur l'origine de la règle 'donner et retenir ne vaut,'" 33 REVUE CRITIQUE DE LÉGISLATION, 207, 311; HUEBNER, HISTORY OF GERMANIC PRIVATE LAW, trans. by Philbrick, 426, note 2. "*Possession vaut titre*" is a juristic maxim developed out of the same idea of the Germanic law. It seems to have acquired its final form late in the eighteenth century, as attempt to put it in Roman terms would also indicate. JOBBÉ-DUVAL, ÉTUDE HISTORIQUE SUR LA REVEN-DICATION DES MEUBLES EN DROIT FRANÇAIS, 230. It will be noted that these maxims of the customary law are not in Latin.

⁸⁴ HERTIUS, PAROEMIAE (1693); MATTHAEUS, PAROEMIAE BELGARUM JURISCONSULTIS USITATISSIMAE (1667); PISTORIUS, THESAURUS PAROEMIARUM (1715); VOLKMAR, PAROEMIAE (1854).

⁸⁵ EISENHART, GRUNDRISSE DES DEUTSCHEN RECHTS IN SPRÜCHWÖRTERN (1759, 3 ed., 1823); HILLEBRAND, DEUTSCHE RECHTSSPRICHWÖRTER (1858); GRAF UND DIETHEER, DEUTSCHE RECHTSSPRICHWÖRTER GESAMMELT UND ERKLÄRT (1864); OSENBRÜGGEN, DIE DEUTSCHE RECHTSSPRICHWÖRTER (1876).

for juristic purposes; but no real advantage has resulted.⁸⁶ Here, as in the French law, there is an older element representing the so-called spontaneous formation of popular proverbial sayings, and a later element due to conscious formulation of maxims often after the example of Roman law, but not at all on Roman-law lines, in circumstances not unlike those in which the Roman maxim originally saw light. The compilations often confuse these and put them side by side, as did the French compilations, and in this respect there is striking analogy to the treatment of *brocardica* by the commentators. The later maxims had behind them neither the juristic skill nor the successive editings and reframings that were behind the Roman maxims; nor was the Roman model before those who framed them so directly and consciously as it was before those who framed the *brocardica* of the canon law and of the civil law of the Middle Ages. For juristic purposes the Roman model is infinitely to be preferred to the model of the popular proverb. The older maxims of the Germanic law are marked by the vague and unprecise characteristics of an oral tradition.⁸⁷ Although they have the unforgettable quality that attaches itself to a popular proverbial saying, they are of no more than historical interest in modern law. More may be said for the later type where the jurist has been at work and conscious reflection upon the rules of a body of primitive law which has passed into the stage of the strict law, has yielded a stock of maxims in which we may see a first tentative toward principles.

6. MAXIMS IN THE COMMON LAW

Legal proverbs of the kind of which Germanic law was full may be found in Anglo-Saxon law.⁸⁸ But the primacy of royal justice

⁸⁶ BESELER, SYSTEM DES GEMEINEN DEUTSCHEN PRIVATRECHTS, I, 336; COSACK, LEHRBUCH DES DEUTSCHEN BÜRGERLICHEN RECHTS, II, § 193c, 6 ed., 96. HEILFRON, LEHRBUCH DES BÜRGERLICHEN RECHTS, I, 491. Cf. BRISSAUD, MANUEL D'HISTOIRE DU DROIT FRANÇAIS, 1392.

⁸⁷ BRISSAUD, MANUEL D'HISTOIRE DU DROIT FRANÇAIS, 22. "The legal proverbs have a lesser value in that they are often ambiguous and obscure." STOBBE, HANDBUCH DES DEUTSCHEN PRIVATRECHTS, 3 ed., I, 181.

⁸⁸ "Whence in English a proverb is had: *Begge spēre of side othe bere*, which is to say, 'Buy spear from side or bear it.'" LEGES EDWARDI CONFESSORIS, 12, 6; LIEBERMANN, GESETZE DER ANGELSACHSEN, I, 638-639.

after the conquest and the development of the common law through the king's courts put an end to the evolution of popular legal proverbs and led to the rise of the professional legal maxim. At first there is a mere quotation of an occasional maxim of the Roman law. Thus Thomas of Marlborough, who may have been Bracton's teacher, quotes a bit of verse containing *quicquid plantatur solo, solo cedit*, which is found also in the margin of some MSS. of Bracton.⁸⁹ Bracton adds an occasional maxim of the Germanic or feudal law.⁹⁰ The earlier Year Books show a small stock of maxims, chiefly in Latin and from the Sext⁹¹ (which is referred to as the "written law"),⁹² sometimes from the civil law,⁹³ sometimes apparently from the writings of canonists or civilians,⁹⁴ but sometimes proverbial sayings of the customary law.⁹⁵ Maxims of the common

⁸⁹ Maitland, Bracton and Azo, pp. xxii, 121.

⁹⁰ E. g., *putagium non adimit hereditatem*, fol. 88.

⁹¹ The most frequent are: *Uolenti non fit injuria* (No. 27 in the title of the Sext *De regulis iuris*), Hotot v. Rychemund, Mich. 4 Edw. II, 88 (1311), 22 SELD. SOC., 199, 200; *Attemulle v. Saundersville*, Trin. 6 Edw. II, 2 (1313), 36 SELD. SOC. 4, 9; Anon., Mich. 16 Edw. III, 85 (1342), Pike, II, 565; Anon., Trin. 19 Edw. III, 55 (1345), Pike, 253. *Melior est conditio possidentis* (No. 45 in the Sext — cf. DIG. I, 17, 154), Anon., Mich. 30 Edw. I (1302), Horwood, 56; *Lilleburne v. Draper*, Hil. 4 Edw. II, 36 (1310-11), 26 SELD. SOC. 68; *Audley v. Deyncourt*, Trin. 6 Edw. II, 20 (1313), 36 SELD. SOC. 68, 70. Others are: *Nemo obligatur ad impossibile* (No. 6 in the Sext), Hotot v. Rychemund, Mich. 4 Edw. II, 38 (1311), 22 SELD. SOC. 199, 200; *Ratihabilitio retrahitur et mandato comparatur* (No. 10 in the Sext), Cornish Iter. 30 Edw. I (1302), Horwood, 129.

⁹² E. g., by Bereford, C. J., in Hotot v. Rychemund, Mich. 4 Edw. II, 88 (1311), 22 SELD. SOC. 199, 200.

⁹³ The most frequent is: *Res inter alios acta* (COD. VII, 56, 2 and 4), cited in Anon., Hereford Iter., 20 Edw. I (1292), Horwood, 25; Anon., Com. Pleas, 21 Edw. I (1293), Horwood, 295; Anon., 2 Edw. II, 19 (1308-9), 17 SELD. SOC. 71; Bayeux v. Beryhale, Mich. 3 Edw. II, 15 (1309), 19 SELD. SOC. 110.

⁹⁴ *Ubi est eadem ratio ibi est idem ius*, Knyveton v. Abbot of Newboth, Trin. 1 Edw. II, 2 (1308), 17 SELD. SOC. 31; *lites ex litibus oriri non debent*, Le Marchaud v. Collon, Cornish Iter., 30 Edw. I (1302), Horwood, 158-160; *melius est nocentem relinquare impunitum quam innocentem punire*, Anon., 30-31 Edw. I, Horwood, App. II, 538; *mortuo mandatore expirat eius mandatum*, Anon., Trin. 14 Edw. III (1388), Horwood, 627; *ex nudo pacto non oritur actio*, Anon., Pasch. 15 Edw. III, 50 (1341), Horwood, 137; *uigilantibus et non dormientibus, etc.*, Anon., Trin. 15 Edw. III, 29 (1341), Pike, 239; *fraus et dolus nemini debent patrocinari*, Anon., Mich. 15 Edw. III, 9 (1341), Pike, 309; *in negatis non est usus*, Anon., Hil. 16 Edw. III, 38 (1342), Pike, 119.

⁹⁵ "A man shall not be received to his law touching a matter whereof the county may have knowledge." Of this, Bereford, J., said: "*Vostre maxime est trop large*." Anon., 2 Edw. II, 106b (1308-9), 19 SELD. SOC. 17. *Putage ne tout pas heritage*, Halstede v. Gravashale, 2 Edw. II, 129 (1308-9), 19 SELD. SOC. 53, 55.

law on the Roman model,⁹⁶ or attempts to frame such maxims,⁹⁷ may be seen also. There is perhaps one borrowing from logic.⁹⁸ The term "maxim" occurs twice; once in connection with a proposition of the common law phrased in the vernacular.⁹⁹ *Regula*, the term used in the Sext, is more usual.¹⁰⁰ Gross misuse of maxims taken from the Sext is not uncommon.¹⁰¹

Scholastic adoption of Aristotelianism and the consequent emphasis upon formal logic made itself felt in English law in the fifteenth century. Fortescue¹⁰² begins his juristic theory with Aristotle's causes. He proceeds to say: "As for principles (*principia*), which the Commentator¹⁰³ calls the efficient causes, these are no other than certain *universalia*, which the learned in the law as well as the mathematicians call maxims (*maximas*); in rhetoric they are called *paradoxa*, the civilians call them *regulae iuris*."¹⁰⁴ Littleton¹⁰⁵ uses "principle" and "maxim" indifferently in this very sense,¹⁰⁶ often using both in a way quite different from that with which we are now familiar. Thus he says it is a maxim that "inheritances may lineally descend but not ascend,"¹⁰⁷ but it is also a maxim that "he which hath an estate but for term of life shall neither do homage nor take homage."¹⁰⁸ It is a "principle"

⁹⁶ *Quia quod nondum erat in persona concedentis nullum erit in persona concessi*, *Elys v. Ryggesby*, Hil. 3 EDW. II, 9b (1310), 19 SELD. SOC. 176. *Malitia supplet aetatem*, Anon., Trin. 12 EDW. III (1338), Horwood, 627.

⁹⁷ "*Et ideo discat unusquisque terminarius quod habeat terminum suum sub tali tempore quod habere posset croppum suum sine calumpnia.*" Note, Hil. 4 EDW. II (1310-11), 26 SELD. SOC. 133.

⁹⁸ *Cessante causa cessare debet effectus*. *Le Marchaud v. Collon*, Cornish Iter., 30 EDW. I (1302), Horwood, 158-160.

⁹⁹ *Bayeux v. Beryhale*, Mich. 3 EDW. II, 15 (1309), 19 SELD. SOC. 110 (*res inter alios acta*); Anon., 2 EDW. II, 106b (1308-9), 19 SELD. SOC. 17 (rule as to wager of law). In *Lilleburne v. Draper*, Hil. 4 EDW. II, 36, 26 SELD. SOC. 68, the translation uses the term "maxim" but not the original.

¹⁰⁰ *Heyling v. Rabeyn*, Hil. 3 EDW. II, 20c, 20 SELD. SOC. 24, 25 (*melior est condicio possidentis*); Anon., Com. Pl., 21 EDW. I (1293), Horwood, 295 (*res inter alios acta*).

¹⁰¹ *E. g.*, in connection with a bond to do the impossible, *Bereford, C. J.*, vouches *uolenti non fit iniuria* — he willed to execute the instrument, there is no wrong in holding him to it. *Hotot v. Rychemund*, Mich. 4 EDW. II, 88, 22 SELD. SOC. 199, 200.

¹⁰² *DE LAUDIBUS LEGUM ANGLIAE*, cap. 8 (written before 1471).

¹⁰³ Apparently Duns Scotus.

¹⁰⁴ *DE LAUDIBUS LEGUM ANGLIAE*, cap. 8. ¹⁰⁵ Written between 1475 and 1481.

¹⁰⁶ "That which our author here calleth a principle, Sect. 3 & 90, he calleth a maxime." CO. LIT. 343a.

¹⁰⁷ LITTLETON, § 3.

¹⁰⁸ LITTLETON, § 90.

that "of every land there is a fee simple in somebody" and that "every land of fee simple may be charged with a rent charge in fee by one way or other."¹⁰⁹ In this sense the rule in Shelley's Case would be a "principle" or a "maxim." The term is used to mean an established rule of the strict law. This is brought out even more clearly in Doctor and Student.¹¹⁰ We are told that there are six "grounds of the law of England": (1) The law of reason, (2) the law of God, (3) "divers general customs of oldtime used through all the realm," (4) "divers *principles*, that be called in the law *maxims*, the which have always been taken for law in this realm, so that it is not lawful for any that is learned in the law to deny them; for every one of those maxims is sufficient for himself," (5) "divers particular customs used in divers counties, towns, cities and lordships in this realm," (6) divers statutes made in parliament.¹¹¹ But these "principles" or "maxims" are by no means general premises for judicial reasoning. They are definite detailed legal rules of narrow content and are said to be "of the same strength and effect in the law as statutes be."¹¹² Occasionally there is some attempt at terse statement.¹¹³ Sometimes there is a comparison and distinction of apparently conflicting rules.¹¹⁴ In another chapter¹¹⁵ ten cases are discussed in which it is doubtful

¹⁰⁹ LITTLETON, § 648.

¹¹⁰ Dialogue I, chap. 8 (1523).

¹¹¹ *Ibid.*

¹¹² Cf. the earlier Roman *regulae*, JÖRS, GESCHICHTE DER RÖMISCHEN RECHTSWISSENSCHAFT ZUR ZEIT DER REPUBLIK, 293.

The following examples will show the nature of the twenty-four "maxims" set forth in chapter 8:

1. "Escuage uncertain maketh knight's service."

2. "Escuage certain makes socage."

10. "A right or title of action that only dependeth in action cannot be given or granted to none other but only to the tenant of the ground, or to him that hath the reversion or remainder of the same land."

20. "He that recovereth debt or damages in the king's courts, by such an action wherein a *capias* lay in the process may within a year after the recovery have a *capias ad satisfaciendum*, to take the body of the defendant and to commit him to prison till he have paid the debt and damages; but if there lay no *capias* in the first action, then the plaintiff shall have no *capias ad satisfaciendum*, but must take a *feri facias*, or an *elegit* within the year, or a *feri facias* after the year, or within the year if he will."

¹¹³ *E. g.*, No. 4, "A descent taketh away an entry;" No. 5, "No prescription in lands maketh a right."

¹¹⁴ *E. g.*, No. 9, "A condition to avoid a freehold cannot be pleaded without deed; but to avoid a gift of chattel, it may be pleaded without deed."

¹¹⁵ Dial. I, chap. 9.

"whether there be only maxims of the law or that they be grounded upon the law of reason." These are rules such as "the accessory shall not be put to answer before the principal" or "if land descend to him that hath right to the same land before, he shall be remitted to his better title, if he will."¹¹⁶ Rarely do we find what we should understand to be maxims today.¹¹⁷ The argument of Serjeant Morgan in *Colthirst v. Bejushin*, reported by Plowden,¹¹⁸ shows the same idea. "There are," he argues, "two principal things from which arguments may be drawn, that is to say, our maxims, and reason which is the mother of all laws. But maxims are the foundations of the law, and the conclusions of reason, and therefore they ought not to be impugned but always to be admitted: yet these maxims may by the help of reason be compared together and set one against another (although they do not vary) whereby may be distinguished by reason that a thing is nearer to one maxim than to another, or placed between two maxims; nevertheless they ought never to be impeached or impugned, but always be observed and held as firm principles and authorities of themselves." At first sight this seems to refer to general formulations of broad principles which are to be the basis of argument and of judicial reasoning. But note the "maxims" which he proceeds to cite and to compare. They are: (1) "There is a maxim that when a remainder is appointed to one, he to whom it is appointed ought at that time to be a person able to have capacity to take the remainder, as else it shall be void," and (2) "that the remainder ought to pass out of the lessor at the time of the livery."¹¹⁹ Clearly we have here a phenomenon of the strict law with which the course of the present study has made us familiar. Reflection upon judicial decisions, regarded as authoritative statements of law, has led to the formulation of rules. These rules are not to be questioned; they may only be interpreted and applied. They have the same

¹¹⁶ See a like sort of "maxim" in Dial. II, chap. 4, Dial. II, chap. 46.

¹¹⁷ "For that law seemeth not reasonable that bindeth a man to an impossibility," Dial. II, chap. 5; "There is an old maxim in the law that a mischief shall be rather suffered than an inconvenience," *Ibid.*; "No time . . . runneth to the king," Dial. II, chap. 36.

¹¹⁸ 1 PLOWD. 21, 27 (1551).

¹¹⁹ *Id.*, 27a. See also SWINBURNE, BRIEF TREATISE OF TESTAMENTS AND LAST WILLS (1590), 59: "For it is a maxime in the common lawes of this realme that he that is outlawed doeth forfeite all his goods and cattelles to the Prince."

effect as statutes. But they may be compared, apparent conflicts may be reconciled, and they may be justified by reason. The next step is to generalize still further to legal principles, and that step was soon to come.

In the writings of Coke the influence of writers upon logic is very marked. As has been seen, his definition of a maxim¹²⁰ goes back to Albertus Magnus, and in defining a "principle" as a synonym of a maxim, he quotes Aristotle.¹²¹ Some of his maxims are detailed legal rules,¹²² as in Doctor and Student, some are legal proverbs,¹²³ and some are logical propositions or formulations of general principles.¹²⁴ Standing at the end of a period of strict law which culminates and is put in its authoritative form in his writings, he uses maxims as did the jurists of the last days of republican Rome when the transition to the stage of natural law was well under way. And Coke's theory is beginning to be that of the period of natural law, if his law and his method are of the period of the strict law. When reason was held to be the life of the law and it was held that the "common lawe itselfe is nothing else but reason,"¹²⁵ the reason was sure presently to supersede the rule as the decisive factor in judicial decision.

A new chapter in the history of maxims in the common law begins with Bacon. Written before Coke's Commentary on Littleton, Bacon's Maxims¹²⁶ definitely abandons the method and ideas of the strict law and uses "maxim" to mean a tersely formulated general principle. Moreover the greater number of his twenty-five maxims represent independent attempts to state principles derived by study of rules in the most diverse parts of the law. Although they are put in Latin, they are by no means mere borrowings from the Digest or the Sext. One, indeed, is taken directly from the Digest.¹²⁷ For the rest, his statement in the preface proves to be accurate: "Some of these rules have a concurrence

¹²⁰ CO. LIT. 10b-11a.

¹²¹ CO. LIT. 343a.

¹²² CO. LIT. 10b, 343a.

¹²³ CO. LIT. 49b, 2 Inst. 63.

¹²⁴ CO. LIT. 70b, 355b, 356a.

¹²⁵ CO. LIT. 97b.

¹²⁶ Written 1596, published 1630. COKE ON LITTLETON, as the preface shows, was written after 1625 and was published in 1628. As to Bacon's preference for aphorisms over continuous argumentative discourse, see CHURCH, BACON, 283-284.

¹²⁷ No. 11, *Iura sanguinis nullo iure civili dirimi possunt*. (DIG. L, 17, 8). This maxim is not in the Sext. Bacon says of it: "They be the very words of the civil law which can not be amended [*i. e.* bettered]."

with the Roman civil law, and some others a diversity, and many others an opposition." After the manner of the time, he put them in Latin, although he had worked them out and framed them himself; "which language," he adds, "I chose as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched in argument."¹²⁸ In the very spirit of the rising philosophy of law which was to make the seventeenth century a period of growth he avoids a hard and fast system so as to "leave the wit of man more free to turn and toss and to make use of that which is delivered to more several purposes and applications."¹²⁹ He uses "rule" and *regula* as synonymous with "maxim." But this does not mean that he uses "maxim" in the sense of a rule of the strict law. Rather he thinks of principles as the materials of the legal system and as having the authority which the immediate past had ascribed to rules. In the discussions under each maxim he quotes maxims of logic¹³⁰ and maxims of the civilians.¹³¹ He nowhere uses the Sext. To the extent that his maxims have passed into common use, Maitland's proposition¹³² that when English lawyers even in the nineteenth century use Latin maxims they are quoting from the Sext, is not well taken. As a first tentative toward systematic generalization Bacon's Maxims deserves an honorable place in the history of the common law. We need but compare one of Bacon's maxims with one of the maxims in Doctor and Student to see that a long step forward has been taken in legal science. To a body of absolute and unquestioned detailed rules, to be compared with one another, to be interpreted and to be applied directly or by analogy, we have added broad general premises for legal reasoning, reached by analysis and comparison of the rules, and by which the rules themselves must presently be tried.¹³³

¹²⁸ BACON, MAXIMS, preface.

¹²⁹ *Ibid.*

¹³⁰ *E. g.*, under No. 24: *Ex multitudine signorum colligitur identitas.*

¹³¹ *E. g.*, under No. 3: *Divinatio non interpretatio est quae omnino recedit a litera.* DIG. II, 7, 5, 3. This is not in the Sext. See also the discussions under Nos. 5, 12, 20, where he draws upon the commentators.

¹³² I POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 196.

¹³³ See for example the way in which Blackstone tried a particular rule of descent by a logical principle reached through study of the rules of descent as a whole. 2 BLACKSTONE, COMMENTARIES, 238-239.

Finch's Law¹³⁴ is a book of much the same type. It is an attempt to put law upon a philosophical basis, to state its principles universally and arrange them systematically, and to subsume the actual rules of law under those principles. Thus arbitrary rules of the strict law are sought to be put in terms of logic.¹³⁵ In Book I there are about one hundred maxims, all in the vernacular. Only one is actually taken from the Sext,¹³⁶ but four others are much like maxims in the Sext.¹³⁷ Probably these were traditionally in use in the courts. For the rest there is an evident attempt to frame original statements rather than to collect current professional proverbs. Noy¹³⁸ is a book of much less value. The classification is borrowed from Finch. Of the thirty-five maxims, one is in the words of the Sext¹³⁹ and three others are obviously variants of the Sext,¹⁴⁰ two are from the Digest,¹⁴¹ and many are but Finch's principles put into Latin. Wingate¹⁴² belongs definitely to the type of compiler. He gives two hundred and fourteen maxims, arranged according to Finch. Four are taken from or variants of the Sext.¹⁴³ Some are taken from Noy.¹⁴⁴ There is little in the way of independent search for principles. Wood,¹⁴⁵ the forerunner of Blackstone, is both systematizer and compiler. In his introduction he sets forth a series of "rules" concerning law, customs, and statutes respectively, which are partly legal proverbs,¹⁴⁶ partly maxims handed down from the Digest and the Sext, and partly

¹³⁴ LAW OR A DISCOURSE THEREOF, 1627.

¹³⁵ Thus the rule requiring a formal release of a sealed instrument is put as a principle of logic that "things are dissolved as they be contracted." FINCH, LAW, bk. I, chap. 1.

¹³⁶ No. 92 is No. 72 of the Sext.

¹³⁷ No. 16 should be compared with No. 35 in the Sext, No. 22 with No. 35 in the Sext, No. 25 with No. 42 in the Sext, and No. 36 with No. 45 in the Sext.

¹³⁸ NOY, TREATISE OF THE PRINCIPALL GROUNDS AND MAXIMS OF THE LAWES OF THIS KINGDOME, 1641.

¹³⁹ No. 9 is No. 18 in the Sext and goes back to DIGEST, L, 17, 29.

¹⁴⁰ Nos. 14, 35, and 47.

¹⁴¹ Nos. 24 and 27.

¹⁴² WINGATE, MAXIMS OF REASON OR THE REASON OF THE COMMON LAW OF ENGLAND, 1658.

¹⁴³ No. 24 is a variant of No. 79 in the Sext (DIG. L, 17, 54); No. 49 is No. 54 in the Sext; No. 122 is a variant of No. 27 in the Sext, and No. 124 is No. 10 in the Sext.

¹⁴⁴ No. 7 is Noy's No. 10.

¹⁴⁵ WOOD, INSTITUTE OF THE LAWS OF ENGLAND, 1722.

¹⁴⁶ E. g., "Common law is common right;" "The law respects the order of nature."

seventeenth-century attempts to state legal principles. Francis¹⁴⁷ must be spoken of fully in another connection. Branche¹⁴⁸ is simply a compiler, presenting a motley collection of Romanist materials from the Digest, the Sext, and the civilian commentators, of legal proverbs and professional sayings of common-law origin, of seventeenth-century attempts to formulate legal principles in their infancy during the transition from the strict law, and of borrowings from scholastic logic. Blackstone, full of old common-law learning, often reverts to the usage of Littleton and of Coke and speaks of "established rules and maxims of the common law," meaning detailed legal rules.¹⁴⁹ Elsewhere he speaks of "general rules and maxims" for the construction of instruments, giving seven rules of interpretation fortified by quotation of Latin maxims.¹⁵⁰ These should be compared with his ten rules for the interpretation of statutes, which are called "rules."¹⁵¹ The parallel with what went on contemporaneously upon the Continent is significant. Beginning with attempts to formulate the customary law in general principles framed after the Roman manner, we end in mere compilations in which, as in the treatment of *regulae* in the Digest and of *brocardica* by the commentators, materials of the most diverse date and historical origin are uncritically heaped together.

Nowadays we know maxims chiefly through Broom.¹⁵² Bacon's maxims represent an attempt to use philosophy creatively. On the other hand the nineteenth century had for a season to assimilate and organize the rich materials which had come into the common law in a period of growth. System was needed, rather than creation. Accordingly Broom's book is an attempt to make maxims the basis of a legal philosophy drawn from within the law whereby to organize and assimilate the infusions from without through the rise of equity and the absorption of the law merchant and the liberalizing tendencies of the seventeenth and eighteenth centu-

¹⁴⁷ FRANCIS, MAXIMS OF EQUITY, 1728.

¹⁴⁸ BRANCHE, PRINCIPIA LEGIS ET AEQUITATIS, being an alphabetical collection of maxims, principles, or rules, definitions and memorable sayings in Law and Equity, 1753.

¹⁴⁹ 1 BLACKSTONE, COMMENTARIES, 68.

¹⁵⁰ 2 COMMENTARIES, 378.

¹⁵¹ 1 COMMENTARIES, 87 ff.

¹⁵² BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED, 1845, 8 ed., 1911. Contains one hundred and three maxims, all in Latin.

ries. The historical idea was abroad also. Hence the historical materials of the maxims, supposed to have been handed down from a remote past, were to be the basis of the organizing and systematizing philosophy. Moreover just at that time the formal defects of the common law and its lack of systematic arrangement were felt acutely. The legislative reform movement was in full tide. Exaggerated respect for Roman legal science was in the air, and Latin maxims seemed to bear a hallmark of science. But the attempt to revive a jurisprudence of maxims came to nothing.¹⁵³ Analysis and a surer and more critical historical method did later in the century, when we were less sure of the exclusive title of the Romans to legal reason and juristic science, what men thought to do earlier in the century by a jurisprudence of maxims transferred from the first century to the nineteenth. A jurisprudence of conceptions soon evolved and was the main engine of nineteenth-century justice.

We are now prepared to take up the maxims of equity.

Roscoe Pound.

HARVARD LAW SCHOOL.

[*To be continued*]

¹⁵³ Its most conspicuous achievement was the attempt to make Bacon's logical proposition with respect to proximate and remote causes a touchstone of legal liability. The result was to confuse the subject for at least a generation. See Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 163, 223, 303; Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633. As to the history of two typical maxims, see Goudy, "Two Ancient Brocards," in VINOGRADOFF, *ESSAYS IN LEGAL HISTORY*, 215-232.

SOVEREIGN COLONIES

I

WHAT IS AN AUSTRALIAN?

UNTIL a very short time ago the only answer to this question would in law have been that there is no such person. Popular language spoke of "Australians," but in a way far too loose and undefined to serve as a legal conception. An "Australian" simply meant a person who had an intimate connection with Australia, involving some residence there at not too remote a period.

Birth in Australia was not necessary. None of the earlier colonists were born in Australia. Long residence in Australia was scarcely necessary, and certainly not sufficient. A Manchester man who had spent his early years from two to twelve in New South Wales would not at fifty be termed "an Australian." Neither did domicile in Australia enter into the popular calculation: the public does not know what domicile is. The possession of estates and property in Australia formed an element in the popular idea, but certainly did not constitute the whole content of it; the carrying on of business in Australia formed another element; well-known sympathies and likings formed another. The whole idea was floating and uncertain. It was merely, to use a descriptive phrase, varying with the mentality of the speaker to say that such and such a person was "an Australian."

In law there was no foundation for the term, any more than there is for the term "a Scotsman," or "an Irishman." There are no Scotsmen; there are no Irishmen. In law there is no differentiation between any of the subjects of the Crown. A denizen of Madras, if he comes to London and acquires the necessary slender justification by residence, can elect and be elected to the House of Commons. A native of British India may be a Secretary of State, a peer, and sit and vote in the House of Lords. The only exception to this generous rule, which decrees that every person who lies at the unlimited power of the Crown shall have all the constitutional rights of modifying the way in which that power shall be exercised, is to be found in the case of the East Indian "protec-

torates," so styled. It is only by the most transparent of fictions that these are held not to lie at the absolute disposal of the Crown. In fact, the British "Resident" is the only effective ruler of such a "protected" country: the will of the British Government prevails there, as clearly as, and more effectively than, it prevails in Lancashire. Yet the English judges persist in seeing in the shadowy and powerless Sultans more or less independent rulers because the Foreign Office tells them so (*i. e.*, certifies these territories to be "foreign"), and in consequence the rulers and people alike of these countries do not enjoy in the courts the rights of British subjects, though they are subject in effect to all their obligations and have lost the moral protection of international law.¹ In the Indian peninsula this peculiar state of things has long existed; probably by this time it has deprived the so-called "native states" of every shred of international status. In the Malay peninsula and in Zanzibar the process has perhaps not quite proceeded so far. It is possible that some spark of independence remains in these districts, though there is nothing to differentiate their daily administration from that of a Crown colony, and all their foreign relations are conducted by Great Britain. Governor Jervois of Singapore, who hesitated at first whether to annex the Malay States or not,² decided that it would be better to "protect" them — "as it would be very inconvenient that these people should acquire the rights of British subjects."

By this thin fiction, therefore — for it is nothing better — Britain rules (and rules, I venture to think, well) in these localities without any but a moral responsibility to the inhabitants: a situation abhorrent to English constitutional principle. Foreign countries enjoy the protection of international law. British subjects enjoy the protection of constitutional law. But the inhabitants of these places enjoy neither — and (as in Baroda, Selangor, and Manipur) their very rulers are subjected arbitrarily to the criminal laws invented *ex post facto* for the occasion by their real masters.

But this is a digression. Malayans and Cochinese, and their congeners, though subject to the power of Britain, are not British

¹ Cf. the Manipur Case, where the "foreign" potentate was tried, condemned, and slain under no law whatever.

² See "Debt-Savery in the Malay Peninsula," 26 LAW MAGAZINE & REVIEW (London), 312.

subjects. Every other person born within the territories, subject to the power of Britain, is. And there is no distinction between them. The sole criterion is birth within the allegiance — which includes of course birth within the lines of a British army,³ and excludes the issue of foreign envoys and invaders.

An Australian is born within the allegiance no less and no more than a cockney. A Parsi born in Bombay or a Tamil born in Singapore stands upon an absolute equality with him. None of them have any secondary, subordinate, or co-ordinate allegiance, from the viewpoint of English law.

There never has been any legislation to affect this broad principle and to attribute to individuals any special allegiance to any particular division of the royal dominions. Allegiance is personal. It is allegiance to the King; and while William IV was King of Hanover, Germans voted freely at English elections, for they were the fellow subjects of Englishmen.⁴

It was declared by the House of Commons in 1879, on the report of a Select Committee appointed by the Law Officers, that a member (Sir B. O'Loughlin) had vacated his seat by the acceptance of office under the Crown: to wit, as Her Majesty's Attorney General for Victoria.⁵

The establishment of the so-called "Commonwealth of Australia" — a federation of the Australian colonies — in 1900 was oddly thought by some continental publicists to have introduced a change in this respect. Had such been the case, it must have been the case thirty years previously, when Canada was federated into a "dominion." But of course nobody even thought of such a thing. The mere federation of colonies introduces no change into their relations with the metropolis.

If authority were wanted to show that there is no legal bond uniting individuals to particular sections of the empire, one would cite *G. Gibson & Co. v. Gibson*,⁶ decided quite recently, in 1913. The English courts will give effect to the judgments⁷ of foreign courts in cases where the defendant is a subject of the foreign power

³ By statute, it includes also the children (formerly also the agnatic grandchildren) of British parents.

⁴ See *Isaacson v. Durant*, 17 Q. B. D. 54 (1886).

⁵ 245 HANSARD'S DEBATES, 1104 (1879).

⁶ [1913] 3 K. B. 379.

⁷ For a liquidated amount.

whose courts they are. They would give effect to the judgment of a French court against a Frenchman. They were now asked to give effect to the judgment of a Victorian court against a "Victorian." The courts in effect said that there was no such thing. They would give effect to a Victorian judgment against a British subject — or a French subject, for the matter of that — domiciled in Victoria. But this defendant was not so domiciled. It could only be said that he was born in Victoria. But this made him a British subject, not a Victorian subject. The analogy of a foreign country thus failed, and the plaintiff was told that he could not sue a British subject in Victoria merely because he happened to be born there.

It would probably be untrue to say that the decision of any French tribunal would be accepted and enforced against any Frenchman. A Parisian sued in a New Caledonian court might probably have a successful defence in England to an action on the judgment. It must probably be the judgment of a court having, on French principles, jurisdiction in the matter. Thus an American, all of whose connections and citizenship are in Pennsylvania, would hardly be held liable, merely because he is an American citizen, to implement in England a judgment rendered in Arizona. It would be necessary to show some principle common to all the courts of his nationality which subjected him to the Arizona jurisdiction. But the principle was laid down without much adverting to the fact that there may be different jurisdictions in one political nationality. It is just possible that it may have been thought that the judgment of any court of the defendant's political sovereign ought to be enforced in England against him. His sovereign's court ought to know best whether it had jurisdiction over him or not. It is difficult to participate in such an attitude, for it seems to invest the most obscure of local courts with an unlimited jurisdiction (so far as English courts are concerned) over all and sundry the subjects and citizens of the realm. The better opinion surely is that the national judge is really accepted as a valid judge only within the limits of his jurisdiction: it is not for him to say what they are.

It does not therefore follow from *G. Gibson & Co. v. Gibson* that a New Caledonian judgment might be enforced in London against a Parisian, whilst a Victorian judgment would *not* be enforced

against a Londoner. What the case establishes is simply that there is nothing corresponding to political nationality which can form a valid claim to jurisdiction on the part of a self-governing colony. It has no subjects or citizens.

So, at least, the law stood before the signing of the Versailles Treaty of Peace in 1919. That remarkable instrument was drawn up in a remarkable way. The British King was one of the High Contracting Parties, and His Majesty was represented for the purposes of signature by five Scots and English gentlemen and "for the Dominion of Canada" by two more, "for the Commonwealth of Australia" by other two, "for the union of South Africa" by another pair, "for the Dominion of New Zealand" by a single personage, and "for India" by H. H. the Maharaja of Bikanir and Mr. Montague. Bikanir is a so-called "native state," technically foreign⁸ territory: it may be important to note this.

It is really difficult to see what is the grammatical sense of this phraseology. What is the meaning of a principal being represented by A. for Z.?

Of course the underlying truth is that the old conception of sovereignty has gone by the board. But we are not dealing, and the treaty was not dealing, with underlying truths, but with definite legal conceptions. And so long as a single individual allegiance to the person of the King is the theory of British constitutional law, the engagements of the King must be made in accordance with the theory. Two courses alone seem open to the interpreter.

Either the mention of signature "for" the colonies was ornamental only, or there is no longer a single individual allegiance throughout the British dominions.

The former course seems the preferable one. Signature by A. on behalf of N. "for" Z. may, without straining language beyond the bounds of possibility, be supposed to mean "in honour of" Z. So in America one "names" a child "for" a relative, or a battleship "for" a city. This would certainly be the interpretation adopted if a plenipotentiary had signed on behalf of the King "for Scotland."

⁸ The Maharaja is not constitutionally a British subject, yet he cannot choose but do what the British government tells him. *Internationally* there is no doubt that Westlake was right in declining to recognize that such princes have any shred of international status. *Constitutionally* the matter may have a different complexion.

But the treaty went further. Passing over the curious wording according to which six German gentlemen purport to sign in the name of "the German Empire and of each and every component State" (intended to represent something not obviously identical, *viz.*, "Germany"), we find the "Covenant of the League of Nations" declaring in its first Article and in its Annex that among its charter members are the British Empire, Canada, Australia, South Africa, New Zealand, and India. The curious feature leaps to the eye that all but the first of these are placed in what lawyers and compositors call the second margin: *i. e.*, they are spaced back so as to suggest that they are included in the empire. What does not leap to the eye is that there is no mention of the United Kingdom; that Newfoundland, though a self-governing colony, is not included; and that India is an ambiguous expression, for part of Imperial India is constitutionally within the British dominions and part is not. And it appears, likewise, on reflection, that although the charter members are said in the covenant to be "signatories" of the treaty, the list of signatories does not literally comprise either "The British Empire" or "Canada" or "Australia" or "New Zealand" or "India."

Does it not seem very arguable that by "spacing back" the names of the colonies the intention was to emphasize that the sole British signatory of the treaty was the King? No doubt His Majesty signed in different ways, but not in different capacities. He is not King of Canada or of South Africa; and if he is Emperor of India it is quite clear that that is an ornamental title merely (it was conferred as such on Queen Victoria and her successors by an Act of the British Parliament). The charter members of the League are the victorious signatories of the treaty — and one of them is the King of the United Kingdom of Great Britain and Ireland, and of the British dominions⁹ beyond the seas, Emperor of India. Canada is not a signatory: two gentlemen signed the treaty "for Canada" but *representing* "the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India" — exactly the same person. Is it not the probable intention that King George is the sole British signatory of the treaty, and the British Empire (comprising, it is true,

⁹ "Dominions" is here used in its proper sense, including all the possessions of the Crown, self-governing or not.

and specially naming, Canada, Australia, South Africa, New Zealand, and India) the sole British member of the League of Nations?

The alternative is a very serious one. It is that the British Empire has broken up. If the King's plenipotentiaries sign "for Canada" and thereby bind Canada and Canada only, it is clear that a new state, semi-sovereign at least, and probably wholly sovereign, has joined the family of nations. Mr. Berriedale Keith — than whom there is no higher authority — seems to incline to this solution in the *Journal of Comparative Legislation*,¹⁰ doubting whether the admission of the colonies to sign the Treaty of Versailles is not incompatible with the constitutional theory of the unity of allegiance. Dr. Keith's opinion would, indeed, be nearly conclusive, only that it is casually and not very positively expressed.

We have hitherto not noticed the provisions of Article 1 of the Covenant, which allows any "fully self-governing state, dominion, or colony" to become a future member of the League. This certainly suggests that the British colonies and India are intended to be independent original members: but its meaning is far from clear, because the article immediately proceeds to speak of the intention of such state, dominion, or colony "to observe its international obligations." Now a colony¹¹ has no international obligations, any more than you or I have. It would therefore seem that only states and colonies enjoying a definite international status are here intended. That is, they must be sovereign or semi-sovereign.

And this does not tell very strongly as an argument either for or against the semi-sovereignty of the British colonies. If they *are* semi-sovereign (or, of course, if they are sovereign) then they are included in the list of members. If they are not, then they may be included when they are; on the footing that they are not "named in the Annex" for *this* purpose, but only as constituents of the

¹⁰ 3 Series, vol. 2, part 4.

¹¹ "Dominion" is a misleading and ambiguous word, the sole object of which is to gratify the *amour propre* of large colonies. It is constantly being confused with "dominion" in the wide and proper sense of territorial possessions. Its use dates from a very recent period. As a proper noun it is the special title of Canada, — of course it goes back to 1870 at least, — but as a common noun, meaning "large self-governing colonies," it would be surprising if an instance could be found of it antedating the twentieth century. Its official use is very recent indeed.

empire.¹² The clause may be looking wholly to the future. That they are not members of the League,¹³ except as components of the British Empire, seems strongly supported by the consideration that it is in the highest degree improbable that disputes between the colonies and the mother-country should be subjected to diplomacy, arbitration, and the mediation of the League Council. Moreover, would their votes be excluded as "parties to the dispute" in case of a British dispute under Article 15? And how can they be said to have "existing" political independence under Article 10? Surely India has no independence, at any rate; yet if Canada is a member, so is India. But here we may leave this branch of the subject with the sole remark that when there is a dispute or doubt as to whether an integral state has impaired its sovereignty, the presumption is always in favour of the *status quo*.¹⁴

II

COLONIAL NATIONALITY

What is the position of the colonies so made sovereign or semi-sovereign, if the Treaty of Versailles has changed their status, in respect of population? If they are nations, who possesses their nationality?

If they are only semi-sovereign, the question is just as insistent as in the case where they are sovereign. For the very essence of a

¹² Article I of the League Constitution is not artistically framed. It first makes Members of "the *Signatories* . . . named," and then provides for the future admission of any "*State, Dominion or Colony* not named." There might be colonies named which are not signatories, nor named *as such*.

Again, in providing for future admissions, the Article speaks of the admission of "fully self-governing States, Dominions or Colonies" which intend to observe their international obligations. As we have seen, these words are unintelligible in the case of a colony. Are we to try to construe them in some occult way as applicable to colonies? Or are we to suppose that by "colonies" is meant internationally independent powers? Or are we to apply the words to "fully self-governing states" alone?

¹³ They are clearly not "Allied or Associated Powers." Cf. German Treaty of Peace, § 296 (4 (e)).

¹⁴ As to the power of the Crown to grant away the high functions of government, and thus to create Counties palatin of the Continental pattern, see *per* Lord Brougham in *Dyke v. Walford* (5 Moore's P. C. 434 (1846)). It would seem that the whole of the old learning regarding the relations of vassals to suzerains will now become of the first importance in determining the legal relations of the colonies to the United Kingdom. *Mi-souverain* states, which had been thought obsolete, have reappeared in a very unexpected form.

semi-sovereign state is that its people do not have the nationality of the suzerain nor are they his subjects.¹⁵ If Britain's action toward the great colonies has made them sovereign or semi-sovereign, then it has deprived their people of British nationality.

It seems to be indisputable that His Majesty can do this. The Crown can cede territory and dissolve allegiance. It may be doubtful whether the tie of sovereign and subject can be severed in individual cases without the subject's consent. But when it is severed along with territory, there is no doubt. The Transvaal colonists, before 1881, were in law British subjects. The Queen granted them independence and they ceased to be such. Individuals who objected had no choice; and the question of who were comprised in the grant was but little doubtful. It was "the inhabitants" of the Transvaal.

But when we have no such definite grant or treaty, but the new sovereignty arises tacitly and by force of circumstances, the question of what persons have been extended from the old sovereignty, or at least from direct dependence upon it, becomes very puzzling. No doubt persons domiciled, in the strict Anglo-American sense, in the new state must be supposed to wear its nationality. But what about persons born there? and what of residents whose comorancy falls short of domicile? After all, "Australia" is an expression which, if used in conferring independence, denotes some body of persons, and not merely a tract of territory. What persons are they? The facile answer would naturally be, "The inhabitants;" but there seems to be no very solid precedent or reason for it. "Inhabitants" is a word often used, it is true, in explicit concessions. That does not say that it is to be read into implicit ones. Has it even been laid down authoritatively that a cession of territory carries the "inhabitants"? Perhaps, after all, it might be wisest to recur to the old and well-rooted criterion of birth: those are subjects of New Australia who are born in Australia. It is a very concise and certain criterion, and would cover most of the inhabitants. Its defect would be that it is inconsistent with the theory of allegiance. A person who was born within the allegiance of the King is to lose the benefits of that allegiance, although living perhaps in the United Kingdom, and altogether undesirous of

¹⁵ The Ionian Ships, 2 Spinks' Ecc. & Ad. Reports, 212 (1855).

being attributed to Australia. On the whole, the text of inhabitancy rather than that of birth seems certain to be adopted in practice.

Any endeavor to establish a double allegiance to Australia and the empire is doomed to failure. No man can serve two masters. If a nation acquires an international status, it is impossible that its subjects should be internationally in the same position as the subjects of another country. They may receive equal treatment, by municipal concession, but they cannot be considered in the same light as subjects by foreign countries.

It may be desired by some that Australia should have a measure of sovereign independence, and yet that the unity of British citizenship should not be impaired. It is a desire for a chimera, and it cannot in the nature of things be justified.

III

SUITS BETWEEN COLONIES

Can one British colony sue another? We are so familiar with the principle of state sovereignty that we forget that the colonies are not sovereign: not even (unless the Versailles Treaty has worked a change) *mi-souverain*. Nor are they corporations. The government of the colony is simply the King acting by a particular set of agents. The suit of one colony by another colony would be like the suit of the cook by the butler because too much was spent on coals, or the suit of the War Office by the Board of Agriculture because men who might be soldiers were kept to work at the harvest.

The colony is merely a particular aspect of the royal power. "The adjustment of interests as between the different parts of the Empire is in general," says Harrison Moore, "not a matter for the consideration of the Court."¹⁶

The cases cited by Professor Caldwell in the *American Journal of International Law*,¹⁷ in which one plantation appears to sue another before the King in Council, are all to be explained as not

¹⁶ COMMONWEALTH OF AUSTRALIA, 74, citing Bateman's Trusts, 15 Eq. 355 (1873); Oriental Bank Corporation, 28 Ch. D. 643 (1884); Monk v. Ouimet, 19 L. C. J. 71 (1874); *sed cf.* Ontario v. Mercer, 8 A. C. 767 (1883); St. Catherine's, etc. v. Reg., 14 A. C. 46 (1888). See as to federal colonies Maritime Bank of Canada v. New Brunswick, [1892] A. C. 437.

¹⁷ Vol. 14, pp. 38, 39.

being really judicial determinations, but merely the exercise of administrative power, though proceeding on more or less judicial lines.¹⁸ This seems to be the view of Professor Caldwell himself; for though he speaks of the Privy Council as a court (and sometimes, as at *ibid.*, p. 40, terms its Board of Trade a "high court"), he appears to recognize that its decisions had all the character of administrative determinations both in their nature and results. His Majesty, that is, decided the proper course to be taken, sitting in the Privy Council, after that body had maturely examined the case, and had possibly consulted the judges. It is as though the master of a large establishment, who might perfectly well issue an arbitrary order, found it best to hear his coachman and game-keeper as to their use of ground at the back of their respective cottages — perhaps with the aid of the family solicitor.

Professor Caldwell then, with some surprise, finds this administrative jurisdiction of the Privy Council disappearing entirely for a century. But there is nothing surprising in the matter. The decay of the jurisdiction coincided with the transfer of the colonies from the Board of Trade and Plantations of the Privy Council to a Secretary of State. It was a purely administrative jurisdiction, and a new administrative department was ultimately created to deal with colonial administration. The creation in 1801 of a third Secretaryship of State, styled "for War and the Colonies," was only the climax of the system of ministerial control which provided the Crown with a simple and constitutional channel for the exercise of the prerogative. Professor Caldwell thinks that the jurisdiction arose again on three occasions in the nineteenth century, — in 1846, 1872, and 1886. In fact these cases, so far as we have been able to consult them, were of a different complexion. The modern Privy Council cases to which Mr. Caldwell refers do not seem capable of being linked into the old administrative ones at all. They appear to be dry legal cases of positive law. In the first (1846, the *Cape Breton Case*¹⁹) there was no suit by Cape Breton against Nova Scotia, and could not be, for the very question was

¹⁸ This seems to be only partially true of the first case cited; for the matter was referred to the chief justices for their opinion and was argued with great solemnity. It is interesting to see the non-severance of administrative and judicial powers persisting into the eighteenth century.

¹⁹ 5 Moore's P. C. 259 (1846).

whether the colony of Cape Breton had any separate existence. Captured from France in 1763, it had been annexed to Nova Scotia. But in 1784 certain provisions had been made by the Crown for the summoning of a separate Assembly for Cape Breton,²⁰ and the proceedings in the Privy Council were taken by individuals (relying on *Campbell v. Hall*²¹) to have these provisions carried into effect. It was not a case of two sets of the King's servants disputing as to the meaning of their master's orders; it was a case of making the King's servants do their alleged duty. The second case, described as "the Pental Island Case, between New South Wales and Victoria in 1872," we have been unable to trace. The question of the boundary between Manitoba and Ontario which Professor Caldwell cites, was referred to the Privy Council under the Statute 3 & 4 Will. IV, c. 41, which is so general in its terms as to include the reference of any questions, and which creates a purely consultative jurisdiction. It cannot therefore be cited as an instance of the old prerogative practice. The decision, says Keith,²² was "accepted" by the two provinces and embodied in the Imperial Act 52 & 53 Vict., c. 28. It was not, therefore, advice to the Crown as to the exercise of its prerogative, like the old Privy Council "decisions." A disputed boundary between New Brunswick and unconfederated Canada arose in 1851, and it is interesting to note the mode of settlement. This was by arbitration—the arbitrators to report to the British government. Both parties chose (if I remember rightly) Dr. Lushington as the oversman. On the report of the arbitrators, the boundary was enacted as recommended by them, by Statutes 14 & 15 Vict., c. 63, reciting that "it is *expedient* that the boundary should be settled in conformity with the award." This shows that there was no question of legal right, but only of expediency. Colonies are not corporations.

It remains to deal a little more in detail with the statutes and cases which look like cases of suit brought by one colony against another.

The British North America Act (1867), which confederated

²⁰ In 1820 the separate sub-governor and council for Cape Breton were likewise suppressed, and the district merged (so far as the Crown could merge it) in Nova Scotia.

²¹ 20 State Trials, 239 (1774).

²² 3 RESPONSIBLE GOVERNMENT IN THE DOMINIONS, 1383.

Canada, made no provision for such suits. But an act passed in Canada, under its provisions, in 1875 provided shortly that the Supreme Court of Canada might have a certain jurisdiction between colonies. The wide jurisdiction conferred upon it to decide any question referred to it by the Governor-General appears to be consultative only; but it has a facultative jurisdiction as between Canada and a province of Canada, or between two provinces. This is doubtless in imitation of the powers of the United States Supreme Court. And it is important to remark that it required a legislative interposition. More important is it to remark that no coercive jurisdiction was conferred.²³ The Supreme Court was placed simply in the position of an arbitrator — and (most important of all) it did not necessarily follow that the colonies were thus tacitly invested with legal rights and a jural personality. For such arbitrated disputes need not involve the assumption that legal rights were concerned. Had the jurisdiction been coercive, it must infallibly have been intended to determine legal rights. As we see in our own day, a tribunal to determine what is desirable as between nations or classes, and not what is legal, has no chance of acceptance as a coercive authority. It becomes a legislature if it is so accepted.

Had the jurisdiction been coercive, it must have followed that a series of legal rights was attributed for the first time to each colony. Previously, the individual colonists had rights; the Crown had rights; but the colony, as such, had none. But there is no use in suing in a coercive jurisdiction unless you have a definite right to assert. Consequently, the admission of the Canadian provinces to sue in a coercive court would have been a tacit clothing of the Canadian provinces with rights — though it could not be clear exactly what they were. They would have become juridical persons. Previously, if the King (*i. e.*, the imperial government) had laid down boundaries for Quebec and Ontario, it was for the good of the empire that he did so. Individuals might complain if crown officials disregarded these boundaries, once laid down, to their prejudice. But colonies could not complain, for they were mere

²³ When the so-called Exchequer Court was created to decide cases to which the federal authority was a party, it was not, it is believed, expressly stated that such cases of dispute *as to legal rights* might exist with provincial authorities. The assumption seems to have been subsequently made, but, it would appear, incautiously.

modes of exercising the powers of government. If the forester settles to bring in fifty rabbits for the royal dinner, the cook cannot sue him, however shamelessly he fails to act up to his intentions. The colony had no *raison d'être* of its own independently of the King (or, if we put sentiment for legality, of the People of the British race). To allow one colony to sue another was to allow the King to sue himself, and to pay into one pocket (less lawyers' fees) what he took out of the other.

In itself, the Canadian legislature of 1875 was not inconsistent with this. Persons carrying on the King's government in Canada were now provided with a judicial way of settling their official disputes by mutual consent. It did not follow that the colonies were clothed with a juridical personality, and regarded as entities in themselves, and not as being mere geographical expressions for various districts in which particular forces of government respectively prevailed.

It is interesting to notice that this last conception was emphatically and authoritatively proclaimed at that very moment in a case which is of the highest interest in this connection.²⁴ This was *Sloman v. The Governor and Government of New Zealand*.²⁵ The action was brought by a German of Hamburg — an emigration agent who considered himself aggrieved by acts of the colonial authorities. He applied for "substituted service" of English process on the defendants — not, presumably, having much desire to voyage to the antipodes to sue them in their own courts. The Common Bench refused the application (Coleridge, L.C.J., and Archibald, J.). Mr. Sloman appealed to the Court of Appeal, and James, Mellor, and Bagallay, L.JJ., all adhered to the view that nothing could be done. There was no defendant. "There is no such corporation as the Governor and Government of New

²⁴ See and distinguish *Newfoundland v. Newfoundland Ry. Co.*, 57 L. J. P. C. 35 (1888). A contract to build a railroad had been made between a colonial government and a corporation. The corporation was admitted to sue the government — but the proceedings may have taken the appropriate form of a suit by or against the Queen. Or Newfoundland legislation may have provided for the virtual incorporation of the government. It is not apparent from the report what form the proceedings took. The case was of course purely a colonial one; the Privy Council decided it exactly as if they were sitting in Newfoundland as the ultimate court of appeal there. Examination of the Newfoundland Act, 9 May, 1881, incorporating the railroad, might then throw some light on the subject.

²⁵ 1 C. P. D. 563 (1876).

Zealand," said the Bench: and as the Governor was not sued personally, there was no one to sustain the rôle of defendant. Presumably, a petition of right might have lain to the Crown. The case arose out of contract: it was an emigration agreement to which the parties were Her Majesty the Queen "on behalf of the colony," the colonial agent-general in London, and Messrs. Sloman and Loesner. The case is conclusive that there was no such thing as "New Zealand" in the mind of the judges, except as an island in the South Seas, ruled in a particular and popular way by the agents of the Queen. Under the Canadian Act of 1875, so inconsistent in its tendency with this view of a colony as a mode of government, very few cases have actually been decided. It may be well briefly to indicate a few which seem to lie within its scope.

*"British Columbia v. Canada"*²⁶ was a reference to the Supreme Court of a question which had arisen on the construction of the Canadian Pacific Railroad, and which a British Columbian Act had provided should be referred for decision to that court. It was clearly not a case of coercive jurisdiction over the province or over Canada. Neither were the cases which involved Ontario and Canada reported in the Law Reports.²⁷ The first of these was referred to an Ontario court in accordance with the provisions of the Ontario Act, 53 Vict., c. 13; the second involved the famous controversy about the application of the federal "Temperance Act, 1886," and was referred by the Viceroy under the Canadian Act, R. S. C., c. 135. The third (a dispute about lakes) was referred under an Ontario Act, and the fourth (concerning fisheries) in the same way as the second. Canada, Ontario, and Quebec referred questions arising under certain Indian treaties to the arbitrators, with appeal to the court, by similar special statutes of Canada, Ontario, and Quebec.²⁸ Manitoba and Canada referred certain financial adjustments to the court,²⁹ by Statutes 48 & 49 Vict., c. 50 (Canada), 49 Vict., c. 38 (Manitoba). Prince Edward Island and Canada referred questions arising out of the Temperance Act in the same way.³⁰ A difference as to the rights of provinces to

²⁶ 14 A. C. 295 (1888).

²⁷ [1894] A. C. 189; [1896] A. C. 348; [1898] A. C. 247, 700.

²⁸ [1897] A. C. 199.

²⁹ [1904] A. C. 799.

³⁰ [1905] A. C. 37.

create "Queen's Counsel" was settled in 1898 by the Privy Council — but, again, simply under a reference by the Ontario Governor to the Ontario courts in accordance with Ontario law. A question between Alberta and Canada was similarly referred prior to 1915.³¹ In fact the only case reaching the Privy Council, in which two co-ordinate colonies have joined in a reference, apart from the federal power, is apparently that of *Ontario v. Quebec*,³² a question of school funds, and itself referred under special legislature, and perhaps the *Ontario v. Manitoba* case of 1886 mentioned by Mr. Caldwell.

All the cases of this type, therefore, resemble rather arbitration than judicial decision. The jurisdiction is not coercive. The colony or province is not clothed with a juridical personality which can *claim* protection for rights. It is all a matter of settling official susceptibilities amicably and by mutual consent. "The answers are only advisory and will have no more effect than the opinions of the law officers" — per Lord Loreburn, C., in *Ontario v. Canada*.³³ But they *look* very like the creation of a real personality in the colony or province and they chime in very well with the growing self-consciousness of the colonies. And so we find that the Australian "Commonwealth" Act of 1900, throwing off the restriction that the legislatures³⁴ must concur in the reference to the court, gives a coercive jurisdiction to the High Court of Australia, and thus clothes the several Australian colonies with a juridical personality, with the corollary of legal rights.

And in 1914 we get the first real case of a legal right being admitted to inhere in a British colony as against another colony. The boundary line between the colony of South Australia and the colony of Victoria was originally laid down by Her late Majesty by reference to astronomical observations. It was an imaginary line. A survey had subsequently laid it down by metes and bounds — inaccurately. The question was, which was the true boundary. Now, in contemplation of law, it did not matter — except to in-

³¹ [1915] A. C. 363.

³² [1903] A. C. 39.

³³ [1912] A. C. 571, 589. The practice of stating questions in this way has often been adversely commented on; *e. g.*, by Lord Moulton in *British Columbia v. Canada*, [1914] A. C. 153. In fact, in one case, the Privy Council refused to answer half the questions. See per Lord Haldane in *British Columbia v. Canada*, [1919] A. C. 164.

³⁴ Not even the concurrence of the *governments* is sufficient, it will be noted, in Canada.

dividuals. Individuals might maintain their view in the courts, but neither colony was interested in the question, as such. The colony was a mode of government and was totally unconcerned as to what its limits were. In the great *St. Catherine's Case*,³⁵ Indian tribes had actually released lands to the government of Canada for the benefit of Her Majesty; and the effect was held to be to put them under the control of the government of Ontario. If the King, or the people, tell you to govern South Australia in accordance with the ideas of its population, it does not matter to you whether South Australia covers fifty thousand miles or two thousand. Your job is to govern it — and if you have any doubt of your sphere, then to take the instructions of those who send you.

But section 75(a) of the Australian Act implies that provinces have legal rights, since they can go to law. The governments of South Australia and Victoria therefore very amicably resorted to a true lawsuit in the High Court, like two little country towns. The court, affirmed by the Judicial Committee of the Privy Council, declared in favour of the recognized, though inaccurate, metes and bounds. It is highly important to observe that this was no abstract declaration of right. It was a judgment for possession, and it really seems to an English lawyer inconsistent with legal and constitutional theory. The "possessors" of the land in question were the freeholders. The judgment did not effect, and was not intended to effect, their private rights. True, in the theory of English law, the King is the lord paramount of all land, and, in a sense, may be said to be "in possession." But there has been nothing transferring this eminent domain from the King to something called South Australia, or the state of South Australia. All that has been done has been to enact how the King shall exercise his powers of government there. The King therefore possessed the land in question, in any view of the case. What was really in dispute was, who was entitled to exercise the powers of government over it? That is not "possession," and nothing like it. In awarding "possession," therefore, of the strip between the two boundaries to the successful litigant, the High Court seems to have created a new and rather startling right, under a highly inappropriate name. Suppose two counties are in dispute regarding their respective

³⁵ *St. Catherine's Milling & Lumber Co. v. Reg.*, 14 A. C. 46 (1888).

boundaries — the corporations in charge of their business can sue each other. But it would be absurd if they sued for "possession." Possession is not a word appropriate to denote the exercise of powers of government and regulation — except in International Law.

The whole matter reveals the loose thought and the ambiguous conceptions which pervade modern constitutional theory. "States" are created with liberty to "sue" each other, without anybody's apparently thinking it desirable to ascertain what their rights are to be. A municipality does not own or possess the land and houses within its orbit, though it may quite well own land outside. Yet the province is treated as though it did.

The confusion between the rights of ownership enjoyed by independent states *inter se* and the derivative powers of government committed to municipalities and counties is apparent. The two conceptions meet and form in an aching sea of frothy uncertainty. We can see how the American conception, resting on a logical basis of state sovereignty and state allegiance, filtered into Canadian practice as a voluntary and convenient mode of settling intercolonial disputes and difficulties by consent. And we have seen how this was transmuted in Australian practice into the creation of true legal municipal rights residing in the several non-sovereign colonies, without the slightest definition of what those rights were. The result cannot be called satisfactory or creditable; but it is only one example of the universal modern indifference to accuracy in drafting public documents which is making puzzles of our statutes and pitfalls of our treaties.

In South Africa no machinery has been provided for the settlement of intercolonial differences. Professor Caldwell professes to find a difficulty here, and suggests possible resort to the Privy Council ³⁶ by the constituent provinces. But the difficulty does not really exist. If we keep steadily to the constitutional conception of a colony as a geographical expression coupled with a particular channel for the exercise of the powers of government therein, we shall see that there is no need to erect colonies into imaginary persons with rights and obligations in order to get justice done. If

³⁶ As to *appeals* to the Privy Council from the South African courts, see *per* Dr. Keith in J. Soc. COM. LEGIS., 3 Series, vol. 2, pt. 3, pp. 328, 331, and Whittaker v. Durban there cited and discussed.

territory is claimed as Natalian, it can only be for the purpose of exercising some power of the Natal government therein. Let that asserted power be actively made use of or resisted, and at once some individual has done to some other individual an act which is either a wrong or not, according as the claim is invalid or justified. An ordinary lawsuit will follow, and the Supreme Court of the Union will decide the boundary question. As Dicey has remarked, this habit of deciding constitutional questions incidentally to the decision of concrete cases is peculiarly English, and lies at the root of much that is valuable in English constitutional ideas. Differences between the federation and the colony may not travel as far as Whitehall; but an independent authority (so far as a federal authority can be impartial between the federal and local executives) will decide them. In this simple way many of the leading Canadian constitutional questions have been decided. The validity of the Canadian Temperance Act, 1878, was decided in 1882 by the Privy Council in this fashion, in a private appeal from New Brunswick on a writ of *certiorari* against a conviction by a local justice.³⁷ The question of the right to escheats in Ontario was decided similarly in *Ontario (A. G.) v. Mercer*,³⁸ and many other instances are reported in Cameron's "Canadian Constitutional Cases of the Judicial Committee," including the great cause of *St. Catherine's Milling & Lumber Co. v. Reg.*,³⁹ which involved questions of ownership as between province and federation, and that of *Compagnie Hydraulique v. Continental Heat Co.*,⁴⁰ which decided that an earlier Canadian statute cannot be overridden by a later provincial one, and thus made Canada supreme over the provinces in their common sphere.

IV

OWNERSHIP AND GOVERNMENT

When the Crown erects a colony with representative institutions and "responsible" government, the quasi-omnipotence of its legislature obscures the question of its proprietary rights. As the legislature can do pretty well what it pleases — could, in fact, embark on a socialist régime — questions of property assume a

³⁷ *Russell v. Reg.*, 7 A. C. 829 (1882).

³⁹ 4 A. C. 46 (1888).

³⁸ 8 A. C. 767 (1883).

⁴⁰ [1909] A. C. 194.

secondary importance. But pending legislation, and in federal colonies where the powers of legislation are divided and may be difficult of exercise, the question of state ownership is really a very important one. And it is very difficult.

Unlike the United States, the British imperial system does not start with the hypothesis of corporate units which unite to form the whole. Except in a few instances of Indian princes, the various parts of the empire are mere forms of the activity of the national will, or in legal speech, the Crown. The Crown creates a colony, prescribes its mode of government, leaves that government to work undisturbed, — but never sees in that creation anything legally independent of itself.

What becomes of the Crown lands in such a colony, when representative institutions and "responsible" government have made it practically independent? The answer is, that they were the Crown's before, and they remain the Crown's afterwards. But what is the Crown to do with them? The fact that the executive of the Crown in the colony is responsible to the electorate secures that the lands shall be managed and their revenues applied in a way more or less agreeable to local feeling or local wire-pulling. But this is a subtlety not very easy to translate into legal language. That, by a nice adjustment of enactments and undertakings, the local Crown lands will probably be managed and appropriated by the local Crown servants in a particular way is not a fact which can be fitted in with any of the known legal categories. It can be expressed popularly and roughly by saying that Crown land in British Columbia "belongs to British Columbia" — and the British North American Act, 1867, is not above emphasizing this slipshod and ambiguous expression. But endless difficulties arise when we have to say what it really means.

That the federation and provinces are to this day not regarded as corporations, but as channels of the powers of government, is seen from *Canada v. Ontario*.⁴¹ The Canadian government bought out certain Indian rights in Ontario and paid for them. Held, that it was not entitled to be reimbursed by the province. The province was not a corporation which was capable of being benefited and held liable to pay for the benefits. If it has rights and duties,

⁴¹ [1910] A. C. 637.

it has never been laid down what they are; and so far as law and equity are concerned they do not exist.

When the British North America Act, 1867, provided that the Crown lands in Ontario should "belong to Ontario," what did it precisely mean? Apparently it did not intend a grant of the lands, for there was no grantee. Nor did it, apparently, incorporate "Ontario" for the purpose of taking the grant, — as churchwardens are incorporated for the purpose of taking gifts to a parish. Nor did it impose on itself equitable obligations, for equity is not mentioned, and the Crown cannot be bound by anything but clear terms. Lord Watson⁴² hinted many years ago that the meaning was only that the right and duty of administration and revenue in regard to the lands was thereby vested in the Crown's ministers for the province. This is a conception difficult to grasp, but it probably approaches the truth. The ministers of the province have the general function of administering public affairs within its borders: it might be thought that this necessarily involved the administration of the Crown lands there, and the perception of their revenues. But these lands are equally situated with the limits of the federal union, so that a conflict would have arisen between the two sets of Crown officials if it had not thus been solved by the provisions of the Act of 1867. The effect of the enactment is thus that the rights of the Crown in respect of its lands shall be exercised through the provincial ministers.⁴³ The ownership of the land is not changed. The prerogative of the Crown to order its ministers to carry out its wishes is not technically impaired.

Bearing these points in mind, we may approach the *catena* of cases in which British Columbia and the federation were involved, and in which ownership and the powers of government are almost inextricably mixed up.

When the Canadian Pacific Railway was projected, its construction was one attraction held out to British Columbia to induce that province to enter the still young Confederation. British

⁴² *British Columbia v. Canada*, 14 A. C. 295 (1889); and see *Esquimalt & Nanaimo Ry. Co. v. Bainbridge*, [1896] A. C. 561.

⁴³ Cf. *Ontario Mining Co. v. Seybold*, [1903] A. C. 73, in which it was held, conformably with this, that the King cannot dispose of Crown lands in a province under the seal of the Dominions. It is a nice point whether his Majesty could do so under the Great Seal of Britain. As the King in Parliament can technically legislate for the province, analogy would seem to indicate the affirmative answer.

Columbia entered accordingly — but the promises held out were slow in being implemented. The province behaved very well in the matter, and displayed considerable patience, which in the end was rewarded. But in the interim, the federation pressed incidental claims against the province, in the decision of which great territorial difficulties arose. The ground of these disputes lay in the fact that British Columbia “conveyed” to the Dominion a forty-mile strip of land across the territory of the province to the sea, for the purpose of railroad construction. Now, was this a conveyance of property or of dominion or of both? Neither party was a corporation, and the land, before and after the transaction, remained simply the Queen’s.

Professor Caldwell calls the transaction a “cession;” but it seems perfectly clear that the Queen’s servants in the province did not and could not give up to the Queen’s servants in the Confederation the rights and duties of government in the “conveyed” area.⁴⁴ The arrest of criminals within that area still appears to rest with the provincial authorities. The provincial courts and legislature must have jurisdiction there. There is no “cession” in any reasonable sense of the word. What is transferred is the administrative disposition and revenue of the land, — and I venture to think more than that — probably all the rights which would be exercisable by a private owner.⁴⁵ Was this competent?

The King’s officers may grant his land, within the limits prescribed by certain statutes, to subjects. But can they hand over their powers of management and the land’s revenues to other crown servants? It would seem that this question deserves more close investigation than it appears to have received.

Assuming, however, that such a transfer was possible, and that it was duly effected by the arrangement in question, we find that

⁴⁴ *Burrard Power Co. v. Rex*, [1911] A. C. 87, appears at first sight inconsistent with this. All it really decides, however, is that the province must not legislate so as to derogate from its quasi-grant.

⁴⁵ Lord Moulton, in *British Columbia v. Canada*, [1914] A. C. 153, calls it “the entire beneficial interest” which passed. But this is to ignore the fact, which Lord Watson saw perfectly well, that it is idle to talk of the “beneficial” interest of agents and servants. Lord Loreburn, in another case (*Ontario v. Canada*, [1912] A. C. 571), shows a truer grasp of principle. “The duty of the Dominion government was not that of trustees [much less beneficial owners] but that of ministers exercising their powers and their discretion for the public welfare.” *Canada v. Ontario*, [1910] A. C. 637, 646.

in course of time gold was found in the soil of the land so handed over. Was this gold to be administered and applied by the British Columbia government or the Canadian government? This was the question in *British Columbia v. Canada*,⁴⁶ and the answer cannot be for a moment doubtful to any one familiar with the rule that gold and silver do not pass from the Crown, unless especially named. It is true that in this case there was no real "conveyance." The gold, like the land, was the Crown's from first to last. But the Crown's ministers had made an arrangement resembling a Crown grant, and it was reasonable to understand it in the same way as if it had been a regular grant to a private person. Professor Caldwell criticizes this decision very adversely — but as it seems to the writer, without substance. He argues that if British Columbia were the representative of the Crown, it is hard to see why she might not alienate gold and silver. It is; and "she" can, — but "she" must do so by appropriate words. It was not, as Professor Caldwell appears to think, that British Columbia acquired the lands from the Crown in two capacities — the land as a private landholder (minus, therefore, the gold and silver), and the gold and silver as a representative of the Crown, — so that when she transferred the land, it was only the land she possessed as a private person, and not the gold and silver which she had as a limb of the Crown. Such would indeed be a truly ridiculous position, and one which, as he says, would tend to cast discredit on the Privy Council. But Lords Watson and Macnaghton were not among the worst of British judges. If they cast discredit on the Privy Council it is hard to see to whom it may look for credit. Professor Caldwell has misapprehended the position. There was no Crown "grant" to "British Columbia" of anything. "British Columbia" — *i. e.*, the Queen's ministers there — disposed of both the land and the gold under precisely the same title — as representatives of the Crown. The only question was, Had they included the gold in their transfer of their powers over the land, or had they not? The answer that they had not may have been right or wrong; but it is clearly not open to criticism based on a supposed "Crown grant" to the province.

Where the learned Privy Councillors erred was rather in failing

⁴⁶ 14 A. C. 295 (1889).

to plumb the exact content of the singular situation created by the ministers of the province purporting to hand over their rights and duties within the province to ministers of the Confederation. If this was possible, it was certainly singular. And the resulting transfer was decidedly different from a conveyance. It ought to have been properly distinguished, and the reason for applying to it the same rules of construction as to conveyances ought to have been made clear.

In other cases British Columbia was less fortunate. The water-power and lakes in the transferred belt were held to go along with the land, and to pass under the Dominion administration. We do not suppose that this subtracted them from the provincial laws: it applied however to the discretion conferred on the agents of the Crown within those laws. The regulation of the ports and harbours was held to be in the Confederation apart from the transfer, under its general powers, in *British Columbia v. Canada*,⁴⁷ and the power of the British Columbia legislature to regulate "civil rights within the province" was held powerless to affect its exercise.

V

CONCLUSION

Any one who wishes to blaze a track through the complicated maze of British Columbia constitutional law will be safe in holding fast to two great principles. "The Colony" or "The Province" is an entity neither in law nor equity, but only in politics and morals. Its "rights" repose merely on constitutional undertakings, and in particular on the high probability that the Crown's agents in the locality will act in accordance with the preponderance of public opinion there. Disputes between colonies only mean disputes between the agents of the Crown, and can seldom, if ever, concern legal rights. Secondly, the Crown is one and indivisible, though it acts by different agents and on different principles in different parts of the empire. It does not "grant" powers of government or the ownership of land to colonies, or to its servants in

⁴⁷ [1914] A. C. 153. The "conveyance" of the forty-mile belt was held to include rights of fishery in non-tidal waters (*i. e.* outside the federal jurisdiction of the Dominion), and the provincial authorities having "conveyed" these, could not derogate from the "conveyance" by the exercise of their undoubted power to legislate for civil rights within the province. *Burrard Power Co. v. Rex*, [1911] A. C. 87.

colonies. Nor, that being so, can colonies or colonial governments grant them to one another. This is the only theory which will hold water; and the tempting analogies of United States practice can only result in utter confusion if they are applied to colonies. For the United States is built up of legally separate entities: whilst the British colonies are only politically such. Loose thinking invokes facile analogy. Sound analysis will demonstrate its danger.⁴⁸

T. Baty.

BARRISTER-AT-LAW, INNER TEMPLE.

⁴⁸ It is a misleading practice to entitle the reports of cases referred to the courts under the Canadian acts as though they were suits between plaintiff and defendant: "The Attorney General of Canada *v.* The Attorney General of Ontario," "British Columbia *v.* Canada," and so on. It suggests a juridical personality which does not really exist. The proper style, it is submitted, would be "In the matter of a reference by the Governor-General concerning the Dominion and the Province of Ontario"—or as the case might be.

JUDICIAL REVIEW OF COMMISSION

RATE REGULATION — THE OHIO VALLEY CASE *

AN administrative rate-regulating order cannot constitutionally be made final; the aggrieved party must be allowed an opportunity to question the order before a court. This much was settled by *Chicago, etc. Ry. Co. v. Minnesota*.¹ But there remained the question as to the kind and extent of review which must be accorded. A line of cases of which *People v. McCall*² may be taken as typical seemed to stand for the doctrine that a review of questions of law (including thereby questions whether findings of fact were based on adequate evidence) was sufficient.³ But the recent case of *Ohio Valley Water Co. v. Ben Avon Burrough*⁴ holds

* The writer is much indebted to Professor Felix Frankfurter's course on Administrative Law at the Harvard Law School.

¹ 134 U. S. 418 (1890).

² 245 U. S. 345 (1917).

³ *I. C. C. v. Ill. Central Ry. Co.*, 215 U. S. 452 (1910); *I. C. C. v. Union Pacific Ry. Co.*, 222 U. S. 541 (1912); *I. C. C. v. Louisville & Nashville R. R. Co.*, 227 U. S. 88 (1913).

⁴ Decided June 1, 1920, 253 U. S. 287, 289, 291. The case involved the following situation: Complaint was made to the Public Service Commission of Pennsylvania of the rates charged by the plaintiff Water Company. The commission heard the parties, made a valuation of the company's property for rate-making purposes, and fixed a rate calculated to yield a fair return on the valuation determined upon. A statute provided for an appeal from an order made by the commission at which the court should determine whether the order was "reasonable and in conformity with law." The company appealed under the statute, claiming the commission order confiscatory. The state Superior Court set aside the order of the commission. The state Supreme Court reversed the decision of the state Superior Court and reinstated the order of the commission. It construed the statute as limiting the state Superior Court to a review on questions of law and apparently confined itself to such a review. ("A review on questions of law" is the term used by Justice Brandeis in his dissenting opinion to describe the sort of review which the state Supreme Court judged proper. He uses it as including a consideration of whether the findings of fact by the lower tribunal were supported by adequate evidence, on the principle that inadequacy of evidence is error in law. It is here used in that same sense.) The United States Supreme Court reversed the decision of the state Supreme Court. Quotations from the majority opinion of Mr. Justice McReynolds are given in the body of the article. Mr. Justice Brandeis, in dissent, with whom were Justices Holmes and Clark, seemed to take the position that it was sufficient for a court passing on the constitutionality of an order legislative in character to give a review of questions of law.

that in some cases at least the reviewing court must exercise "its own independent judgment as to both law and facts."

Mr. Justice McReynolds, speaking for the majority, said:

"We are compelled to conclude that the [state] Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. . . . The State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts. . . . Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the State . . . the challenged order is invalid."

It is submitted that the ultimate solution of the problem as to the extent of review which must be accorded depends on the question whether an administrative rate-regulating order shall for purposes of review and of application of the due-process clause be treated on the analogy of a judicial decision or of a legislative act. To explain this distinction it is necessary to examine how a judicial decision differs from a legislative act in each of these two respects.

First, then, to distinguish between judicial review of court action and of a legislative act. In the case of the former, the lower court has decided a past controversy according to law, has applied law. This, in the nature of things, involves findings of fact as to the controversy, and findings of the law applicable thereto. The reviewing court reviews the actual findings of law, determines whether

The reasoning of the majority seems to be as follows: Due process requires that a state give an opportunity for the review of an administrative rate-regulating order. In the face of the claim of confiscation a review of questions of law is not enough. If, then, the state will not give a more complete review, its order will be a deprivation of property without due process of law.

The reasoning of the dissenting opinion seems to be as follows: A state must give an opportunity for the judicial review of an administrative rate-regulating order. Whether the review actually given was sufficient need not be decided, since the state did give an opportunity for a sufficient review (by another provision in the statute). However, the review proceedings actually had, might be a denial of due process by disregard of the essentials of judicial process. But such was not the case; the court reviewed questions of law. The claim of confiscation does not require this court to give more than a review of questions of law. We find no error of law. Therefore the judgment of the court below should be affirmed.

it would so have found them. As to findings of fact, ordinarily it determines only whether they were based on adequate evidence.

The so-called review of a legislative act differs radically. The legislature has laid down a rule or policy for the future, has made law. The court here does not review, as a revisory legislative body might, to determine whether it would so have legislated, but merely passes on the constitutionality of the act. Generically this is a determination whether the legislature acted within its constitutional jurisdiction when it laid down the rule. Without a constitution there could be no such thing as the judicial review of a legislative act. And the court determines constitutionality merely in the ordinary process of finding the law applicable to a judicial controversy. In review, as elsewhere, the court clings to its judicial function of applying the law. For example, a judicial case before the court is affected by a statutory rule of law. In order to determine the law applicable, the court must decide the constitutionality of the statute, quite as it must decide the common-law rule.⁵ Again, a government official has confiscated property as authorized by statute. According to our law, if the act is unlawful, the official is liable. In a suit against the official, the court must therefore, to determine the lawfulness of his act, determine the constitutionality of the statute (as it must determine the common-law rule regarding an alleged trespass).⁶ Again, a government official has ordered property destroyed as authorized by statute. The injured party, threatened with irreparable injury, may sue in equity to enjoin enforcement of the order on the ground of the unconstitutionality of the statute. To determine if an unlawful act is threatened, the court must first settle if the statute is constitutional.⁷

Thus the question of the constitutionality of an act comes up in the ordinary course of a court's finding the law applicable to a judicial case. By Article III of the Constitution a potential ⁸ right of appeal to the Supreme Court lies from its decision, since it in-

⁵ *Holden v. Hardy*, 169 U. S. 366 (1898).

⁶ *Lawton v. Steele*, 152 U. S. 133 (1894) (the fish-net case).

⁷ *Davis v. Gray*, 16 Wall. (U. S.) 203 (1872); *Scott v. Donald*, 165 U. S. 107 (1897). See *JUD. CODE*, § 266; *COMP. STAT.*, § 1243, regulating bills to enjoin enforcement of statutes on the ground of unconstitutionality.

⁸ Potential because "with such exceptions and subject to such regulations as the Congress shall make." Constitution, Art. III.

volves a "federal" question. *If the reviewing court is not to go outside the judicial function of applying law, this is the only way in which it could review a legislative act.* A lower court has applied law; the reviewing court reviews the correctness of the actual decision. A legislature has made law; the reviewing court in the process of applying law determines whether the law supposedly made by the legislature really is law, determines whether the legislature acted within its constitutional jurisdiction.⁹ In the one case it reviews the actual decision of another body; in the other it reviews whether that body acted within its jurisdiction. This distinction is however blurred by the fact that according to the accepted interpretation of the due-process clause, the constitutional jurisdiction of the legislature is made to depend to some extent on the substantive content of the rule laid down. That is, as regards a specific subject within the competence of the legislature, a rule expressing one legislative policy might be constitutional, while a rule expressing a different and perhaps more extreme legislative policy might not be.¹⁰ Therefore a court in reviewing whether a legislature acted within its jurisdiction must act very much as though it were reviewing the actual legislative decision. Its function here certainly approaches a revisory legislative function — though only of a negative sort.¹¹ Yet in distinguishing the review of a legislative act from the review of court action, it is well to insist that the former is generically a review of whether the legislature acted within its jurisdiction.

Since the court passes upon the constitutionality of a legislative act merely in the ordinary course of finding the law applicable to a judicial controversy, it is apparent that the process of such a determination *cannot* be divided into review of law and review of

⁹ A court, provided it is not to venture outside of the judicial function of applying law, can review the decision of a tribunal in the same way in which it reviews the decision of a lower court — that is to say, review the correctness of the actual decision — only when that tribunal has exercised a judicial function. This is perhaps the explanation of the rule that courts will not on certiorari review other than judicial action. *Reg. v. Bowman*, [1898] 1 Q. B. 663; *Christlieb v. Board*, 41 Minn. 142, 42 N. W. 930 (1889); *Moede v. Board*, 43 Minn. 312, 45 N. W. 438 (1890).

¹⁰ See footnote 12, *infra*.

¹¹ "Called upon late in life to teach constitutional law, a great teacher of property law, after a brief trial, gave it up in despair on the ground that constitutional law 'was not law at all but politics.'" From the opening sentence of an article by Professor Felix Frankfurter in 29 HARV. L. REV. 683.

fact, as must be the process of reviewing the determination of a past controversy according to law. Any talk of such separation of process has no application to this situation. Yet though such language is not used in connection with the review of a legislative act, it seems to be found where virtually the same situation arises with respect to commission action.

Second, to distinguish the application of the due-process clause to court action and legislative action. Due process limits the substance of *legislative action*. An arbitrary legislative rule affecting life, liberty, or property might be unconstitutional where a more reasonable one would not be, the actual procedure in the discussion and adoption of the statute being the same in both cases.¹² How can this result be reached from a constitutional provision which certainly seems to lay down not a substantive but a procedural standard? The matter is discussed in *Davidson v. New Orleans*,¹³ where it is said:

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

If a state enacts and applies a statute in a procedurally valid manner, it would seem that the state's action is procedurally irre-

¹² *Holden v. Hardy*, 169 U. S. 366 (1898); *Jacobson v. Massachusetts*, 197 U. S. 11 (1905); *Smyth v. Ames*, 169 U. S. 466 (1898).

¹³ 96 U. S. 97, 102 (1877).

proachable. To hold the statute invalid under the due-process clause in such a case is really to throw overboard (so far as legislative action is concerned) the conception of due process as a limitation on procedure; to say "if a legislature does this arbitrary thing, it is a violation of due process, no matter how irreproachable the procedure was," is to transform (so far as legislative action is concerned) the due-process clause from a limitation on procedure to a limitation on substance. And such is the law.

And in the case of legislative action, due process is not a limitation on procedure. Those affected by the act have no right to hearing or notice. As is pointed out in *Bi-Metallic Co. v. Colorado*,¹⁴ hearing and notice, in the case of provisions of general application, are impossible; and even where feasible, as in acts of special application, are not required.

On the other hand, due process does not limit the substance of *judicial* action. The preceding discussion relative to legislative action covered the case where a court has applied an unconstitutional statute. Aside from that case, a court may lay down a judgment affecting life, liberty, or property which, however arbitrary the aggrieved party may consider it, affords no grounds for the federal question of deprivation of property without due process of law. The authorities on this point are clear. In the case of *Marchant v. R. R.*¹⁵ a plaintiff was firmly convinced that she had a good cause of action. The state courts, however, held that she did not. Her appeal to the Supreme Court of the United States, on the ground that the decision of the state court deprived her of property without due process of law, was met with the decision that the proceedings in the state court were due process. In the case of *Howard v. Fleming*¹⁶ it was held: "The [state] Court held that it was a common law offense. . . . Whether there be such an offense is not a Federal question." In *In re Converse*¹⁷ the contention was made that the plaintiff's act did not in fact come within a state criminal statute, as the state court held, and that the state court's decision therefore deprived the plaintiff of liberty without

¹⁴ 239 U. S. 441 (1915), holding that in the case of a general tax assessment hearing was not necessary.

¹⁵ 153 U. S. 380 (1894).

¹⁶ 191 U. S. 126, 135 (1903).

¹⁷ 137 U. S. 624, 631 (1891).

due process of law. The Supreme Court held: "The State cannot be deemed guilty of a violation of its obligation under the Constitution of the United States because of a decision, even if erroneous, of its highest court while acting within its jurisdiction." And in *Davidson v. New Orleans*,¹⁸ the court commented with disapproval upon the notion that the due-process clause is a "means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him." It is believed that there never has been a case wherein the unconstitutionality of a statute was not involved, or wherein the court's procedure was not questioned, in which the Supreme Court has overthrown the decision of a state court on the ground that the substantive result reached by the court was a deprivation of property without due process of law.

Due process perhaps does, however, limit court procedure. It may be that a federal question can be raised by the claim that the court has acted procedurally in an outrageous manner. Of course, if some statute assumes to authorize the court to adopt some outrageous procedure and the court does so, the aggrieved party can raise a federal question by challenging the constitutionality of the statute. But that is a case of the court's applying an unconstitutional statute, which is covered by the discussion above in regard to legislative action. Here, however, the question is whether in the absence of the application of an unconstitutional statute a federal question may be raised by the claim that the court's procedure was not due process of law. Diligent search has failed to reveal a single square decision to that effect.¹⁹

In summation, it may be said that under the due-process clause a federal question can be raised by challenging the substance of a legislative act or (perhaps) court procedure, but not by challenging the procedure of a legislative act or the substance of a judicial decision.

Why should due process be construed as limiting the substance of legislative but not of judicial action? Not because judicial

¹⁸ 96 U. S. 97, 104 (1877).

¹⁹ See *Frank v. Mangum*, 237 U. S. 309 (1915). It was claimed that the trial in the court below was not due process of law due to certain procedure. *Held*, that it was due process of law.

action is due process of law. That assumes the result that due process shall not limit the substance of judicial action. In the case of legislative action it might equally well be said that the proper application of a properly enacted statute was due process of law. But in that case the Supreme Court has been willing to take the step discussed in the passage quoted above from *Davidson v. New Orleans* and construe due process as a limitation on substance.

The explanation is doubtless to be found in the difference in theory between court and legislative action. Court action is in theory an application of law. If the result is outrageous or unjust, it must be because the law was not correctly applied. To suggest that due process limits the substance of judicial action is therefore to suggest that a person shall be able to claim a failure in *due process* merely because of an incorrect decision of his case. Where the theory is of an application of law, however, it requires too much of a strain to construe the phrase "due process of law" other than as a limitation on procedure. It is too apparent that while the Constitution may well (and, in fact, does) guarantee to every individual adequate machinery for the application of law to his case, it cannot guarantee that in every case the law will be correctly applied. The possibility of raising a federal question by challenging the substance of every judicial decision is unthinkable. But where the theory is of a making of law, it requires less strain to say that due process limits substance and that the Constitution protects the individual from the injustice of every legislative act.²⁰ Even here, however, one may wonder whether such a construction does not do violence to the words, if not to the intent of the provision, and whether it does not result in bringing before the Supreme Court questions to which there should "be an end"²¹ in some state legislature or at most in some state Supreme Court.

Before leaving this question, one possible source of confusion may be mentioned. It is sometimes said that the substantive result of a judicial decision cannot be questioned under the due-process clause *because judicial action is due process of law*. It would

²⁰ This was precisely the point under discussion in the passage quoted above from *Davidson v. New Orleans*.

²¹ "Somewhere there must be an end," quoted from the opinion of Mr. Justice Holmes in *Chicago, etc. Ry. Co. v. Babcock*, 204 U. S. 585, 598 (1907), holding that the Supreme Court would not review a valuation of property for purposes of taxation made by a state assessing board.

seem to follow that since the substantive result of a legislative act can be questioned under the due-process clause, legislative action is not due process of law. But that is not so. Whether or not legislative action is due process of law depends on the substance of the particular act, — just and reasonable or oppressive and arbitrary. The fallacy is that in saying "because judicial action is due process of law" one is really talking in terms of procedure. The reason why the substantive result of a judicial decision cannot be questioned under the due-process clause is not because judicial action is due process of law, but because in that case the due-process clause is not construed as a limitation on substance. The reason why the substantive result of a legislative act can be questioned under the due-process clause is that there due process is construed as a limitation on substance. The ultimate question is not whether the action "is due process of law," but whether due process is to be construed as a limitation on substance. And there seems no inherent reason why in any given case due process may not be a limitation both on procedure and on substance.

So much for the differences between court and legislative action in respect to the nature of review appropriate to each, and in respect to the nature of the application of the due-process clause to each.

It was suggested above that the problem presented by the Ohio Valley case depended for solution on whether administrative rate regulation should, as regards due process and review, be treated on the analogy of a legislative act or of a judicial decision:

A. If administrative rate regulation be regarded as an application of law, the theory of review should be that it is to determine the correctness on law and fact of the actual administrative decision.

M. If administrative rate regulation be regarded as a making of law, the theory of review should be that it is to determine whether the administrative acted within its jurisdiction when it laid down the ruling.²²

²² Clearly if administrative rate regulation were regarded as a making of law, a review of the actual ruling with power to amend that ruling would take the court outside of its judicial function of applying law. In *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 227 (1908), administrative rate regulation was said to be legislative in substance. In that case there was a state statute providing for a review of the actual ruling with power to amend that ruling, and the court said that the duties of the state courts under the act were legislative in character. And in *Reagan v. Farmers'*

It does not seem necessary to consider any possible third category. A ruling authoritatively laid down and given legal sanction must be regarded either as a making or as an application of law.

The jurisdiction of a legislature in law-making is limited only by the Constitution, one of the constitutional limitations being that the substance of the ruling must not be so oppressive as to be a deprivation of property without due process of law. But the jurisdiction of an administrative body is more limited. Usually, if not always, such a body derives its powers from a statute which defines closely the field within which it may act. In determining whether an administrative body acted within its jurisdiction, it would therefore be necessary to consider: (1) whether it acted within its statutory jurisdiction,²³ (2) whether that statute was constitutional.

Is there a third question as to whether the administrative ruling itself was so oppressive as to be a deprivation of property without due process of law? In other words, shall the due-process clause be held to limit the substance of administrative law-making as it limits the substance of legislative law-making? On the authorities the answer seems affirmative.²⁴ If so, then there is a third question as to whether the administrative order was confiscatory.²⁵

Loan & Trust Company, 154 U. S. 362, 400 (1894), the court said: "If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this [a case of the judicial review of administrative rate regulation]."

²³ *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 313 (1913). The court said: "The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature," etc. See *I. C. C. v. Union Pacific R. R. Co.*, 222 U. S. 541, 547 (1912).

²⁴ See footnotes 34, 35, and 36: an unreasonably low rate would be unconstitutional.

²⁵ This would mean, however, that a federal question could be raised by attacking the substance of any administrative rate-regulating order. One may wonder whether there should not "be an end" to these questions in the state courts. Is not the Supreme Court already sufficiently burdened by the doctrine that a federal question can be raised by an attack upon the substance of any legislative act? This result could be avoided by regarding the oppressiveness of administrative law-making as raising only a question of whether the administrative acted within its statutory jurisdiction, without there being any question whether it acted within its constitutional jurisdiction. Arbitrary administrative procedure has sometimes been regarded as a matter of statutory jurisdiction rather than of constitutional right to due process of law. This is notably so in England. *Local Government Board v. Arlidge*, [1915] A. C. 120; *Board of Education v. Rice*, [1911] A. C. 179. See comments of A. V. Dicey in 31 *LAW QUART.*

From this it appears that the questions for review are: on view A, whether the actual decision is correct on law and fact; on view M, whether the administrative acted within its jurisdiction, including the question (and that is usually the main question) whether the order was confiscatory.²⁶

What shall be the extent of review? On view A it would seem that the usual review of questions of law, with conclusive effect given to findings of fact based on adequate evidence, would be sufficient. Elsewhere in the law, facts are usually not found first by one and then by another tribunal, but facts found by the lower tribunal are gone into only sufficiently to determine that they were supported by adequate evidence. But on view M such review seems insufficient. In determining whether the rate was confiscatory, the court should not be restricted to a review of questions of law with conclusive effect given to findings of fact based on adequate evidence, but should give a review as broad as that familiarly

REV. 148 (1915). The same view has sometimes been taken in the United States, though the courts tend to talk of constitutional right — possibly as the line of least resistance. See *Colyer v. Skeffington*, 265 Fed. 17, 47 (1920); *Garfield v. Goldsby*, 211 U. S. 249, 262 (1908). In *Chin Yow v. United States*, 208 U. S. 8 (1908), and cases following it, holding that the claim of an unfair hearing before the immigration authorities presented a matter for judicial review, it is not entirely clear on which theory the court grounds its decision. In the case of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902), the review seems to have been on the theory of statutory jurisdiction. The cases are apt to be unsatisfactory. For example, there may be a discussion of whether certain administrative action was reasonable and it may not be clear whether that word means: (1) reasonable in procedure or substance or both, (2) reasonable as regards statutory jurisdiction, (3) reasonable as raising a federal question under the United States Constitution, (4) reasonable as showing a correct application of law.

²⁶ There is a real distinction between these two positions. On view M, the whole result is looked at, conceived of as a law, and the question is whether that result is confiscatory. On view A, the result is not looked at as a whole, but is split up into findings of law and findings of fact. Whether the result as a whole is confiscatory is not one of the questions of law. The most crucial part of the decision, so far as the result goes, may be findings of fact, and the only question of law in regard to them is whether they were based on adequate evidence. Indeed it seems a misnomer to speak of confiscation in this case. The only question is of the correctness of the decision on law and fact. Even if due process is construed to limit the substance of an administrative application of law (see the discussion above as to whether due process limits the substance of a judicial application of law), it still seems that there is no question as to whether the result as a whole was confiscatory. The question is still of the correctness of the decision on law and fact, but a federal question could be raised by challenging the correctness of the decision.

given in passing on the constitutionality of a legislative act.²⁷ This, it is believed, is the basis for the holding in the Ohio Valley case. The court there tended to take view M. It held that the courts must have "power to determine the question of *confiscation* according to their own independent judgment when the action of the commission comes to be considered on appeal." It is submitted, however, that the language of that case had reference to the determination of whether an order, legislative in substance, was confiscatory, and should not be considered to have any reference to the different situation where the court is reviewing a quasi-judicial order and determining whether the law was correctly applied. It is believed that the Ohio Valley case does not stand for any doctrine that in such a case the reviewing court, besides giving the customary review of questions of law, must enter upon an independent determination of the facts found by the administrative.

It will be observed that the basis for the constitutional right to judicial review^{27a} would be different according to views A and M. On view A the basis of the right would be that before the questions of law incident to an application of law could finally be disposed of, they must come before a court as the ultimate arbiter of questions of law; that as a matter of procedure, due process required that a state accord judicial review.²⁸ On view M the basis of the right

²⁷ On view M it seems really out of place to talk of any separation of processes into findings of fact and findings of law. (See the discussion above in regard to the review of a legislative act.) Whether a law-making body acted within its jurisdiction is a question of law decided by the court in the process of finding the law. On view M, therefore, any appeal would really be analogous to the bill in equity to enjoin enforcement of a statute on the ground of unconstitutionality. In *Bacon v. Rutland*, 232 U. S. 134, 138 (1914), the court said: "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity." A review of questions of law is, then, really sufficient to determine whether the rate was confiscatory. But when it is said "a review of questions of law with conclusive effect given to findings of fact based on adequate evidence," or words to that effect, the context shows that reference is made to *what would be the questions of law were administrative rate regulation regarded as an application of law*, and it is submitted that a review of those questions would not be sufficient to determine whether the rate was confiscatory. As stated above, when administrative rate regulation is regarded as an application of law, whether the rate as a whole is confiscatory is not one of the question of law.

^{27a} See opening sentence of article.

²⁸ See quotation below from the majority opinion in *Chicago, etc. Ry. Co. v. Minnesota*.

would be that, as in the case of a legislative act alleged to be oppressive, a party would have by Article III a constitutional right to raise the issue of confiscation.²⁹

The authorities have vacillated between these two positions, frequently with none too clear a differentiation between them. The split extends back to the leading case on the subject (*Chicago, etc. Ry. Co. v. Minnesota*),³⁰ in which the majority tended to take position A, while Mr. Justice Miller, in his concurring opinion, tended to take position M.

Mr. Justice Blatchford, speaking for the majority, said:³¹

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived from the lawful use of its property . . . without due process of law."

Mr. Justice Miller in his concurring opinion said:³²

"Neither the legislature nor such commission acting under the authority of the legislature, can establish . . . a tariff . . . which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"In either of these classes of cases there is an ultimate remedy . . ., in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law."

On the one view it is a failure in due process as a limitation on procedure not to have some court action; on the other it is a failure in due process as a limitation on substance if the ruling is oppressive. The manner in which Mr. Justice Miller assimilates the cases of administrative and legislative rate making seems especially significant.

²⁹ In *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298 (1913), it was held that the due-process requirement of review was completely satisfied in the absence of statutory provisions as to review, since the aggrieved party could avail himself of a suit in equity to enjoin enforcement of the order on the ground of unconstitutionality.

³⁰ 134 U. S. 418 (1890).

³¹ *Ibid.*, 458.

³² *Ibid.*, 459.

Since this case the split has remained discernible. The line of cases represented by *People v. McCall*³³ standing for the doctrine that judicial review of questions of law, with conclusive effect given to findings of fact based on adequate evidence, is sufficient, seems really to follow view A. The line of cases now to be examined, holding that the reviewing court must consider whether the regulation was confiscatory, clearly show the influence of Mr. Justice Miller's reasoning, and tend to take position M.

In *Reagan v. Farmers' Loan and Trust Co.*³⁴ the court, following Mr. Justice Miller, assimilated the cases of legislative and administrative rate making, saying:

"There can be no doubt of their [the courts'] power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable."

In *Smyth v. Ames*³⁵ the court again assimilated the cases of legislative and of administrative rate making, saying:

"A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law."

In *Louisville & Nashville R. R. Co. v. Garrett*³⁶ the court said:

"The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements."

But there has been in the cases no sharp distinction between views A and M. Even in the cases cited above as tending toward view A, there is language sounding as though the court would consider whether the rate itself was confiscatory. The suggestion seems to be that that question can be decided by giving a review

³³ See footnote 3, *supra*.

³⁴ 154 U. S. 362, 397 (1894).

³⁵ 169 U. S. 466, 526 (1898).

³⁶ 231 U. S. 298, 313 (1913).

of questions of law with conclusive effect given to findings of fact based on adequate evidence. But surely this view is not sound and is repudiated by the *Ohio Valley* case. Does it not result from insufficient differentiation of judicial and legislative action and of the kind of review properly applicable to each?

It will also be observed that the question before the Supreme Court would be different according to views A and M. Whereas on view A the question before the Supreme Court is merely whether the state granted sufficient judicial review, on view M it is hard to see how the Supreme Court can avoid ultimately being faced with the difficult question whether the rate was confiscatory.³⁷ This perhaps seems undesirable, and might furnish a reason either for adopting view A, or for construing the due-process clause as not limiting the substance of administrative action.³⁸

Having examined the authorities, it remains to discuss on principle views A and M.

In attempting to approach this matter on principle, one is met at the start with the difficulty that the distinction between the making and the application of law is frequently at bottom one of theory only. The theory that courts in deciding cases, even where it is necessary to lay down a new rule of law, are merely applying law, rests upon the fiction of the all-inclusiveness of law, containing in itself material for the solution of every possible legal question.³⁹ Why then, it may be asked, predicate differences upon mere theoretical abstraction? The answer is that in our system of government, with its separation of powers, we are committed to somewhat theoretical distinctions. There is a theory as to the judicial function, that is an application of law. If so, the nature of the judicial review in any case must depend upon the theoretical nature of the action being reviewed. This was worked out in the discussion of the sort of review applicable to court and legislative action.

Is administrative rate regulation judicial or legislative in nature?

³⁷ The disposition made by the Supreme Court of the *Ohio Valley* case is somewhat puzzling. The court held that the commission order would be invalid unless the state would give an adequate review.

³⁸ As discussed in footnote 25.

³⁹ See Roscoe Pound, "Courts and Legislation," 7 *AM. POL. SCI. REV.* 361, 365 (1913).

It is easy to classify other forms of administrative regulation. Reparation suits, suits for damages based on the claim that past rates were excessive, are rather of a judicial nature;⁴⁰ general rules for the future, such as prescription of uniform accounts, are rather of a legislative nature.⁴¹ But in the case of administrative rate regulation, classification is more difficult. It becomes necessary to examine the rate-regulating function.

Formerly there was little rate regulation as such, but a carrier was liable for the breach of its common-law duty to render reasonable service at reasonable rates. A shipper could sue the carrier, claiming a past rate unreasonable, and, if so found, could recover judgment for the excess.⁴² The question of reasonableness then came up as a purely judicial question. Later, commissions were established to handle these technical questions.⁴³ Meanwhile it became common practice for legislatures to fix rates.⁴⁴ In 1906 the Interstate Commerce Commission was empowered to do so.⁴⁵ Now if the commission found an existing rate unreasonable it could fix a reasonable rate. Such is administrative rate regulation at present. Although damages for past breaches are still given, the point of emphasis has shifted. The important question before the commission is no longer whether a past rate was reasonable, but is, what is a reasonable rate?

The determination of what is a reasonable rate seems to partake

⁴⁰ In *I. C. C. v. Cincinnati Ry. Co.*, 167 U. S. 479, 499 (1897), the court said: "To inquire whether rates which have been charged and collected are reasonable . . . is a judicial act."

⁴¹ *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194 (1912), holds the provision empowering the commission to prescribe uniform amounts not an unconstitutional delegation of legislative power.

⁴² *Ashmole v. Wainwright*, 2 Q. B. 837 (1842); *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873 (1892); *Heiserman v. Burlington, etc. Ry. Co.*, 63 Iowa, 732, 18 N. W. 903 (1884); *Peters v. Scioto Co.*, 42 Ohio St. 275 (1884). See MOORE, CARRIERS, 2 ed., p. 165.

⁴³ The Interstate Commerce Act (24 STAT. AT L. 379 (1887)) enacted the common law that charges must be just and reasonable (§ 1), and provided for complaint to the commission of violations of the Act (§ 13), and for award of damages by the commission, (§ 16 as amended by 34 STAT. AT L. 584 (1906)), which, however, could be enforced only by a court (*ibid.*). Claims for reparation for past excessive rates might now be heard before the commission. *Trier v. Chicago, etc. Ry. Co.*, 30 I. C. C. 352 (1914); *Coomes v. Chicago, etc. Ry. Co.*, 13 I. C. C. 192 (1908).

⁴⁴ *Chicago, etc. Ry. Co. v. Iowa*, 94 U. S. 155 (1876); *Peik v. Chicago, etc. Ry. Co.*, 94 U. S. 164 (1876).

⁴⁵ Section 15 as amended by the Hepburn Act of 1906, 34 STAT. AT L. 584.

of some of the characteristics both of judicial and of legislative action. It is a special rule for a particular case rather than one of general application. Investigations are, of course, common before legislation, but the investigation entered into by a commission before the determination of what is a reasonable rate, is of a rather judicial nature. Administrative rate regulation is said to be a laying down of a rule for the future, and as such legislative;⁴⁶ yet in many ways it resembles more a mandatory injunction than a legislative act. But certainly before commissions were given the rate-regulating power, courts had not ventured into that field; what rate regulation there was had been done by special act of the legislature. To this extent the holding that administrative rate regulation is quasi-legislative rather than quasi-judicial is indisputable. From the historical point of view, rate regulation is legislative in character. But the question as to its nature is of practical importance mainly in determining what shall be the theory of review and of the application of the due-process clause, and as regards those two questions it is submitted that the significant distinction is between a special rule of particular application and a general rule. On such a functional differentiation rate regulation should be classed as judicial in character.

The purpose of the paper is not, however, to pick one or another theory as to the nature of administrative rate regulation, but to point out that, as a result of our system of the separation of powers, as a result of the accepted construction of the due-process clause, there will be a difference in the nature of judicial review properly applicable to administrative rate regulation, depending on the view taken as to its nature. More specifically, there will be a difference as to the question before the courts on review, the extent of review necessary to determine that question, the basis for the constitutional right to review, and the nature of the question before the Supreme Court when the claim is made that a person has been deprived of his constitutional right to review. It is submitted that the problem regarding judicial review of administrative rate regulation should be determined according to the accepted

⁴⁶ In *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226 (1908), the court said: "The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind." See *I. C. C. v. Cincinnati, etc. Ry. Co.*, 167 U. S. 479, 499 (1897) *acc.*; *R. R. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909), *contra*.

principles of review as seen in the review of judicial decisions and of legislative acts, and that there should be no haphazard mingling of the principles seen in those two cases. For purposes of review there must be a clear differentiation of the judicial and legislative functions and of the sort of review properly applicable to each.

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STRIKES AND BOYCOTTS. — Labor's two great weapons in industrial competition are the strike and the boycott. In the last thirty years, the use of these weapons has given rise to so great a mass of litigation¹ that there is a growing recognition of the necessity of formulating a definite and convincing rationale on which cases can be decided.² It is often affirmed that thus far the courts have failed to meet the test adequately;³ and it is undoubtedly true that the law of labor-disputes furnishes glaring examples of the use of misleading catch-phrases and of frequent discrepancy between legal precedent and economic fact. The

¹ The following are various compilations of cases: FRANCIS B. SAYRE, SYLLABUS for a course in Labor Law (delivered at Harvard Law School, 1920-1921); CARSON, INTERNAL LAW OF TRADE UNIONS; GROAT, ATTITUDE OF AMERICAN COURTS IN LABOR CASES, 3-6; LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE, appendix. For a collection of every known labor case in this country prior to 1842, less than forty in all, see A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY. For English cases prior to 1906, see REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES AND TRADE COMBINATIONS, 95 *et seq.*

² It is not within the scope of this note to discuss the expediency of injunctive relief; and equitable and legal remedies will be treated as on a parity. There has been so much criticism of the use of injunctions in labor disputes. See Charles C. Allen, "Injunction and Organized Labor," 28 AM. L. REV. 828; I. B. Rosenblum, "The Use of Injunctions in Labor Disputes," 4 ST. LOUIS L. REV. 18, 78. It has never been used so much in England as in the United States. See SIDNEY & BEATRICE WEBB, THE HISTORY OF TRADE UNIONISM, Rev. ed. 1920, 599. A Massachusetts statute abolishing the use of injunctions in labor disputes was held unconstitutional. *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853 (1916). For a criticism of this case see 30 HARV. L. REV. 75.

³ See Wm. D. Lewis, "Modern American Cases Arising out of Trade and Labor Disputes," 44 AM. L. REG. (N. S.) 465, 491-492. See also A. V. Dicey, "Combination

indisputable need for further clarification gives vital interest to the question.

A strike has been defined⁴ as "a simultaneous cessation of work on the part of workmen." Strikes are called for a variety of objects, and it is with the legality of these objects that the law is concerned.⁵ As a whole, these objects fall into two general classes, though any classification is purely suggestive: (1) Strikes for immediate needs, like higher wages, shorter hours, better working conditions, etc. (2) Strikes for the strengthening of the unions — which include strikes to secure recognition of unions, strikes to secure re-employment of discharged fellow-workmen or the discharge of non-union workmen, strikes for the closed shop or the enforcement of closed shop agreements, strikes to enforce payment of fines imposed by the unions on employers or workmen, and so-called sympathetic strikes. First of all, what have the authorities to say as to the legality of each of these types?

(1) The simplest form, the strike for higher wages, shorter hours, or better working conditions, is everywhere recognized as legal.⁶ The Massachusetts cases, chaotic on other points, are at least clear here. A rarer form is the strike to enforce the employment of a larger number of men than the employer desires — *e. g.* an organist in a theater refuses to work unless an orchestra of five is employed, as union rules demand. Massachusetts⁷ holds this illegal, while the Minnesota court⁸ takes the

Laws and Public Opinion," 17 HARV. L. REV. 511, 532: "The confusion reaches much deeper than a mere opposition between the beliefs of different classes. Let each man . . . look within. He will find that inconsistent social theories are battling in his own mind for victory . . . If then the law be confused, it all the more accurately reflects the spirit of the time."

⁴ See *Farrer v. Close*, L. R. 4 Q. B. D. 602, 612 (1863), *per* Hannen, J.

⁵ Though there has been much authority to the contrary, and though it is not possible to state it as absolute truth, it seems to be the better rule that what one man may do lawfully a combination of men may do lawfully. It would seem curious that a sort of legal "legerdemain" should create illegality out of legality merely on account of the number of the actors. See *Lindsay & Co., Ltd. v. Montana Fed. of Labor*, 37 Mont. 264, 273, 96 Pac. 127, 130 (1908). See also *Jeremiah Smith*, "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 345, 351. See *contra*, *Allis Chalmers Co. v. Iron Moulders Union*, 150 Fed. 155, 176 (1906); *State v. Dalton*, 134 Mo. App. 517, 537, 114 S. W. 1132, 1139 (1908). Now the settled definition of a conspiracy is a "combination of two or more persons to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means." *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 123 (1842). Thus, as quitting work is lawful even though by combination, we come eventually to the proper consideration in the strike cases; *i. e.*, not loose talk about unlawful conspiracy and coercive combinations, but the legality of the purpose for which the strike is called. For a list and discussion of early English statutes which have had a bad effect in keeping the unsupportable view of conspiracy alive, see *National Protective Ass'n of Steam Fitters v. Cumming*, 170 N. Y. 315, 332, 63 N. E. 369, 373 (1902).

⁶ *Karges Furniture Co. v. Amalgamated Woodworkers Union No 131*, 165 Ind. 421, 75 N. E. 877 (1905); *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906); *Cohn & Roth Electric Co. v. Bricklayers Union*, 92 Conn. 161, 101 Atl. 659 (1917).

⁷ *Haverhill Strand Theatre v. Gillen*, 229 Mass. 413, 118 N. E. 671 (1918). The court argues that similarly all carpenters could refuse to work on buildings unless they were ten stories high. The simile presents action that seems perfectly legal. It would not be doubted that capital could refuse to invest itself on similar conditions. The case clearly illustrates a situation that should be left entirely to control by economic forces.

⁸ *Scott-Stafford Co. v. Minneapolis Musicians*, 118 Minn. 410, 136 N. W. 1092 (1912).

opposite view. (2) The strike as part of the campaign for the unionization of industry is but a step removed from the strike for higher wages or shorter hours; yet here the decisions are contradictory. New York⁹ allows the strike to secure recognition of the union, to force discharge of non-union men, or to effect a closed shop; Massachusetts¹⁰ adopts the contrary view, and each state is followed by a number of other jurisdictions. The strike to enforce payment of fines imposed on employers or union-members because of the breach of some union rule seems uniformly to be held illegal.¹¹ The sympathetic strike, so-called, has also been uniformly condemned in *dicta* from other decisions.¹² Strikes are admittedly illegal which involve defamation, fraud, actual physical violence, threats of physical violence, or inducement of breach of contract;¹³ and these are dismissed from further consideration.¹⁴

⁹ *Nat'l Protective Ass'n v. Cumming*, *supra*; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389 (1912); *Gray v. Bldg. Trades Council*, 91 Minn. 171, 97 N. W. 663 (1903). The English law prior to 1906 was in confusion. *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495. See REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES AND TRADE COMBINATIONS, 24-30. But such strikes were rendered legal by 6 EDW. VII, c. 47 (TRADE DISPUTES ACT, 1906). *Cf.*, however, *Valentine v. Hyde*, [1919] 2 Ch. 129. The strike to enforce an agreement for a closed shop should stand on the same footing. An early case in New York held such an agreement illegal when made between an employers' association and a union. *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297 (1897). Between an employer and a union such an agreement has been upheld. *Jacobs v. Cohen*, 183 N. Y. 207, 76 N. E. 5 (1905); *Kissam v. United States Printing Co.*, 199 N. Y. 76, 92 N. E. 214 (1910); *Nat'l Fireproofing Co. v. Mason Builders Ass'n*, 169 Fed. 259 (1909).

¹⁰ *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900); *State v. Dyer*, 67 Vt. 690, 32 Atl. 814 (1895); *Ruddy v. United Ass'n of Plumbers*, 79 N. J. L. 467, 75 Atl. 742 (1910); *Bausbach v. Reiff*, 237 Pa. 482, 85 Atl. 762 (1912); *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600 (1913). An early case decided by Shaw, C. J., seems to have held exactly the opposite of *Plant v. Woods*, *supra*. *Commonwealth v. Hunt*, *supra*. See comment by Holmes, J., dissenting in *Vegelahn v. Guntner*, 167 Mass. 92, 109, 44 N. E. 1077, 1082 (1896). *Cf.* however *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036 (1911) (strike to force discharge of employee's helper on ground there was not enough work to go around held legal). A recent case, however, enjoined a strike called to make the employer re-employ a discharged employee. *Mechanics' Foundry & Machine Co. v. Lynch*, 128 N. E. 877 (1920). For the facts of this case, see RECENT CASES, page 891, *infra*. A union shop agreement has been held illegal. *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603 (1905). But agreements to give preference in hiring to union men have been upheld. *Hoban v. Dempsey*, 217 Mass. 166, 104 N. E. 717 (1914); *Shinsky v. O'Neil*, 232 Mass. 99, 121 N. E. 790 (1919).

¹¹ Fines on members. *Brennan v. United Hatters of No. America*, 73 N. J. L. 729, 65 Atl. 165 (1906). *Cf.* *Conway v. Wade*, [1909] A. C. 506 (giving effect to TRADE DISPUTES ACT 1906 but upholding a finding by the jury that no trade dispute was involved). Fines on employers. *Carew v. Rutherford*, 106 Mass. 1 (1870); *March v. Bricklayers Union*, 79 Conn. 7, 63 Atl. 291 (1906); *State v. Dalton*, 134 Mo. App. 517, 114 S. W. 1132 (1908).

¹² See *Reynolds v. Davis*, 198 Mass. 294, 300, 84 N. E. 457, 459 (1908); *Duplex Printing Press Co. v. Deering*, 41 Sup. Ct. 172, 178 (1921). See also STIMSON, *HANDBOOK TO THE LABOR LAW OF THE UNITED STATES*, 222.

¹³ 6 EDW. VII, c. 47, § 3, abolishes even this exception in trade disputes. See also COOKE, *THE LAW OF COMBINATIONS*, etc., 2 ed., § 27.

¹⁴ Intentional Aggression. This might be listed as another exception to the rule that all strikes are legal. The authorities for the most part seem to follow the view laid down by Lord Lindley in *Quinn v. Leatham*, 533, *supra*, that "an act otherwise lawful although harmful does not become actionable by being done maliciously in the sense of proceeding from a bad motive and with intent to annoy or harm another." It is possible, however, on the ground of the social interest in the general security, to

This, then, is the state of the authorities.¹⁵ It is next necessary to consider what is or should be the method of approach to these cases. The prevalent view is that the affirmative action of the strikers is *prima facie* actionable, and therefore requires justification if the strike is to be held legal.¹⁶ The legal standard by which justification is found to be sufficient or insufficient is virtually "public policy." The phrase discloses at once the source of confusion, and the occasion of the charges of judicial bias in labor cases. It inevitably increases the chance for decisions on first impressions, decisions that reflect merely the fluctuating and perhaps inadequately informed economic views of judges at a given time or place.¹⁷

In recent years, there has been a growing attempt among juristic writers to subject "public policy" to analysis and explanation—to attempt to find objective criteria by which it may be tested, and to eliminate, as far as possible, the courts' internal and subjective impressions which make it uncertain in application.¹⁸ There is clear progress in this, even though it is impossible to arrive at any standard having quite the exactness of a rule of property law. This newer method seeks to ascertain the interests involved in any given situation, and to base its decision on a balancing of those interests. Certain interests are indisputable. Others are perhaps doubtful and need to be explained by their relation to these non-controversial interests. In cases concerning

make a strong argument the other way. See James B. Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411; GROAT, ATTITUDE OF AMERICAN COURTS IN LABOR CASES, 221; POUND, OUTLINES OF LECTURES ON JURISPRUDENCE, 3 ed., 43. But even though the latter rule is adopted, it needs careful application and is usually not relevant in cases arising out of trade disputes. See Ames, *supra*, 418, note.

¹⁵ Where a strike is called for both a legal and an illegal purpose, a question arises as to the legality of the whole strike. See Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 N. E. 897 (1908). The most recent statement, a *dictum*, holds such a strike illegal. See Baush Machine Tool Co. v. Hill, 231 Mass. 30, 36, 120 N. E. 188. 188 (1918). Cf. GROAT, ATTITUDE OF AMERICAN COURTS IN LABOR CASES, 251 *et seq.*

¹⁶ See Vegelahn v. Guntner, *supra*, dissenting opinion by Holmes, J.; Plant v. Woods, *supra*; Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 253, 262.

¹⁷ See O. W. Holmes, Jr., "Privilege, Malice, and Intent," 8 HARV. L. REV. 1, 8. See also FINAL REPORT OF THE COMMISSION ON INDUSTRIAL RELATIONS, 90 (reprinted from SENATE DOC. NO. 415, 64th Congress). Single words have been some of the worst offenders in building up theories in labor law. "Threats." But a "threat" is only notice of one's intention to do something. See Jeremiah Smith, *supra*, 20 HARV. L. REV. 253, 273. A "threat" to do something legal is therefore legal. "Coercion" or "Compulsion." These words are altogether nebulous. See criticism of their use by Shaw, C. J., in Commonwealth v. Hunt, *supra*, 132. A recent article on the subject of labor law rashly uses "coercion" as if it had an accepted meaning. 30 YALE L. J. 407. "Extortion" (in the case of levying and collection of fines). The simple answer is that "extortion" only occurs when a threat to do something illegal is present. "Malice." See James B. Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411, 422: note: "If so 'slippery' a word were eliminated from legal arguments and opinions, only good would result."

¹⁸ See Jeremiah Smith, *supra*, 20 HARV. L. REV. 345, 361; O. W. Holmes, Jr., *supra*, 8 HARV. L. REV. 1, 3; Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343, 344; Note on "Boycotts on Materials," 31 HARV. L. REV. 482. See also POUND, OUTLINES OF LECTURES ON JURISPRUDENCE, 3 ed., 79-90. For an early recognition of the presence of social interests in economic controversies, see opinion by Shaw, C. J., in Commonwealth v. Hunt, *supra*.

strikes, the social interest in peace or general security and the social interest in economic progress are at once important. If the evident interest of society in industrial peace and unimpeded production were the sole consideration, all strikes might be held illegal. Over against this, however, is the social interest in economic progress. Whatever might be the considerations under another economic order, our law has always recognized the social interest in freedom of competition, and has frequently said that competition with all its cruelties is worth all that it costs.¹⁹ Incidental to the social interest in economic progress is also the social interest in the strengthening of labor combinations, because conditions which pit a single employee against an aggregation of capital are not conditions of free competition. To-day few would deny the social interest in the existence of labor-unions, or question the interest in effecting through them a more evenly balanced system of bargaining between employer and employee. If, then, these vital interests are to be satisfied, the unions must have some effective means wherewith to back up the demands essential to their functioning.

There are also individual interests of substance involved. The employer has an interest in freedom of contract, in carrying on his business as he pleases without dictation, in "hiring and firing" whom he pleases.²⁰ But to offset this, there is also the employee's interest in freedom of contract, in selling his labor to whom, and under what conditions, he pleases, in working with whom he pleases. No list of the interests involved can be exhaustive. Unfortunately, moreover, a balance between these interests cannot be struck with mathematical precision. But it seems that though the individual interests cancel each other, the social interest in industrial peace and a maximum of production is outweighed by the social interest in economic progress through the maintenance of free competition and the strengthening of labor combinations. In the balance, then, the interests on the side of the strikers prevail. The best principle to adopt or to enact into legislation is that of California,²¹ and of England since the Trade Disputes Act of 1906,²² that all strikes which do not involve the admitted exceptions of defamation, fraud, physical violence, threats of physical violence, or inducement of breach of contract,²³ are legal.²⁴

¹⁹ See *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.*, 23 Q. B. D. 598 (1889), [1892] A. C. 25; *Nat'l Protective Ass'n v. Cumming*, *supra*, 330.

²⁰ Of course where non-union men, against whom the unions proceed, are concerned, their individual interests of a similar nature are also to be thrown into the scales.

²¹ See *Parkinson Co. v. Bldg. Trades Council of Santa Clara County*, 154 Cal. 581, 98 Pac. 1027. (1908).

²² 6 EDW. VII, c. 47.

²³ Cf. note 13, *supra*.

²⁴ Lockouts present converse situations to strikes and are to be appraised by the same standards. If a given strike is legal, a lockout to resist that strike is legal. *Lefebvre v. Knott*, 32 Quebec Sup. Ct. 441, 13 Can. Cr. Cas. 223 (1907). Cf. *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190 (1894). Strikes for political purposes undoubtedly infringe so far on the state's regular governmental processes that they must be considered illegal. See REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES AND TRADE COMBINATIONS, 23. For a discussion of these strikes, see WEBBS, HISTORY OF TRADE UNIONISM, Rev. ed. 1920, 669 *et seq.* The recent dissolution of the *Confédération Générale du Travail* by a minor French court was based on the ground of wrongful political action by the C. G. T. in the general railway strike of May, 1920, for nationalization of the railways. See NEW YORK TIMES, Jan. 14, 1921.

Boycott cases present the same problems and are subject to the same methods of solution as strike cases. Judges and writers define primary and secondary boycotts in such widely divergent ways²⁵ that it is better to deal with concrete situations than with an abstract classification. An organization may, acting as a body of consumers, refuse to buy of the plaintiff. This situation is so common and so naturally a concomitant of the competitive system in industry that courts assume it to be legal and usually do not even term it a boycott at all. It is rarely used by labor.²⁶ Another situation arises when the defendants bring third parties, like wholesalers, or consumers, or employers, into the dispute and try to induce or persuade them not to deal with the plaintiff. This is done in various ways, — by threats of strikes or loss of business, or merely by publication of the "Unfair List," which asks friends of the boycotters not to deal with the proscribed employers. Practically all jurisdictions²⁷ hold such kinds of action illegal,²⁸ with the exception of Montana, which allows a boycott by publication of the "Unfair List,"²⁹ and of California, which allows all boycotts.³⁰ In the *Danbury Hatters* case³¹ and the *Bucks Stove* case,³² the Supreme Court of the United States held that the publication of an "Unfair List" in interstate commerce was illegal under the Sherman Act.

Finally, there is the so-called "boycott on materials,"³³ now made famous by the *Duplex* case,³⁴ where, in order to bring pressure on the

²⁵ See, for example, *Lindsay & Co., Ltd. v. Montana Fed. of Labor*, *supra*, 272; *Gray v. Bldg. Trades Council*, *supra*; 30 HARV. L. REV. 632; LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE*, 64; WOLMAN, *THE BOYCOTT IN AMERICAN TRADE UNIONS*, 14. For the origin of the term "boycott," see LAIDLER, *supra*, 23-27. It is often difficult, especially in cases involving strikes to force the discharge of fellow-workmen, to draw any black line between strikes and boycotts. See Wm. D. Lewis, *supra*, 44 AM. L. REG. (N. S.) 503 *et seq.*

²⁶ See LAIDLER, *supra*, 64.

²⁷ Any statement about boycotts must be made with a reservation about state statutes concerning Restraint of Trade which may have a bearing on any particular case. For these statutes, see COOKE, *THE LAW OF COMBINATIONS*, etc., 2 ed., § 204 *et seq.*

²⁸ *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928 (1908); *Beck v. Ry. Teamsters Union*, 118 Mich. 497, 77 N. W. 13 (1898); *Gray v. Bldg. Trades Council*, *supra*; *Barr v. Essex Trades Council*, 53 N. J. E. 101, 30 Atl. 881 (1894); *Booth v. Burgess*, 65 Atl. 226 (N. J.) (1906); *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 124 N. E. 97 (1919).

²⁹ *Lindsay & Co. v. Montana Fed. of Labor*, *supra*. *Accord*, *Heitkamper v. Hoffman*, 99 N. Y. Misc. 543, 164 N. Y. Supp. 533 (1917); *Sinsheimer v. United Garment Workers*, 77 Hun, 215, 28 N. Y. Supp. 321 (1894) (*semble*); *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391 (1902) (*semble*). See also *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719 (1911); *Empire Theater Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107 (1917).

³⁰ See *Parkinson Co. v. Bldg. Trades Council of Santa Clara County*, *supra*.

³¹ *Lawlor v. Loewe*, 235 U. S. 522 (1915). See also *Loewe v. Lawlor*, 208 U. S. 274 (1908).

³² *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 (1911).

³³ See 31 HARV. L. REV. 482.

³⁴ *Duplex Printing Press Co. v. Deering*, 41 Sup. Ct. 172 (1921). For the facts of this case see RECENT CASES, page 891, *infra*. Pitney, J., wrote the majority opinion, which was concurred in by White, C. J., and McKenna, Day, Van Devanter, McReynolds, JJ. Brandeis, J., wrote the dissenting opinion, which was concurred in by Holmes, Clarke, JJ. Reports of the case in the lower courts are in 247 Fed. 192; 252 Fed. 722, 164 C. C. A. 562.

plaintiff, workmen refuse to expend labor on materials which their employers buy from the plaintiff. The Supreme Court, six to three, held this illegal under the Sherman Act,³⁵ and decided that the Clayton Act³⁶ did not render it legal. The importance of the case³⁷ entitles it to detailed attention. There were in this country four manufacturers of newspaper printing presses, all in competition. The International Association of Machinists, an organization with some 60,000 members, sought to have these four manufacturers recognize the union and the union standards of work, such as the eight-hour day. Three had done so. The Duplex plant in Michigan refused. Two of the other three then told the union that the exigencies of competition with the Duplex non-union standards would force them to end their agreements with the union. The union thereupon called a strike in the Duplex plant, and sought to have its members in New York City boycott the Duplex presses, that is, refuse to install, repair, or do other work on them. The legality of this boycott under the Sherman and Clayton Acts was the question at issue.

It seems that the majority opinion to the effect that it was illegal is not supportable, because it makes two major errors. (1) It does not appreciate the real facts, and had it done so, would, according to its own test, have decided the case differently. Mr. Justice Pitney says the benefits of § 20 of the Clayton Act are limited to those "who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective."³⁸ When the unionization of the four companies was dependent on the unionization of the Duplex plant, and when the result of the Duplex plant's refusal was to jeopardize the union principle under which the union members were employed, it seems wrong to say that the Machinists in New York had no substantial interest in the dispute.³⁹ (2) The opinion is wrong, or at least misleading, in terming this a secondary boycott, to be treated according to the same principles (apart from the Clayton Act) as the publication of an "Unfair List" in the *Danbury Hatters* case. In New York (and the action in the *Duplex* case was brought in a federal court in that state), where a boycott by an "Unfair List" is held illegal, it is nevertheless well settled that refusal to work on non-union materials is justifiable.⁴⁰ Some other cases are in

³⁵ 26 STAT. AT L. 209.

³⁶ 38 STAT. AT L. 730. Section 20 among other things provides that "peacefully persuading any person to work or abstain from working, or Recommending, advising, or persuading others by peaceful and lawful means so to do" shall not be prohibited by injunction "in any case between an employer and employees, or between employers and employees involving or growing out of a dispute concerning terms or conditions of employment." The resolution of the ambiguity in the last clause was in effect the issue in the *Duplex* case. That ambiguity would not have been enacted if the legislators had been intelligently forewarned by reading REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES, etc., 15, and 6 EDW. VII, c. 47, § 5 (3). For early criticism of the Clayton Act soon after its adoption see "Labor Provisions of the Clayton Act," 30 HARV. L. REV. 632; Wm. H. Taft, 39 AMER. BAR. ASS'N REPORTS, 359, 378.

³⁷ See Francis B. Sayre, "The Clayton Act Construed," THE SURVEY, Jan. 22, 1921. See also comment by counsel, NEW YORK TIMES, Jan. 4, 1921.

³⁸ 41 Sup. Ct. 172, 178.

³⁹ See Brandeis, J., dissenting, p. 184.

⁴⁰ *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582 (1917); *Reardon v. Caton*, 189

accord.⁴¹ The courts thus have made a distinction between these two types of cases and have refused to consider this situation as involving the usual so-called secondary boycott. Consequently the court's quotations from Congressional sponsors of the Clayton Act⁴² to the effect that it was not intended to legalize secondary boycotts are beside the point.

Altogether it seems that (subject of course to the exceptions of defamation, fraud, physical violence, etc., mentioned under strikes) all boycotts where third parties are concerned — whether involving threats to do legal acts, "Unfair Lists," or strikes on materials — should be treated alike, and held to be legal. The only valid distinction from the strike cases is that here the struggle often concerns "neutrals,"⁴³ involves industrial war to a point one degree removed from the employer-employee relation. Is then the social interest in keeping the struggle in close limits sufficient to override the social interest in economic progress and the strengthening of the unions? For several reasons, the answer should be No. First, it is often hard to see that boycotts really do carry the industrial struggle further than strikes. Not only are strikes and boycotts often indistinguishable; but also with society as closely interrelated as it is today, it is not unreasonable to say that there are third parties affected by strikes almost as directly as are the "conscripted neutrals" in boycotts. There is, moreover, much weight (as well as much cause for concern in our courts' reputation for non-partisanship) in the fact that in trade disputes between employers, courts have been ready to hold that actions analogous to labor boycotts are legal,⁴⁴ and thus have recognized the compelling importance of the social interest in free competition, even in struggles not confined strictly to two parties. Finally, it seems clear that once the social interest in the organization of unions has been recognized they should not be deprived of one of the chief methods of making that organization effective, unless that method is indisputably harmful.⁴⁵

But in the end, though all strikes and boycotts (subject to the admitted exceptions) are recognized as legal, as actions with which the courts should not interfere, it must be perceived that such methods are only wasteful and primitive makeshifts. Underneath all the legal

N. Y. App. Div. 501, 178 N. Y. Supp. 713 (1919). See also *Buyer v. Guilan*, 63 N. Y. L. J. 1625 (Fed.) (1920).

⁴¹ *Grant Construction Co. v. St. Paul Bldg. Trades Council*, 136 Minn. 167, 161 N. W. 520 (1917); *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177 (1904). *Contra*, *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997 (1908); *Purvis v. Local No. 500*, 214 Pa. 348, 63 Atl. 585 (1906); *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841 (1914).

⁴² 51 CONG. RECORD 9652, 9653, 9658.

⁴³ See *Jeremiah Smith*, *supra*, 20 HARV. L. REV. 253, 278.

⁴⁴ See *Payne v. Western R. R. Co.*, 13 Lea (Tenn.) 507 (1884); *Haywood v. Tillson*, 75 Me. 225 (1883); *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53 (1896) — involving threats to discharge employee if he patronized plaintiff. See also *United States v. United Shoe Machinery Co. of New Jersey*, 247 U. S. 32 (1918) — "tying clauses" in leases of shoe machinery upheld. *Cf. Cote v. Murphy*, *supra* (trade boycott involving third parties to the dispute held legal); *Macauley Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1 (1895); *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.*, *supra*. For laws of foreign countries as to boycotts see LAIDLER, *BOYCOTTS*, 251-254.

⁴⁵ GROAT, *supra*, 255.

aspects of trade disputes is the necessity of devising some adequate economic means for their real settlement.⁴⁶

CREDITORS' RIGHTS AGAINST THE RECIPIENT OF FUNDS WHICH IMPAIR THE CAPITAL OF A CORPORATION. — In a recent Tennessee case,¹ an assignee for the benefit of creditors sued to recover sums paid out of the capital stock by the corporation to the defendant who accepted them in payment of a personal debt of a stockholder. It did not appear that the defendant knew that the sums were paid out of capital. The court dismissed the plaintiff's bill.

The statutes under which this corporation was organized and issued its capital stock are similar to those usually in force.² A fair interpretation of these statutes warrants the conclusion that the legislatures clearly intended the capital stock of a corporation to be a margin of safety for its creditors.³ The general rule is that a solvent individual is unrestrained master of his assets and may dispose of them freely or even capriciously, provided he remains solvent after such dispositions. But by the grant of corporate privileges, individuals are enabled to profit from the transactions of a business without being exposed to unlimited liability for the obligations incurred in the conduct of that business. The legislatures, therefore, are especially jealous of the rights of the creditors of the corporation. The margin of safety must be preserved. Consequently, the corporation cannot make any and every disposition of its capital it chooses, even though it remain solvent after such disposition.

The contemplated margin of safety for creditors, present and future, may be reduced in consequence of losses sustained in the legitimate undertakings of the corporation. The creditors must be expected to take the risk of those losses. But the legislature does not authorize the corporation to apply its capital to the payment of personal debts of stockholders.⁴ Further, the legislature does not intend that the contemplated margin of safety be reduced through the return of the capital,⁵

⁴⁶ Cf. Sidney Webb's Memo in REPORT OF THE ROYAL COMMISSION ON TRADE DISPUTES, 18. See also Henry B. Higgins, "A New Province for Law and Order," 29 HARV. L. REV. 13, 32 HARV. L. REV. 189 (reprinted in NAT'L CONSUMERS LEAGUE PUBLICATION No. 106), 34 HARV. L. REV. 105, dealing with the Commonwealth Court of Conciliation and Arbitration in Australia.

¹ Memphis Lumber Co. v. Security Bank and Trust Co., 226 S. W. (Tenn.) 182 (1920). For the facts of this case see RECENT CASES, page 891, *infra*.

² See 1896 LAWS OF NEW JERSEY, c. 185, §§ 29, 47, 48; 1890 LAWS OF NEW YORK, c. 564, §§ 42, 44, 57; and compare with 1905 ACTS OF TENNESSEE, c. 174, § 1; 1915 PUBLIC ACTS OF TENNESSEE, c. 108, § 1.

³ Seignouret v. Home Insurance Co., 24 Fed. 332 (1885). See 4 THOMPSON, CORPORATIONS, 2 ed., § 3660.

⁴ *In re Haas Co.*, 131 Fed. 232 (1904); *American Wood Working Machinery Co. v. Norment*, 157 Fed. 801 (1908); *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. 585 (1908). See 1 COOK, CORPORATIONS, 7 ed., § 3.

⁵ *Lockhart v. Van Alstyne*, 31 Mich. 76 (1875). The force of this objection is reduced when a solvent corporation is in liquidation and where the rights of creditors are not involved. *Dupee v. Boston Water Power Co.*, 114 Mass. 37 (1873).

whether directly or indirectly, to any or all of the stockholders. Such a return is made if a dividend is paid to stockholders out of capital or if a portion of the capital is paid to them for no consideration other than the surrender of certificates of stock. If the corporation has impaired its capital in any one of these different ways, creditors of the corporation have often been granted relief.⁶

Three theories have been advanced to explain the basis of the injured creditors' right to relief when the capital of the corporation has been impaired. The first theory is that the capital stock of a corporation constitutes a "trust-fund" for the benefit of its creditors.⁷ This phrase was not intended to connote a property interest of the creditors in the capital of a solvent corporation, because the corporation is both full legal and equitable owner of its capital.⁸ It is simply a convenient way of expressing the fact that, in dealing with its capital, the corporation is under a duty to safeguard its creditors. The second theory declares that innocent persons who extend credit to the corporation on the basis of its professed capital are defrauded by those acts of the corporation which impair its capital.⁹ The third theory is that such a voluntary impairment of capital is improper and that appropriate relief must be

⁶ For cases which granted relief to creditors against those who received corporate capital in payment of personal debts of stockholders, see note 4, *supra*.

Creditors and receivers of corporations can recover dividends paid out of the capital of a solvent corporation. *Stoltz v. Scott*, 23 Ida. 104, 129 Pac. 340 (1912); *Cornell v. Seddinger*, 237 Pa. 389, 85 Atl. 446 (1912). See also *Davenport v. Lines*, 72 Conn. 118, 128, 44 Atl. 17, 21 (1899). However, courts have reached a different result when the stockholders received the dividends in good faith. *Ratcliff v. Clendenin*, 232 Fed. 61 (1916); *McDonald v. Williams*, 174 U. S. 397 (1899). See also 2 COOK, CORPORATIONS, 7 ed., § 548. But the corporation itself cannot recover dividends from its stockholders, though paid out of capital, if no element of mistake is present. See *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37, 44, 46 N. W. 310, 313 (1890). *Contra*, *Main v. Mills*, 16 Fed. Cas. No. 8974 (1874) (*semble*). Receivers and creditors of corporations may recover from stockholders who received funds reducing the capital stock in a manner not authorized by the legislature. *Dane v. Young*, 61 Me. 160 (1872); *Crandall v. Lincoln*, 52 Conn. 73 (1884); *Clapp v. Peterson*, 104 Ill. 26 (1882). See also *Thompson v. Reno Savings Bank*, 19 Nev. 103, 111, 7 Pac. 68, 69 (1885); 1 COOK, CORPORATIONS, 7 ed., § 281; 4 THOMPSON, CORPORATIONS, 2 ed., § 3661. They may also clearly recover dividends paid out of capital when the corporation was insolvent. *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142 (1905); *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117 (1908).

It is not clear from the facts in the principal case whether the corporation was solvent or insolvent when it paid the sums to the defendant. If, in fact, the corporation was insolvent, the decision is utterly indefensible.

⁷ The "trust-fund" theory was probably first enunciated by Story, J., in *Wood v. Dummer*, 3 Mas. (U. S.) 308 (1824). Although the Supreme Court of the United States accepted it in *Sawyer v. Hoag*, 17 Wall. (U. S.) 610 (1873) and in *Scovill v. Thayer*, 105 U. S. 143 (1881), yet it cast doubts upon this theory in *McDonald v. Williams*, *supra*. For a comprehensive list of the state courts paying service to this doctrine, see 1 COOK, CORPORATIONS, 7 ed., § 199; 4 THOMPSON, CORPORATIONS, 2 ed., § 3417.

⁸ See *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 192, 50 N. W. 1117, 1119 (1892).

⁹ *Hospes v. Northwestern Mfg. & Car Co.*, *supra*; *State Trust Co. v. Turner*, 111 Iowa, 664, 82 N. W. 1029 (1900); *Lea v. Iron Belt Co.*, 147 Ala. 421, 42 So. 415 (1906); *McDonald v. Williams*, *supra*. See also 4 THOMPSON, CORPORATIONS, 2 ed., § 3418. This theory would grant recovery only to subsequent creditors who relied on the corporation's professed capital.

given against the consequences of such improper acts.¹⁰ The legislature objects to acts impairing the capital because they are subversive of stability and confidence in a complex, commercial system. The legislative policy can be best subserved not by requiring the creditor to prove a reliance on the corporation's professed capital, but rather by inquiring whether the creditor has, in fact, been injured.¹¹ Gradually, the courts are beginning to recognize that the third theory affords the most definite, scientific, and adequate basis for the protection of existing and subsequent creditors of the corporation.¹²

Any innocent defendant, not a purchaser for value, who has profited by such an improper act of the corporation, as the payment of dividends out of capital, ought to be required to disgorge the benefit which he has received, or, at least, as much of it as he still retains.¹³ If the defendant knew or ought to have known, when he received corporate assets, that they were paid to him in defiance of the legislative intent, he should be required to account for the benefit received.¹⁴ If he received corporate assets in discharge of the personal debt of a stockholder, he should be obliged, at his peril, to ascertain whether the payment to him results in an impairment of the capital stock of the corporation.

Even if the corporation in the principal case were not granted relief, despite a repentance of its improper conduct, yet its assignee for the benefit of creditors should be allowed to recover the corporate assets illegally paid out or their equivalent. For not only does the assignee represent the creditors as well as the corporation,¹⁵ but he has greater rights than the corporation, representing primarily the creditors in cases where the corporation has been guilty of a wrong with respect to them.¹⁶

¹⁰ *Easton National Bank v. American Brick Co.*, 70 N. J. Eq. 732, 64 Atl. 1095 (1906).

¹¹ *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057 (1902).

¹² *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19 (1898); *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736 (1895).

¹³ But see *McDonald v. Williams and Ratcliff v. Clendenin*, *supra*.

¹⁴ See Edward H. Warren, "Progress of the Law: Corporations," 34 HARV. L. REV. 293-295.

¹⁵ *National Trust Co. v. Miller*, 33 N. J. Eq. 155 (1880). See also WAIT, *INSOLVENT CORPORATIONS*, §§ 199, 210; HIGH, *RECEIVERS*, 3 ed., §§ 314, 315.

¹⁶ *Scovill v. Thayer*, *supra*; *Glenn v. Semple*, 80 Ala. 159 (1885).

A statement appears in WAIT, *INSOLVENT CORPORATIONS*, § 235, to the effect that a receiver has no greater rights than the corporation itself. The authorities are overwhelmingly *contra*. *Cole v. Satsop R. R. Co.*, 9 Wash. 487, 37 Pac. 700 (1894); *Alexander v. Relfe*, 74 Mo. 495 (1881); *Williams v. Traphagen*, 38 N. J. Eq. 57 (1884); *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 23 N. E. 530 (1890); *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953 (1898). *Contra*, *Republic Life Insurance Co. v. Swigert*, 135 Ill. 150, 25 N. E. 680 (1890). See HIGH, *RECEIVERS*, 3 ed., § 315; 5 THOMPSON, *CORPORATIONS*, 2 ed., § 5159.

RECENT CASES

CORPORATIONS — *ULTRA VIRES* — LIABILITY OF ONE RECEIVING CORPORATE CAPITAL IN PAYMENT OF PERSONAL DEBT OF STOCKHOLDER. — A corporation paid out of its capital stock a personal debt due from a stockholder to the defendant. The defendant, however, was not aware that payment was made out of capital. The assignee of the corporation for the benefit of creditors seeks to recover the sum paid to the defendant. *Held*, that he cannot recover. *Memphis Lumber Co. v. Security Bank & Trust Co.*, 226 S. W. 182 (Tenn.).

For a discussion of the principles involved in this case, see NOTES, page 888, *supra*.

TRADE UNIONS — BOYCOTTS — BOYCOTTS ON MATERIALS. — The plaintiff, a manufacturer of printing presses, refused to recognize a union among its workmen. Two of the other three manufacturers of printing presses in the country had notified the union that this action would necessitate their abandonment of the union shop which they had previously recognized. The officers of the union thereupon sought to prevent the members in other states from installing, delivering, or repairing the presses of the plaintiff. The plaintiff sued for an injunction against these acts by the officers. The defendants set up the Clayton Act (38 STAT. AT L. 730). The two lower courts dismissed the bill, and the plaintiff appealed. *Held*, that the judgment be reversed, and the injunction be granted. *Duplex Printing Press Co. v. Deering*, 41 Sup. Ct. 172.

For a discussion of the principles involved in this case, see NOTES, page 880, *supra*.

TRADE UNIONS — STRIKES — STRIKES TO SECURE THE RE-EMPLOYMENT OF DISCHARGED FELLOW-WORKMEN. — The defendants quit work because one of their fellow-workmen was discharged. It was admitted that the defendants had done nothing else that could be questioned. The employer brought a bill to restrain the defendants from continuing to strike. *Held*, that the injunction be granted. *Mechanics' Foundry & Machine Co. v. Lynch*, 128 N. E. 877 (Mass.).

For a discussion of the principles involved in this case, see NOTES, page 880, *supra*.

BOOK REVIEWS

THE LAW OF CONTRACTS. By Samuel Williston. New York: Baker Voorhis and Company. 1920. In four volumes. pp. xxiii, 1155; xxi, 1158-2329; xxii, 2331-3456; 3457-4182.

The book does not intend or pretend to be a concise statement of the propositions constituting the law of contracts. Neither does it confine itself to a consideration of simple contracts alone. It deals also with "specialties," or contracts under seal, and with "quasi-specialties," or mercantile specialties, that is with negotiable instruments. It goes so far, in order to make its treatment of the subject exhaustive, as to incorporate within its pages the whole text of the uniform Negotiable Instruments Law.

It is important to define the province sought to be covered by an author, because otherwise there cannot be made any analysis or comment which will be fair or indeed entirely applicable to the subject matter. A concise, succinct, plain statement of what the law is, or what the author believes the law should be on the main fundamental principles of contract, — like Langdell's "Summary of Contracts," — is one thing; an exhaustive, all-comprehensive, argumentative, analytical discussion of all, or most, of the questions involving the law of contracts, even though the discussion leads us into other realms of law, — like this book of Mr. Williston's, — is quite another.

To criticize one because it is not the other would be to misapprehend the purpose of a review.

A monumental treatise on contracts, a treasure-house of the accumulated learning of centuries on the subject, an exhaustive exposition of the principles which constitute this branch of law, accompanied by a critical analysis of them, running with and through their statement, was needed, and this book answers the need.

It will not do for a classroom text-book, but as a book of reference for students of the law, in law schools and in practice, it will be eminently useful, helpful, and valuable. It is the last word in scholarly and scientific treatment of the wide-reaches of the subject, bearing in mind that it is intended to be a maximum and not a minimum of exposition.

The author has taken the liberty of expressing his own views on various mooted questions. This he had a right to do and would be expected to do, and has thereby rendered a very distinct and valuable service. That his views are not always defensible does not make them any less interesting or noteworthy.

For illustration of the few regrettable inadvertences in the work, reference may be had to Section 69. The caption of this section presages the error which is elaborated in the text of that section. The caption asserts that "communication may be necessary to acceptances of unilateral contracts when the act requested is peculiarly within the knowledge of the offeree." The error is not corrected in the text, of which the foregoing quotation is the preface.

Now the fact is that nothing in the law of contracts requires a communication save a promise. An act to be complete does not require communication. That should be self-evident. Therefore, the proposition which forms the index of this statement cannot be said to be true. The truth is that where the act which creates the contract by constituting the acceptance of an offer contemplating a unilateral contract is peculiarly within the knowledge of the offeree, there is a condition implied to his right to sue upon the obligation, *which has already been created*, that he take reasonable means to give notice to the promisor that his obligation *has arisen*. There is no requirement in law that the notice *reach* the promisor; in other words, it need not be *communicated* to him at all in order to perfect the right of the promisee. It is enough if the promisee has pursued a reasonable method of *dispatching* a timely notice. We wish that this confusion might have been avoided.

Again, the author states in substance, in Section 70, that if the offeror contemplates a bilateral contract, but says that the counter promise may be made by an act or a sign, then the bilateral contract will be created by that act or sign, although there be no communication of it to the offeror. And he quotes *Household Insurance Company v. Grant*,¹ which involved a stock allotment contract, which was, as stock allotment cases usually are, a unilateral and not a bilateral contract. That is to overlook entirely the nature of a promise, which, indeed, in another portion of this same section, the author well recognizes. There can be, in the nature of the thing, no promise without a communication, and even the offeror cannot change its nature, however much he

¹ L. R. 4 Ex. Div. 216 (1879).

may wish or intend to do so. No one can waive one of the promises necessary to a bilateral contract, which must consist of promise for promise. It was a notice, required to be given as a condition implied in law, where the act or fact upon which a promisor's liability depends is peculiarly within the knowledge of the other party, with which the court is really dealing in such stock allotment cases, as the Grant Case and Hebb's Case and Harris' Case (both cited in the Grant Case), upon which it was based. In such cases the requirement is not that the notice shall be given, that is, communicated, but only that reasonable efforts, like posting a letter properly addressed and stamped within a reasonable time, shall be made. The offer in such a case is really this: "If you [the Company] will allot me 100 shares of stock I will pay you \$10,000,"—an offer contemplating a unilateral contract, created when the act of allotment is done. *Adams v. Lindsell*,² establishing the erroneous doctrine, in cases of bilateral contracts, was decided by a court which felt itself constrained to its decision by a difficulty which had no existence in fact.

So again, in connection with the portions of the book dealing with the question of the right of a beneficiary of a contract, the proposition there stated cannot be approved, nor the reasoning said to be satisfactory. In Section 114 the proposition which is condemned by the author is not the proposition which the principles of the law of contracts require or embody. The sound principle is not only that the consideration must move from the promisee, but that the plaintiff in an action on contract must be both promisee and the party who furnished the consideration. The true point is that the consideration must move from the plaintiff, *who must also be the promisee*. The proposition having been stated by the author in the other form, the alternative form, of "promisee or plaintiff," is easily destroyed as a man of straw. If the promisee furnishes the consideration, a valid contract is made and, as is correctly stated in the text of Section 114, the difficulty arises in allowing some one who was not the promisee to recover on the promise. Consonantly with the logical principle of contract law, there is not only a "difficulty" in allowing such recovery, — there is an impossibility. In the history of the simple contract it was necessary for the plaintiff to show detriment suffered by him, to wit: that he had been deceived by the defendant's promise into giving something up. If he could not show this, he was non-suited, because the action of assumpsit (simple contract) came into the law as an action on the case in the nature of deceit, and if the plaintiff had not been deceived to his injury, he could not avail himself of that form of action. The argument of the author is not made more convincing by the reference to a novation, because there the plaintiff always furnishes the consideration, namely, his release or promise to release his former debtor.

The case of *De Cicco v. Schweizer*³ is cited in the author's note to this section. But no help for his contention can be gained from that case because there the plaintiff furnished *part* of the consideration and there is no rule required by the logic of the matter that the plaintiff shall furnish *all* of the consideration. It is enough that he suffer a detriment at the request of the promisor.

Doubtless the author was moved to his position by the feeling that such contracts *should be enforceable by the beneficiary*, as a matter of business expediency. Indeed he says so. In Section 357 his language is: "Contracts for the sole benefit of a third person should be enforceable." Even if that be true, it cannot be done, under sound principles of contract; and if parties seek to secure rights by means other than those sanctioned by the law which they are invoking, there is no help except in the almost universal efficacy of a statute.

² 1 B. & Ald. 681 (1818).

³ 221 N. Y. 431 (1917).

No better demonstration of the impossibility of finding a satisfactory ground upon which to sustain an action by the beneficiary of a contract can well be discovered than will be found in the very decisions in which recoveries, by such beneficiaries, have been allowed, beginning with the "leading case" of *Lawrence v. Fox*⁴ and ending with the last decided case on the subject.

On the other hand, it is gratifying to note the clear and decided stand taken by the author in behalf of the sound view on some long mooted questions. The controversy which has long occupied the thoughts of scholars as to whether an act, or a promise to do an act which one is already under a contractual obligation to perform, can be a consideration for a promise, never merited the expenditure of ingenuity which has been employed in connection with it. The defense of the affirmative of the proposition has exhausted every argument, good and bad, which could well be conceived. And yet, if we start with the proposition that nothing can be a consideration for a promise save the surrender of a legal right or a promise to surrender a legal right, then the attempt to defend the affirmative of the proposition would seem to have been vain from the outset. Langdell, Pollock, Holmes, and Anson, among many writers, have notably contributed to the controversy. The author of the book under consideration sums up, after thorough exposition of the subject and the arguments on both sides, the sound view that such an act or promise cannot be a consideration, in a few terse sentences:

"Section 130. . . . On principle, the second agreement is invalid, for the performance by the recalcitrant contractor is no legal detriment to him, whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance of the second agreement a legal benefit to the promisor, since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion. In a few jurisdictions, a contrary view has prevailed."

Perhaps the most valuable and distinctive characteristic among the many valuable features of this book, namely the fearlessness with which the author stamps in no uncertain terms and with clearness of logic and irrefutable argument those vicious errors which have crept in, in one way or another, but which should be extirpated for the everlasting good of the science, can be illustrated in no better way than by his attack upon the false doctrine of "anticipatory breach." That doctrine, as the author well demonstrates, is not and never has been defensible. The erroneous conception which Mr. Williston refutes arose in "a hard case" where there was some plausible pretext for the belief that the contract created a "status" which was violated by words or acts inconsistent therewith, although there had been, in fact, no breach of promise. There can be no fine-spun reasoning which will successfully make that a breach of promise which, in fact, is not a breach of promise. It should be sufficiently clear that a promise cannot possibly be broken until the time for its performance arrives. To say that it may be broken by anticipation is to say that which, in the nature of things, cannot be so. One has only to look at the result of the doctrine to see how far from principle it strays. When the courts struggle with the question of the measure of damages for anticipatory breach of contract, they demonstrate the unscientific and illogical basis of the whole doctrine. Damages for an anticipatory breach become a matter of pure speculation and guesswork, and a jury is left to uncertain and indefinable tests which are condemned universally in all other instances of breach of contract.

The argument in behalf of the doctrine of anticipatory breach is not helped, as some would have us believe, by the attempt to import "conditions" which are said to be "implied in law." There are no conditions implied in law in

⁴ 20 N. Y. 268 (1859).

such cases, either in fact or in any decision made by any court, that we know of, attempting to support this doctrine. Any erroneous doctrine can be supported if there were allowed to be imported into the question enough "implications," either of fact or of law; but it is obvious that that would only be making contracts for the parties, which, in this particular instance, would be inconsistent with the contract which the parties have actually made. "Conditions," which are so called "implied in law," are never imported into a contract in violation of the terms of the same, although they are made "out of whole cloth," to work justice between the parties in the performance of the contract, but never in the creation of a contract under direct derogation of the provisions agreed upon by the parties.

One wishes that in all instances (as has been well done in some instances) in which serious errors have been made by text-book writers and by courts, arising either from carelessness in the statement of principles or from lack of precise and accurate knowledge of the subject, the errors had been branded as such once for all, and a clear statement made not only of the errors themselves, but of the propositions in their correct form. For example, there are found repeatedly in text-books and in cases the statement that infant's contracts are voidable, except contracts for necessities. The truth is that an infant's contracts, *including* his contracts for necessities, are voidable. The recovery which is had against an infant for necessities, for which he has contracted to pay, is not upon his promise at all, if he has chosen to avoid it, but in quasi-contract; and the amount recovered is not the amount which he promised, but the reasonable or market value.

All this may be gathered by putting together various parts of the discussion, historical and otherwise, contained in pages 427 to 483; but it would have been a valuable service, added to the other valuable features of this book, if the erroneous and incorrect statements of the general principle on this topic had been indelibly stamped *at the outset*, to be *followed* by the important historical and other material, in the extended exposition which marks this and other topics.

It may be noted in passing that the scheme of page headings in connection with "Capacity of Parties" has not been carried out. The pages in Chapter VIII, dealing with infants, are uniformly headed "Capacity of Parties, Infants." But the pages of Chapters IX and X, dealing with "Insane and Intoxicated Persons," and "Married Women and Corporations," respectively, are not similarly marked with appropriate headings. A uniform plan in this regard would have increased the ease of reference.

In conclusion, it may be said that perfection cannot be attained in any piece of writing, certainly not in the case of a treatise upon an important branch of a science. The most which can be done is to deal with the subject in as clear and scientific a way as possible, and by the employment of accepted authorities and the canons of sound reasoning eliminate as many as may be of the mistakes, confusions, and false precedents which grow up and obscure any branch of knowledge which is in frequent use, and which is made the subject of constant application.

This work is, everything considered, and laying aside the empty hope of perfection, a great contribution not only to the learning of the law of contracts, but to the art of writing law books. It is written scientifically and conscientiously and understandingly. It is clear and unambiguous in its expressions, and even where in places it seems to fall into inadvertences, there is happily no mistaking the author's meaning. Would that all text-books and, indeed, all decisions of courts, were thus written! There would be, in that case, a certainty that the time would come when the science would be perfected and justice under law be swiftly and certainly administered.

Nothing could be cited as more conclusive evidence of the rare excellence of

the book, nor disclose the orderly mind out of which the work was fashioned, than the "Table of Contents," which is very detailed, very clear, very carefully and accurately divided, and very illuminating as to the whole character of the book. It tells not only where everything will be found, but, for the most part, what each of those things will be when it is found. Where the thing cannot be considered as settled, the proposition in the index is stated in the form of a question, which is answered as far as may be in the text.

There are text-books and text-books. The number reaches almost to infinity. They are good, bad, and indifferent, — mostly bad and indifferent. This book under review furnishes an example of what a good text-book may be. Any one would be justly proud to have written it. The student, the profession, the bench, and the bar are alike blessed by the opportunity to use it; and, perhaps better still, the science of law is advanced and improved by this highly meritorious contribution.

CHARLES THADDEUS TERRY.

COLUMBIA UNIVERSITY.

JURIS ET JUDICII FEICIALIS, SIVE JURIS INTER GENTES, ET QUESTIONUM DE EODEM EXPLICATIO. By Richard Zouche. Edited by Thomas Erskine Holland. In two volumes. Washington, D. C.: The Carnegie Institution. 1911. pp. xvi, 16, 204; xvii, 186.

DE JURE NATURAE ET GENTIUM DISSERTATIONES. By Samuel Rachel. Edited by Ludwig von Bar. In two volumes. Washington, D. C.: The Carnegie Institution. 1916. pp. 16, 335; 16, iv, 233.

SYNOPSIS JURIS GENTIUM. By John Wolfgang Textor. Edited by Ludwig von Bar. In two volumes. Washington, D. C.: The Carnegie Institution. 1916. pp. 28, vi, 168; 26, v, 349.

The publication of Grotius' *De Jure Belli ac Pacis* in 1625 made an epoch. Writers on international law may be classified accordingly as *pre*-Grotian or *post*-Grotian. The *pre*-Grotian works published in the series entitled Classics of International Law have been reviewed heretofore.¹ The volumes now to be reviewed are *post*-Grotian. More accurately, they are works written by Grotius' junior contemporaries.

It ought to be enough to arouse interest in Zouche to say that his *Juris et Judicii Feicialis, sive Juris Inter Gentes, et Quaestionum de Eodem Explicatio*, was the first treatise on international law written by an Englishman. The earliest edition was published in 1650. It is here presented in facsimile, with an introduction by Sir T. E. Holland, lately Professor of International Law in the University of Oxford, and with a translation by J. L. Brierly.

Zouche was born in 1589; and he died in 1661, having spent a long life in activities whose scope is indicated by saying that he was Regius Professor of Civil Law at Oxford, Member of Parliament, Judge of the Court of Admiralty, and author of about sixteen published works, most of them dealing with law. He was a successor to the professorial chair of Gentilis, the Italian scholar who was the first to write of international law in England. Though Zouche was a contemporary of Grotius, his own writings on international law were subsequent to Grotius' *De Jure Belli ac Pacis*. Thus Zouche was obviously not the earliest of the famous writers on the subject of this work; and indeed he himself was careful to acknowledge indebtedness to predecessors.

Professor Holland, after pointing out defects in arrangement, concludes that Zouche made two valuable contributions, in that he was the first to emphasize

¹ 34 HARV. L. REV. 794.

war as a means of obtaining the rights enjoyed in time of peace and the first to point out clearly the ambiguities underlying the phrase *Jus gentium* and to introduce formally, as a proper description of the subject, the phrase *Jus inter gentes* — the forerunner of Bentham's term, International Law.

When a book is as old as this one, a reader seldom goes to it to ascertain existing law. Nevertheless, Zouche's work has many features of interest. Zouche begins by saying "Law between Nations is the law which is recognized in the community of different princes or peoples who hold sovereign power — that is to say, the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one another, and which is observed by nations at peace and by those at war." This passage, noticeably modern in tone, appears to place Zouche not with the school of theorists, but with the practical school of those collecting and classifying rules actually existent, though there is carried into the definition the somewhat theoretical point — perhaps a point which logicians would call an accident — that the rules are founded in reason. As Zouche thus emphasizes what is, rather than what ought to be, it is not surprising to find that he devotes almost the whole of his space to the statement of historical facts and the presentation of the views held by his predecessors. His historical facts, it should be said, are frequently events which his predecessors did not mention.

His work is divided into two parts. The first deals with established doctrines, and the second with vexed questions. In each part the method is chiefly to state with great clearness and brevity an historical event involving the problem and then to state with similar clearness and brevity the views of Gentilis, Grotius, and other authors. On the vexed questions Zouche seldom indicates his own opinion, unless, indeed, he may be said to favor the practice, attributed by Coke to Littleton, of stating last the view preferred by himself. Throughout each part of the work Zouche deals with peace before he deals with war, thus departing from Grotius and emphasizing his own conception that peace is not merely the preferable but also the normal status.

Early in life Zouche produced a comprehensive work entitled *Elementa Jurisprudentiæ*, dealing with many heads of law, both public and private. The present treatise is one of several in which he elaborated the plan laid down in that earlier work. Even a hasty reading of it raises several questions interesting to any one caring for the history of legal literature. Is this a piece of work undertaken simply to complete a scheme based upon a professorial career; or does it have its foundation appreciably in the author's experience as Judge of the Court of Admiralty? Does the book contain much original matter; or is it chiefly a convenient systematization of the contributions made by Grotius and others? Is the book of practical use to-day? On all these matters a convenient starting point is given by the topical references at the close of Professor Holland's introduction. For example, regarding international law in time of peace there are important references on Arbitration, Armaments, Domicil, Embassy, Extradition, Sea, Treaties, and Wreckage; and regarding international law in time of war there are important references on Declaration, Booty, Capture, Contraband, Neutrality, Prisoners, Prize, Property, and Ship and Goods. If that list be too formidable, even the hurried reader should find time to read what Zouche says on dual citizenship (Part II, Sect. II, par. 13), and on Angary (Part II, Sect. V, par. 10), and on whether, when arms or ships are contraband, the materials of which they are made are contraband also (Part II, Sect. VIII, par. 8). Those passages are worth reading, both because they deal with topics still current and because they illustrate Zouche's method.

Another one of the junior contemporaries of Grotius was Rachel. He was born in 1628; and he died in 1691. He was a German. His *De Jure Naturæ et Gentium Dissertationes*, which appeared in 1676, must be considered the

fruit of his professorship of the Law of Nature and of Nations in the University of Kiel. The present edition contains a facsimile of the original, an introduction by Professor von Bar of the University of Göttingen, and a translation by John Pawley Bate. The introduction explains that this work appeared a few years after Pufendorf, another of the junior contemporaries of Grotius, had overemphasized the theory denying the existence of a positive *jus gentium*, distinct from *jus naturale*, and that Rachel overemphasized the opposite theory. In other words, Pufendorf was a Naturalist and Rachel a Positivist, going much beyond Zouche. The whole of the dissertation on the Law of Nature is devoted to discussing differences between theories, and so is at least half of the dissertation on The Law of Nations. To-day such discussions seem dreary, uninteresting, and useless; but the bitter attacks on Hobbes may attract some readers. In the dissertation on The Law of Nations there are some passages of a practical nature (Sections XXXIX-LXXIX), containing rules regarding just war, destruction and plundering, capture, truce, postliminium, hostages, ambassadors and their retinue, and other matters. The author's method differs from Zouche's, in that there is less use of historical instances. There are many passages of an enlightened tone; and any one of scholarly taste will find it profitable to compare Rachel with the other early authorities.

Textor was still another of the junior contemporaries of Grotius. He was born in 1638; and he died in 1701. He was a professor of law in the University of Heidelberg. In 1680 appeared his *Synopsis Juris Gentium*. The present volumes give a facsimile of the earliest edition, an introduction by Professor von Bar, and a translation by John Pawley Bate. Textor is usually classed as a Positivist; but he is deemed by Professor von Bar not so extreme as Rachel, for Textor believes that the law of nations consists both of *jus naturae* and of customs.

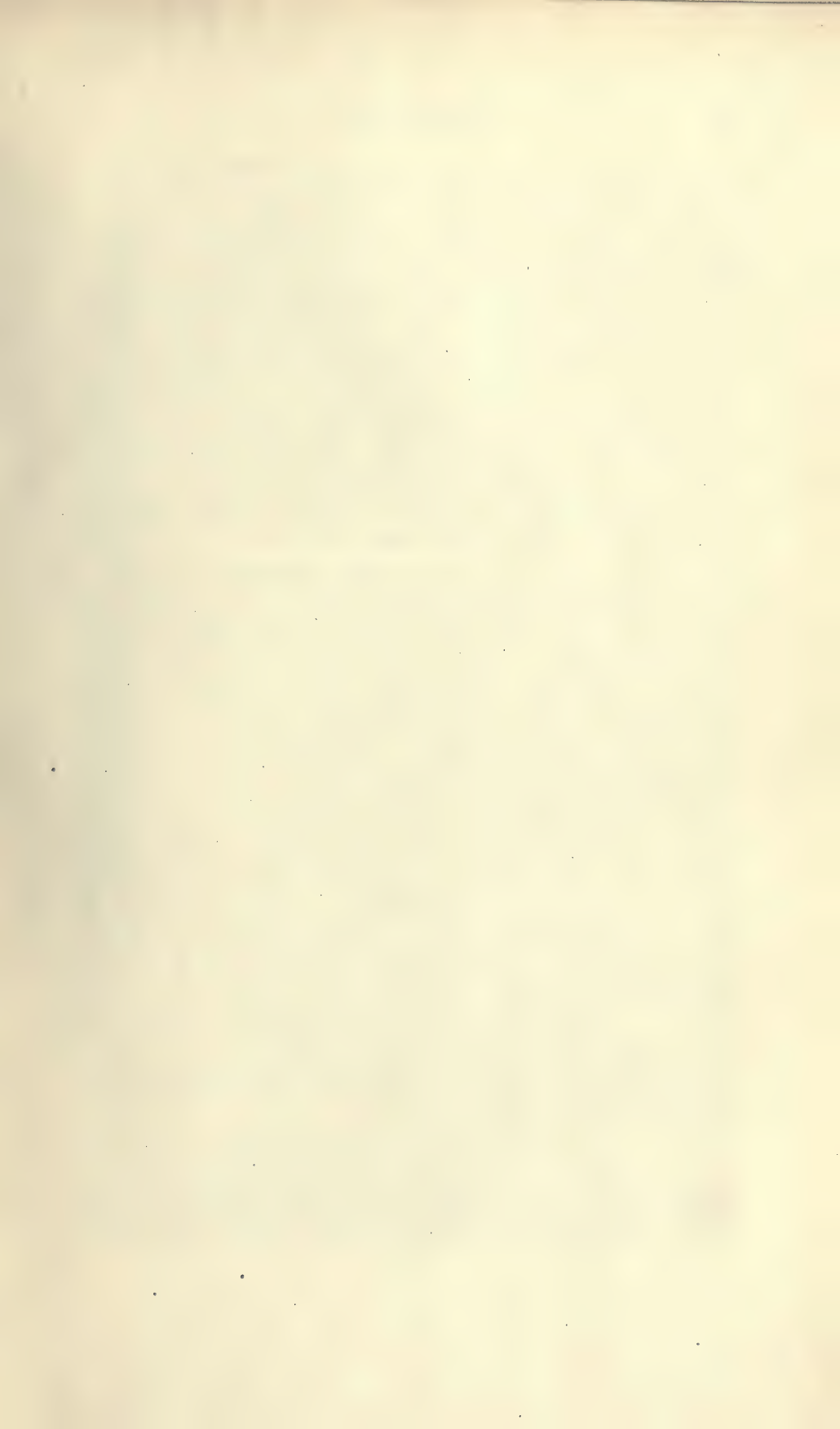
Textor deals to some extent with private law and constitutional law; but, even while he is doing so, he has international law in mind, and it is to international law that he devotes vastly the largest part of his space. Among his topics are ownership of the sea, capture, ambassadors, public and private war, just causes of war, declaration of war, captives, postliminy, truces and armistices, treaties of peace, alliances, neutrality, and the rights of the victor. The discussion adequately cites historical facts and the views of earlier authors. Textor's own views cannot be said to be always progressive, but the tone of his work is thoroughly entitled to respect.

It only remains to add that these volumes of the Classics of International Law, like the *pre-Grotian* volumes heretofore reviewed, give precisely the proper basis for scholarly and practical investigation into the history and theory of the doctrines which will be presented by counsel arguing before any international tribunal and by statesmen participating in any international conference.

EUGENE WAMBAUGH.

A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND; WITH ILLUSTRATIONS FROM SCOTCH, INDIAN, AMERICAN, AND OTHER LEGAL SYSTEMS. By Pitt Taylor. 11th Edition by J. B. Matthews and G. F. Spear. London: Sweet & Maxwell, Ltd. (Toronto: The Carswell Co., Ltd.). 1920. 2 vols. pp. cii, 1468.

When Mr. Taylor was engaged in his historic controversy with Chief Justice Cockburn over *Bedingfield's Case*, he was confronted with a passage dead against him from the sixth edition of Roscoe's "Criminal Evidence." With a



certain glee he replied, "*Roscoe never wrote one line of the passage on which you rely.*"¹ It was by an editor of Roscoe, written years after his death, and incorporated into the text, according to what James Bradley Thayer called "a vicious method," without anything to show its separate origin. Taylor could hardly have foreseen that his own book would meet a somewhat similar fate.

This dovetailing process, which is such a frequent characteristic in English editions of dead writers, has been well done. In some instances the new sections have been indicated by a plan of numbering, but often it is hard to know where Taylor ends and the editors begin. The collection of statutes and decisions is large, and the two volumes will be convenient for lawyers who wish to learn the present state of the English authorities on Evidence. The legislation and Rules of Court are of value in connection with proposed enactments in this field in our various states. If, however, one goes to this book hoping to find the latest English reasoning on the difficult problems of Evidence, one will be disappointed. There is, indeed, some discussion of principles, but that for the most part is neither new nor English. The editors should not have omitted the preface to Taylor's first edition, or at least its opening sentence: "The following work is founded on 'Dr. Greenleaf's American Treatise on the Law of Evidence.'"² The leading English book on Evidence gives us in 1920 the same legal reasoning that Simon Greenleaf wrote down in 1842.

Sydney Smith infuriated Greenleaf's contemporaries by asking, "Who reads an American book?" He might have got his answer from Mr. Taylor. Section after section of this work acknowledges his indebtedness to the early editions of Greenleaf. But apparently Taylor and his editors stopped their American studies at that point, and read no more. If Taylor, like many great English text-writers — Lindley on Partnership is an example — had limited himself to English sources and refrained from consideration of American authorities, an American reviewer would have no just cause to regard the omission of distinguished treatises and important decisions on this side of the Atlantic as a serious shortcoming. It is, however, inexcusable that a book confessedly based upon Greenleaf should wholly ignore the overhauling which all his ideas have received from Wigmore. The editors should at least have embodied the results of Wigmore's edition of Greenleaf, even if they were ignorant of his own Treatise. Furthermore, they should either have cited no American cases at all or else given a selection which would adequately represent the present American law of Evidence. Instead, they give an occasional old decision from Greenleaf's footnotes, usually in the form of a reference to the American State Reports followed by "(Am.)" and nothing more. Apparently for these editors all American cases are created equal, and it is not considered worth while to mention the name of the state deciding them. Even if we concede that an extensive acquaintance with the output of forty-eight state courts and the lower United States courts is too much to ask, at least it would have been helpful to include decisions by the United States Supreme Court on points in Evidence which are still unsettled in England.

Stories are told of Arctic explorers who emerged after years in the northern waste to learn that the European War had begun and ended without their knowing anything about it. For all that the editors of the eleventh edition of Taylor reveal, either in their text or their footnotes, nothing has happened to

¹ "A Letter to the Lord Chief Justice of England, by John Pitt Taylor," London, 1880, page 13; see THAYER, *LEGAL ESSAYS*, 212, note.

² "If Mr. Taylor, in abandoning his original purpose of merely editing Greenleaf, had indicated the real nature of his book, not merely in the ample acknowledgments found in his preface and elsewhere, but in the title of his book; if, for instance, he had called it 'Taylor's Greenleaf' — less dissatisfaction with his course would have been felt on this side of the water." THAYER, *LEGAL ESSAYS*, 210, note.

the principles of Evidence in this country since Greenleaf wrote. There is not a trace of influence from any subsequent discussion. Apparently they have never consulted an article in our law reviews, never read a line of Wigmore's five volumes or of Thayer's Preliminary Treatise on Evidence, which Sir Frederick Pollock³ pronounced "A book which goes to the root of the subject more thoroughly than any other text-book in existence."

This insularity is not generally characteristic of English writers. Maitland paid tribute to Thayer. His books and Wigmore's were reviewed at length in England.⁴ Pollock reinforces his discussion of inevitable accident in Torts by the *Nitro-Glycerine Case*,⁵ and devotes an article to *Abrams v. United States*.⁶ Yet the editors of Taylor ignore important Supreme Court cases on the hearsay rule, cite Wigram's theory of interpretation without mention of Holmes's essay,⁷ and discuss *Bedingfield's Case*⁸ without a word about Thayer's exhaustive review of the Taylor-Cockburn controversy, though it has been in print forty years.⁹

The consequence of such omissions in successive editions of a leading English work on Evidence is not only to render the book itself seriously inadequate in its analysis of legal principles, but also to make easier confusion in judicial thinking. Although the English law of Evidence, under the Judicature Act and the Rules of Court, is, far more than ours, "harmonious with the present demands of justice,"¹⁰ several important questions still remain open, and a book like this gives the courts no aid in solving them. For example, the *res gestae* exception to the hearsay rule was left by Taylor in a tangle. Four absolutely different types of utterances are lumped together under this heading: (1) words which are important from the mere fact that they were spoken even if they are untrue;¹¹ (2) declarations of physical or mental condition; (3) declarations accompanying a material act;¹² (4) admissions by an agent. Thayer analyzed Taylor's errors in 1881,¹³ but they are still uncorrected in 1920. A good discussion of these points in the footnotes to a leading English text-book, as Taylor's has always been, might avoid the dubious reasoning of such a decision as *Lloyd v. Powell Duffryn*,¹⁴ which, by the way, the editors fail to cite although it was decided by the House of Lords six years before they went to press.

Take another example. *Sugden v. Lord St. Leonards*¹⁵ left the hearsay rule in much uncertainty, especially the admissibility of declarations by the testator of his testamentary intentions. The editors do not mention this case in their discussion of the hearsay rule. They do not cite *Woodward v. Goulstone*¹⁶

³ 15 L. Q. R. 86.

⁴ Thayer's Preliminary Treatise in 13 L. Q. R. 208, 15 L. Q. R. 86; his Legal Essays in 24 L. Q. R. 219; Wigmore on Evidence in 21 L. Q. R. 193, 323, and 24 L. Q. R. 222.

⁵ 15 Wall. (U. S.) 524 (1872).

⁶ 250 U. S. 616 (1919). See L. Q. R. (1920).

⁷ TAYLOR, 11th ed., 774, note; Oliver Wendell Holmes, "The Theory of Legal Interpretation," 12 HARV. L. REV. 417 (1899), and his COLLECTED LEGAL PAPERS, N. Y. 1920, 203. Even the able monograph of an Englishman, F. Vaughan Hawkins, in 2 JURID. SOC. PAPERS, 298, is not mentioned by Taylor's editors.

⁸ 14 Cox C. C. 341 (1879).

⁹ "Bedingfield's Case — Declarations as a Part of the Res Gesta," 14 AM. L. REV. 817, 15 *ibid.*, 1, 71; THAYER, LEGAL ESSAYS, 207.

¹⁰ 1 WIGMORE, EVIDENCE, § 8.

¹¹ For instance, the offer and acceptance in an oral contract.

¹² These alone fall properly under the *res gestae* exception.

¹³ See note 9, *supra*.

¹⁴ [1914] A. C. 753; see 28 HARV. L. REV. 299. TAYLOR, 11th ed., 460, cites the same case in the Court of Appeal for another point *sub nom.* Ward v. Pitt.

¹⁵ 1 Pro. Div. 154 (1876).

¹⁶ 11 A. C. 469 (1886).

at all, though in the House of Lords. If they had read Wigmore or the Supreme Court decisions in *Hillmon v. Mutual Life Insurance Co.*,¹⁷ and *Throckmorton v. Holt*,¹⁸ they would have been saved from such a blunder. They do not discuss the admissibility of declarations of intention as evidence of a subsequent act. They do not even cite a decision of Lord Alverstone in 1912,¹ excluding such declarations in an abortion case. An English text-book discussing the *Hillmon Case* might lead to a different result in another case of declarations of intention, for it is plain that the American cases and the principle underlying them were wholly unknown to court and counsel in the abortion case. Of course, the present editors of Taylor cannot be blamed for these past decisions, but they have done nothing to furnish the English Bar and Bench with better theoretical equipment for the future.

Surely, the nation which has produced the great treatises of Maitland, Dicey, Pollock, and many others, might spend the immense labor which has gone into these two volumes for a better purpose, and give us a survey of the English law of Evidence in the light of twentieth-century thought, instead of warming over for the eleventh time the words of an American, an energetic pioneer four-score years ago but long superseded in his own country.

Z. C., JR.

THE EQUALITY OF STATES IN INTERNATIONAL LAW. By Edwin DeWitt Dickinson, Ph.D., J.D. Being Volume III of the Harvard Studies in Jurisprudence. Cambridge: Harvard University Press. 1920. pp. xiii, 424.

"Equality is one of the natural and primitive rights of nations. . . . The equality of sovereign states is a generally recognized principle of public law." So says Calvo;¹ such are the common statements which pass current among the writers of international law, and which with little change, to use the words of Hobbes, have passed "like gaping, from mouth to mouth." As to what is the fundamental meaning of this threadbare assertion, what are the practical consequences in the domain of international law which necessarily follow, what its origin and its history, comparatively few have stopped to inquire.

Mr. Dickinson, in his studious book recently published, has made a careful inquiry as to the sources and origin of this principle of the equality of states, and has traced the historical development of the idea down to our own times. Writing after painstaking and scholarly investigations, Mr. Dickinson shows that the idea of state equality did not originate, as many suppose, with that great monument of international law, *De Jure Belli ac Pacis*, nor was the idea even stressed by Grotius in that epoch-making book. Its origin is to be traced, rather, to the Law of Nature, a conception which goes directly back to the days of Greece and Rome. No principle was more familiar to Roman lawyers or to Greek philosophers than that in the famous phrase of Ulpian, "quod ad jus naturale attinet, omnes homines aequales sunt."² What could be more natural than for the seventeenth-century writers, immersed in the teachings of ancient classics and in the principles of natural law, to apply to states, in the system of international law which they were evolving, this universally accepted principle of equality, just as the Roman lawyers had applied it to the persons of municipal law?

¹⁷ 145 U. S. 285 (1892).

¹⁸ 180 U. S. 552 (1901).

¹⁹ *Rex v. Thomson*, [1912] 3 K. B. 19 (C. A.).

¹ Dictionnaire, I, 286.

² Digest, L, 17, 32.

Thus the principle has come down to us almost as part of the religion of an orthodox international lawyer; but as is true of many dogmas, the question of what is its meaning and significance remains largely unanswered. As Mr. Dickinson explains, the dogma is large enough to cover two very distinct ideas, — equality before the law, and political equality. Most will be inclined freely to admit the truth of the dogma if given the former meaning; but the latter interpretation at once spells difficulties. The bald truth is that states are not, and never can be, equal so far as political power and influence in the shaping of international affairs are concerned; and this discrepancy between fact and theory has been responsible for a vast amount of speculation and theorizing in the effort to reconcile the theory of the equality dogma with the facts of international life.

If so excellent a study as Mr. Dickinson's is to be criticized it must be on the ground that the author fails to draw any very practical conclusions from his painstaking research, — that the book seems academic in the midst of very pressing practical issues. Perhaps Mr. Dickinson purposely sought to avoid entering upon a most contentious field. Nevertheless the question as to what practical consequences the equality dogma entails in international law is today a matter of such paramount importance that one cannot help regretting that it is not further developed in Mr. Dickinson's book. What, for instance, does it involve in regard to the unanimity requirement of voting in international congresses or commissions? Does it mean that all states must have equal voting power? In the sense of equality before the law it seems fairly clear that this principle would mean that every state participating in a conference to consider the adoption of some treaty or international arrangement would be entitled to an equal vote before it could be bound; but the situation would be very different if it were a question of voting within an international commission or executive organ whose powers are specifically delegated and carefully delimited. The insistence upon equality of voting power under the cover of this dogma has wrecked more than one international project; this was directly, if not solely, responsible for the failure of the earnest efforts made at the Hague Conference of 1907 to create an international Court of Arbitral Justice.

But perhaps one should not criticize an author for not attempting more, — particularly when he has done well what he set out to do. Perhaps Mr. Dickinson will essay a further study in this direction at a future time. The execution of the present work merits the hope that some day he may see fit to do so.

F. B. S.

LATIN-AMERICAN COMMERCIAL LAW. By T. Esquivel Obregón, with the Collaboration of Edwin M. Borchard. New York: The Banks Law Publishing Company. 1921. pp. xxiii, 972.

After an introductory statement of thirty-one pages, the author subdivides his subject with reference to the divisions in the Commercial Codes of the Latin-American states, and treats each topic comprehensively for all the states with whose law he deals. The reader is thereby enabled to see at once what differences there may be in the several codes in regard to a particular question.

This work seems to have been well done, and the difficulties of translating terms in use in one system of law so that they can be understood by lawyers trained in another system, seem to have been met as well as could be expected. The book, therefore, is a contribution of value to the study of comparative law, and should be a step forward in an attempt to make the nature of business relations between North America and South America more comprehensible. It is only fair, however, to point out some difficulties that one who is trained in the common law feels in examining the book.

In the first place, the distinction between commercial law and general private law is not a division to which one who is trained in the common law takes kindly. Even those trained in the civil law, as the author points out in his introductory chapter, are not agreed as to the propriety or nature of the distinction. In the second place, and perhaps more important, the provisions of the codes are often very general in terms, and the precise bearing of a provision on a particular state of facts cannot be fully understood. Though the author occasionally cites the decisions of courts, his work in the main consists of a classification and restatement of code provisions. One who has a difficult practical question will often find that there is nothing in this book, nor in the general language of the codes from which it is taken, to give him any help. In the chapter devoted to mercantile contracts, for instance, there is nothing to indicate how far a failure of performance by one party to a bilateral contract excuses the other party from his obligation.

The value of the book is increased by a glossary of Latin-American legal terms and by bibliographies. The index might with advantage have been made somewhat fuller.

S. W.

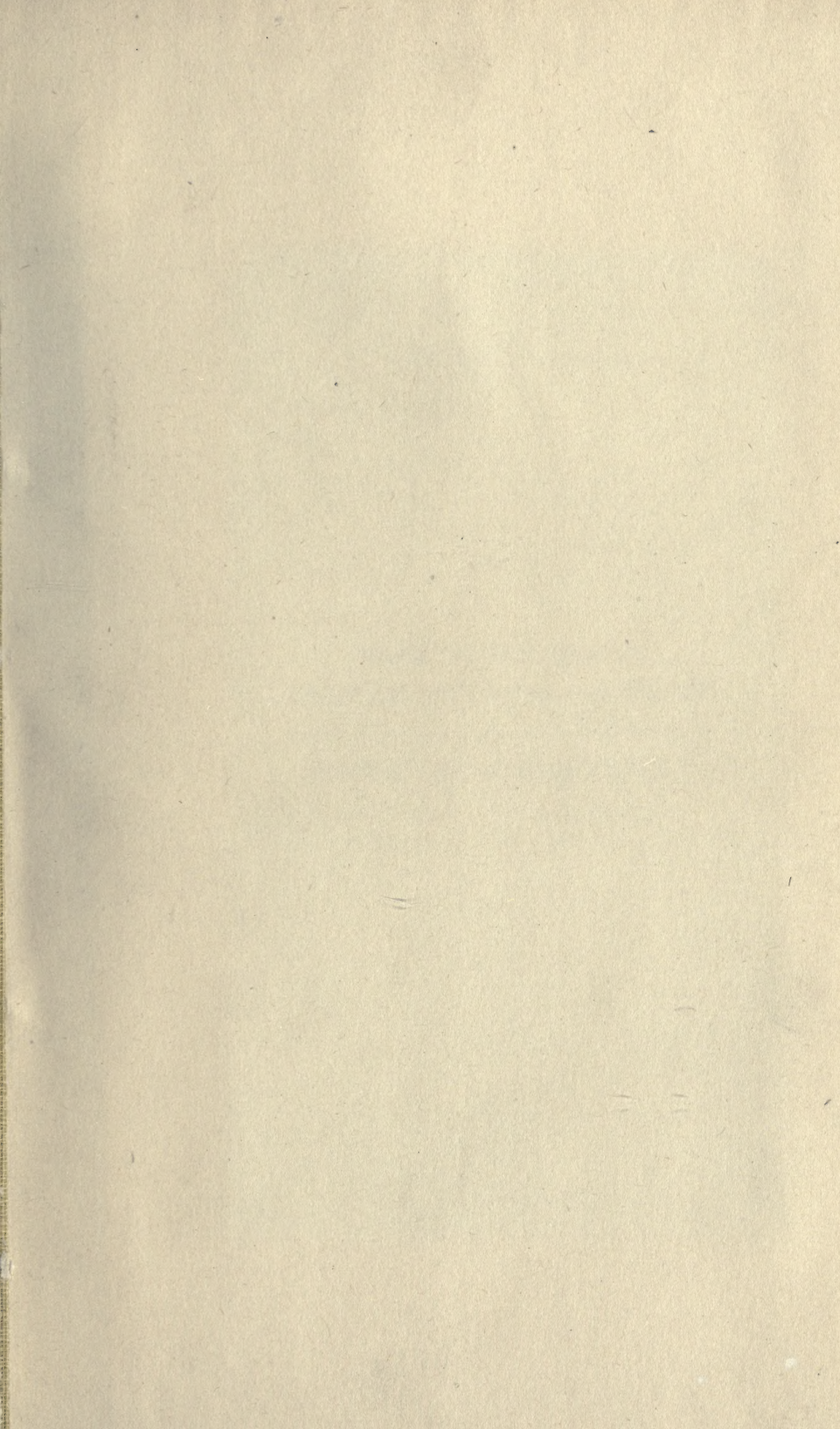
ORAL AND WRITTEN PLEADING IN ATHENIAN COURTS. By George Miller Calhoun. 50 Transactions and Proceedings of the American Philological Association, 177 (1919).

American lawyers will find much to interest them in the papers on Greek law which are frequently read at the meetings of the American Philological Association. In 1919 Professor Calhoun propounded the thesis that complaints in the Athenian Courts were presented orally until about 370 B. C. Although he speaks of these complaints as pleadings, it must be remembered that most of the Athenian proceedings were criminal in character, being either prosecutions or actions to recover a penalty. In support of his position, he quotes the Clouds of Aristophanes, in which the hero remarks that if an action were being entered against him, he would get a magnifying glass and melt out the writing that constituted the record of his case as fast as the clerk put it down on the wax tablet, a method not entirely unlike the modern plan of burning down court houses in order to interrupt prosecutions. The device would have been much less effectual if the clerk were merely copying a written complaint. Probably the clerk was writing down what was orally stated to him. Professor Calhoun's conclusion is rested on additional evidence both grammatical and historical. He thinks that the substitution of written for oral complaints was contemporaneous with the transition from witnesses to written depositions — a step exactly the opposite of what has taken place in our law.

Z. C., JR.

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- THE NEW CHURCH LAW ON MATRIMONY. By Rev. Joseph J. C. Petrovits. Philadelphia: John J. McVey.
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- THE LEAGUE OF NATIONS AND THE NEW INTERNATIONAL LAW. By John Eugene Harley. New York: Oxford University Press.
- THE POSITION AND RIGHTS OF A BONA FIDE PURCHASER FOR VALUE OF GOODS IMPROPERLY OBTAINED. By J. Walter Jones. New York: The Macmillan Company.
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- LE DROIT INTERNATIONAL PUBLIC. By J. de Louter. London: Oxford University Press.
- IS AMERICA SAFE FOR DEMOCRACY? By William McDougall. New York: Charles Scribner's Sons.
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